Consultation response 1 of 130

E-mail Message

From:	Matt Restall [redacted]
Cc:	
Sent:	04/07/2012 at 11:29
Received:	04/07/2012 at 11:27
Subject:	Consultation Paper No 205

Dear James,

Law Commission , Consultation Paper No 205 ,THE ELECTRONIC COMMUNICATIONS CODE , A Consultation Paper.

I represent one of the largest firms in the UK acting for landlords on telecoms matters. We currently provide advice and assistance to thousands of landlords across the country.

I am extremely concerned at the moment about the current misuse of Code Powers i.e. rights given to operators under The 1984 Telecommunications Act as amended by The Communications ACT 2003. We are now being presented with numerous cases where The Code is being used simply as a negotiation tactic by Operators to obtain a better deal in lease / agreement renewals of phone mast sites.

I worked for [redacted] for a number of years and Code Powers was not normally used (largely for PR reasons i.e. If Operators used the Code and Landlord's knew how hard it was to get a possession order under the Code, no one in their right mind would let a phone mast operator on site). Times have now changed, Counter Notices under the Code are the norm, with operators knowing that Landlords have to commit a massive amount of money in legal fees (on average £20,000 +) to obtain a possession order under the Code to get them off site. Yes, there may be grounds for compensation but operators appear to be playing the system knowing Landlords have to pay legal fees upfront at risk, which is preposterous! Something needs to be done to stop this. If a Landlord requires vacant possession then this should be simplified. The operators should be allowed a reasonable time to vacate , but not hide behind the Code.

I have am also seeing instances where operators and the Code are presenting risks to multi million pound redevelopment projects. Surely in the current economic climate this cannot be allowed to happen?

The new proposal Consultation Paper No 205 seeks to introduce compensation rather than consideration. We need to be clear on how this works but obtaining possession for Landlords MUST be simplified without the expensive Court route. A proposal to contract out of the Code must be agreed for new leases but more importantly, Landlords with existing masts / operators on site must also be allowed to contract out of the Code at agreement renewal if they so wish.

Consultation response 1 of 130

Please can you confirm the issues stated above will be addressed and dealt with in the latest reform?

Regards,

Matt Restall BSc (Hons)

Founder of The Phone Mast Company Ltd.

The Old School House, Holyhead Road, Chirk, Wrexham, LL14 5NA

[redacted]

[redacted]

w: www.phonemastcompany.co.uk

From: Charles Anderson [redacted]
Sent: 09 July 2012 11:51
To: LAWCOM Property and Trust
Subject: THE ELECTRONIC COMMUNICATIONS CODE- A Landlord's view The Law Commission

Dear Sirs
Whilst I can understand the common good argument, please be aware that the operators [redacted] are unscrupulous in their dealings with their Landlords and that in considering a code this needs to be factored in. I outline my experiences to show this.

My father agreed a 25yr lease [redacted] this was not contracted out of the 1954 Act (which seems common for these leases). [redacted] After a series of low offers from the their agent, I came to the conclusion that I would prefer the mast removed and told them so. At this point they said that they did want the site and a 2nd agent would contact me. I also employed an agent and and eventually they agreed terms which I understood would be accepted [redacted]. [redacted] 4 months later and after continual chasing [redacted] reject the terms. This no doubt was a tactic to allow them to continue at the existing very low rental (which had been RPI linked not revised to Market). To try and bring forward a resolution I issued a section 25 notice, though I was reluctant to enter into litigation as the court would award Market rental which would be both complex and expensive to determine in a court case. At the time of writing my agent continues to negotiate [redacted], but this being at one remove this is both tiresome and time consuming.

[redacted] are grossly exploiting the 1954 Act which was intended to protect disadvantaged Tenants against Landlords and [redacted] there is not a true Market. There is effectively a Duopoly, the major Operators having combined into two groups for their site interests. The Operators have a very strong incentive to manipulate the market downwards as future renewals and many reviews will be determined by the Market rate. For a landlord to take Legal proceedings is a high risk strategy as the Operators are expert and have much to defend, the risk of huge costs for the Landlord are out of all proportion to the improved rental that might be gained.

[redacted]

At the rent level which now seems likely to be agreed between agents my preference would be that the mast was removed. However I am advised this not an option open for me to pursue. In conclusion when framing this proposed code you need to bear in mind that most Landlords are at a disadvantage to the Operators. I believe I have

described a situation which widely applies so if past experiences are to be any indicator the Operators will not be reluctant to exploit a code that does not rebalance the situation towards the Landlord.

Please contact if you require any further information.

Yours sincerely
Charles Anderson
[redacted]

From: Charles Anderson [redacted]
Sent: 18 October 2012 22:16
To: LAWCOM Property and Trust
Subject: THE ELECTRONIC COMMUNICATIONS CODE- A Landlord's view updated

Dear Eleanor

As the period for consultation ends shortly, I thought it might be appropriate to update my earlier submission of 9th July 2012.

The situation with [redacted] which I previously described continues. I attach a record of my dealings with [redacted] to show the extent of the delaying tactics they have employed. There can be no doubt these are a deliberate and cynical attempt to put pressure on me as the Landlord. I understand this is common practice and amounts to placing Landlords under duress to accept low offers. This is market manipulation by a very powerful Company.

An important point I wish to make is that I believe that both Ofcom and the OFT are relaxed about the powerful position of the Mast Operators. My reason for saying this is that, through Oliver Letwin, the MP for West Dorset, I approached Ofcom to draw their attention to the consequences of allowing [redacted] and [redacted] to combine their Telecom Mast interests. Oliver Letwin has now received replies from both Ofcom and the OFT (see attached). Both replies suggest an unconcerned attitude. Thus the Law Commission's Electronic Communications Code is perhaps the only opportunity there will be to redress the balance between the Mast Operators and their Landlords.

My suggestion to be included in the Code:-

In the event of Mast Operator and Landlord failing to reach agreement on the terms of a new Lease, then at the expiry of the old Lease the Landlord should have the right to elect to have the matter go to Binding Arbitration with all costs of this Arbitration being met by the Mast Operator. In this situation the arbitrated new Lease and rent should be back-dated to the expiry of the Old Lease.

Should you wish any further information please do not hesitate to contact me (by e-mail please as I am currently away from home). I would be obliged if you could acknowledge receipt of this e-mail and confirm that you have been able to open the attachments.

Yours sincerely
Charles Anderson

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:
MICHAEL FLETCHER M.R.I.C.S
Email address:
[redacted]
Postal address:
EVERGREEN PROPERTY CONSULTING LTD. [redacted]
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):
FIRM (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.

NO
WHEN CONSENT IS GIVEN THAT MAY BE FOR SPECIFIC EQUIPMENT AND TECHNOLOGIES THIS IS REFLECTED IN THE SITE VALUATION OPENING THE SCOPE OF WORKS BY STATUTE INTERFERES WITH BASIS OF VALUATION.

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.

NO, RIGHTS SHOULD BE REDUCED
OPERATORS HAVE NOT USED RIGHTS TO A SIGNIFICANT DEGREE AS WITNESSED BY THE FEW CASES OF PRECEDENT FROM JUDGEMENTS.
THE CODE IS OFTEN ABUSED AS A LITIGATION RISK ON LANDLORDS. EXISTING LANDLORD & TENANT LEGISLATION IS ADEQUATE THE EXISTING CODE COULD REMAIN SUBJECT TO A NEEDS TEST SO IT CANNOT BE MISUSED AS BEFORE

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

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

NO
DIFFERENT TECHNOLOGIES BEGET DIFFERENT VALUATIONS THUS THE CODE SHOULD NOT BE AVAILABLE AS A TOOL OR LEVER TO ENABLE PAYING FAIR VALUE

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.

OBLIGATION TO PAY COSTS FOR USE AND OPERATION OF THE CODE
WITHOUT THIS THE PREVIOUS ABUSE OF THE CODE WILL BE DISCOURAGED AND ONLY USED WHERE STRICTLY NECESSARY

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 APPARATUS CONCERNED SHOULD BE LIMITED TO THAT PERMITTED IN CONTRACT.
OTHERWISE, OPERATORS WILL USE THE LEVER OF LITIGATION COSTS, AS THEY HAVE IN THE PAST, TO FORCE SITE OWNERS TO ACCEPT EQUIPMENT WITHOUT PAYMENT OF FAIR VALUE.

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.

ONLY THOSE WHO EXPRESSLY CONTRACT IN.
IN MY EXPERIENCE THE CODE HAS BEEN USED TO EXTRACT DISPROPORTIONATE SUMS FROM LANDLORDS EXCEEDING ENTIRE RENT ROLLS, TO CAUSE DELAYS TO DEVELOPMENTS OF HOSPITALS SCHOOLS AND COLLEGES. THIS IS NOT IN THE PUBLIC INTERESTS.
WHERE STATUTORY OBLIGATIONS OF A LANDLORD SUCH AS AN NHS TRUST EXIST THEN THE POSITION OF THE LANDLORD SHOULD TAKE PRECEDENCE.

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. LITIGATION COSTS EXCEED VALUE COMPENSATION DIFFICULT TO CALCULATE.

2) NO. AS ABOVE.

3) (A) OPERATOR MUST PAY COSTS FOR OPERATING THE CODE.
(B) A TEST OF NECESSITY WILL AVOID FLIPPANT SERVICE OF NOTICE
(C) CONFLICT OF STATUTORY UNDERTAKINGS WILL BE AVOIDED BY A + B ABOVE.

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 CODE IS EXCESSIVE AND SUBJECT TO WIDESPREAD ABUSE IN ITS CURRENT FORM ALREADY LANDLORDS ARE FORCED INTO A SITUATION OF FORE MAJEUR BY COMPANIES WITH DISPROPORTIONATE RESOURCES WITHOUT JUSTIFICATION OF ESSENTIAL NEED THE NEED FOR FURTHER ADVANTAGEOUS REFORM FOR OPERATORS IS NOT JUSTIFIED BY EVIDENCE

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. THIS IS ALSO UNNECESSARY.

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.

~~THIS SHOULD NOT BE~~
OBJECTION RIGHTS SHOULD REMAIN AND BE MORE EASY FOR LANDOWNERS TO APPLY TO CONCUR WITH THE ELECTRICITY ACT.

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.

AVOIDING IDENTIFICATION, SUCH AS OPERATORS WITHDRAWAL FROM THE OFCOM SITEFINDER DATABASE IS UNFAIR AND NOT IN THE PUBLIC INTEREST
AVOIDANCE OF ~~BE~~ SIGNAGE AND USE OF SITEFINDER SHOULD BE 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.

NO.
OPERATORS SHOULD ENTER INTO THIS RIGHT CONTRACTUALLY DUE TO POSSIBLE CONFLICT OF NEEDS FOR LANDSCAPING, SCREENING, TPO'S, AND ENVIRONMENTAL CONSIDERATION.

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 THE CONVERSE SHOULD APPLY IN STATUTE OTHERWISE OPERATORS WILL EXPAND RIGHTS UNILATERALLY

(2) YES. OPERATORS SHOULD PAY FAIR VALUE.

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, IT WILL AS OPERATORS DO NOT OFFER FAIR VALUE FOR SUCH RIGHTS WHERE THEY ARE ON SITE.

(2) NO. FOR REASONS OF ABILITY FOR LANDLORDS TO FREELY NEGOTIATE FAIR VALUE.

(3) YES. ESTABLISHED BY NEGOTIATION OR ARBITRATION.

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 ABILITY TO OPERATE SHOULD BE SPECIFIC TO ~~THE~~ ~~AGREED~~ A SPECIFIC OPERATING LICENCE ONLY.

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. ASSIGNMENT RIGHTS HAVE BEEN ABUSED FOR USE OF SITES BY MORE THAN ONE OPERATOR WITHOUT FAIR PAYMENT.

(2) NO. AS ABOVE.

(3) YES. OPERATORS SHOULD PAY ~~FAIR~~ FAIR VALUE IF ANOTHER OPERATING LICENCE IS INVOLVED.

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.

OBLIGATION FOR OPERATORS TO PAY LANDLORDS COST FOR OPERATION OF THE CODE IN ANY WAY.

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. OPERATORS CAN ALWAYS OBTAIN ACCESS BUT REFUSE TO DO SO AS THEY WILL ONLY ENTER INTO AGREEMENTS UNDER THEIR OWN PREFERRED TERMS.

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.

YES. WHERE AN OPERATOR IS REFUSING TO NEGOTIATE TERMS, OTHER THAN THEIR OWN DICTATED TERMS AN ARBITRATOR CAN BE APPOINTED TO APPLY FAIR VALUES AND TERMS.

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.

YES. INDEED IT IS MOST OFTEN USED AS A LEVER TO FORCE OWNERS INTO A SITUATION OF FORCE MAJEUR DUE TO LITIGATION COSTS.

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) NONE

(2) NOT AWARE

(3) NO. OPPOSITE. OPERATORS ARE COMMERCIAL ORGANISATIONS AND DO NOT NEED THE POWER OF CRIMINAL LAW PROTECTION.

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. IN PARTICULAR THE OBLIGATION TO VACATE A SITE. I SUGGEST A 6 MONTH STATUTORY NOTICE AFTER WHICH THE OWNER MAY REMOVE EQUIPMENT AND RECLAIM COSTS FROM THE OPERATOR

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. INSTALLATIONS OF MANY STREETWORKS BLOCK HIGHWAYS AND EVADE PAYMENT OF FAIR VALUE TO THE LANDOWNER. EG HIGHWAYS. OPERATORS SHOULD PAY FAIR VALUE FOR "STREET WORKS"

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.

(1) NO

(2) NO.

(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) ELECTRICITY ACT PRINCIPLES SHOULD APPLY
(2) NOT IN MY EXPERIENCE
(3) YES.
(4) EXISTING STATUTE ALREADY EXCESSIVE OF NEED.
(5) OBLIGATION TO PAY COSTS OF LANDOWNER FOR OPERATION OF STATUTORY RIGHTS - REASON - TO AVOID FORCE MAJEURE

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, PROVIDING THAT DOES NOT EXCEED ANY CONTRACTUAL DEMISE

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. EXISTING CODE IS ALREADY DRACONIAN AND EXCESSIVE. OPERATORS HAVE NO EVIDENCE OF NEED.

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.

NO

OPERATORS SHOULD BE ENTIRELY RESPONSIBLE FOR THEIR OWN SECURITY AND RISKS. THEY ARE THERE AT THE GIFT OF OWNERS, IT IS IMPERTINENT AND ILL CONCEIVED TO SUGGEST THIS REVISION.

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

THE EXISTING PROVISION IS ALREADY EXCESSIVE AND UNFAIR

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.

INDEED IT SHOULD BE NECESSARY TO EXPRESSLY 'CONTRACT IN'.

REASON: FEW OWNERS ~~FF~~ KNOW OF THE CODE'S EXISTENCE, LET ALONE ITS POTENTIAL PROBLEMS

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 No REVISION NEEDED.

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.
OWNERS SHOULD BE FREE TO REMOVE AND RECLAIM COSTS FOR REMOVAL OF ABANDONED EQUIPMENT OR EQUIPMENT IN THE WAY OF A PERMITTED DEVELOPMENT.

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.

IT IS TOO COSTLY FOR LANDOWNERS TO USE IN PRACTICE. COST SHOULD FALL TO OPERATORS - THUS ENCOURAGING NEGOTIATED REMOVALS.

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.

* COSTS FALL ON OPERATORS
* NO "SQUATTING" UNDER PROTECTION OF THE CODE.
* OPERATORS TO PAY A FAIR AND CURRENT VALUE.
* USE OF ARBITRATION TO AVOID LITIGATION.

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
EXPRESS 'CONTRACTING IN' 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	

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.
LC Act RULES AND CPO RULES SHOULD APPLY WITH IDENTICAL RECOURSE TO ARBITRATION OR LAND TRIBUNAL

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
ADJACENT OWNERS SHOULD ALSO HAVE CLEARER RIGHTS TO CLAIM AND NOT BE PREVENTED AS EASILY AS THE CURRENT PROVISIONS ALLOW. THE TIME LIMITATIONS SHOULD BE SCRAPPED.

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
COSTS OF OPERATING THE PROVISION SHOULD FALL ON THE OPERATOR

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.

UNECESSARY - TO AVOID CONFLICTING LEGISLATION

- TO ENSURE SIMILARITY BETWEEN UTILITY ACTS

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 AT FAIR COMMERCIAL VALUE
* COSTS TO FALL ON OPERATOR
* ARBITRATION IF FAIL TO AGREE

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.

ALTERNATIVE DISPUTE RESOLUTION VIA ARBITRATION SHOULD BE PREFERRED. NOT EXPERTS OR COST WILL BE USED AS A WEAPON AGAINST ~~THE~~ LANDOWNERS.

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.

(1) TO COSTLY AND CUMBERSOME.

(2) YES

(3) ARBITRATION - FLEXIBLE AND WELL PRACTISED.

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, ALL USE OF ANY CODE RIGHTS SHOULD BE SUBJECT TO A TEST OF NECESSITY.

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

Consultation Paper, Part 7, paragraph 7.32.

NONE

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) AGREE - BUT NOTING THE LITIGIOUS NATURE OF OPERATORS AND FORCING OF UNNECESSARY PROCEDURES. REASONABLE AND DEMONSTRABLE SHOULD BE PAYABLE.

(2) NO AS THAT POSES AN UNACCEPTABLE LITIGATION RISK TO LOW NET WORTH LANDOWNERS.

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.

ARBITRATION CAN DEAL WITH THIS UNDER THE 1996 ARBITRATION ACT

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.

ELECTRONIC NOTICES SHOULD BE ACCEPTABLE

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. CLEAR WARNINGS ABOUT THE EXISTENCE AND RISKS OF THE CODE SHOULD BE MANDATORY - NOT JUST A SUGGESTION TO SEEK ADVICE

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.
No. OPERATORS ALREADY SEEK TO DICTATE UNFAIR AND UNREASONABLE TERMS. STANDARD FORMS DO NOT ALLOW THE MARKET TO EVOLVE IN ITS OWN WAY.

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. PARTIES SHOULD BE FREE TO CONTRACT IN OR OUT OF PT 2 AS WELL AS THE CODE.
REASON: TO AVOID FORCE MAJEUR.
WHERE PT 2 IS CONTRACTED OUT, THE NEW CODE SHOULD INFER THAT CODE PROTECTION DOES NOT APPLY

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.
OPERATORS ARE EVADING STAMP DUTY - WHICH SHOULD BE DULY PAID.

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) NO.

(2) OFCOM DO NOT SEEM ENTIRELY INDEPENDENT OF OPERATORS

(3) YES.

(4) STREETWORKS RIGHTS SHOULD NOT APPLY TO TELECOMS MASTS OR CABINS.

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.

THE REGULATIONS ARE ALREADY EXCESSIVELY 'PRO OPERATOR'

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:
Peter Browning
Email address:
[redacted]
Postal address:
[redacted]
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):
Responding as a citizen
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., but I would prefer that my full address and contact was not published. Thankyou.
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.

Only provide they have prior agreement from the land-owner. Other utility firms (e.g. SW Electricity) will always ask first. That's a matter of courtesy at least, and if a land-owner's privacy is to be invaded, it must be a courteous as well as legal grounds.

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.

Reduced if possible.

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

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

Yes

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.
Additional to 10.3 above, it seems to me that the present provisions for "community consultation" are woefully inadequate, usually only assuring lip-service to the concept of consultation, and the evidence shows that communities are powerless to stop or to amend proposals. That cannot be right or fair.	

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.
There should be an absolute requirement to publish the levels of radiation which are being and/or will be emitted from these installations, together with a clear statement of the geographic range of those radiations both before installation and at five-yearly intervals thereafter. This is essential information for those living in close proximity to such equipment.	

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.
A local land-owner reached agreement with a telecommunications company for the installation of a mast on his land which is within 50 metres of a group of park-homes. Whilst the local council (now defunct) approved this installation, there was nothing effective that the representatives of these residents could achieve – it was a "done deal" as said these days. Meaningful consultation ? Non-existent ! Both operators and land-owners must be put under a substantial obligation to provide at least six months well-publicised notice of their intent.	

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) Is the wrong question. It ignores the public radiation risk still responsibly associated with this type of equipment. The Tribunal should be required to take account of representations made by the local public who are potentially put at risk BEFORE making the order. That said, the Tribunal should be in a position to weigh [if it deems appropriate in all the circumstances] any proven benefit against any prejudice to the landowner.

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 is abundantly clear that "others with an interest in the land" suggests a very broad-based range of interests, from public rights-of-way users right through to beneficiaries under any disposition of the land.

Clearly, it cannot be right to bind all such parties without very full consideration being given o any such interests, with ample proof that such consideration is meaningful, rather than (again) just a lip-service process.

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 must be recognised that radio-masts are an essential element of twenty-first century communication but these eye-sores are seldom placed in the least obtrusive location. Again there should be a process of meaningful consultation prior to any contractual commitment to establish that all the available local options have been thoroughly appraised, and their relative advantages and disadvantages had been properly evaluated at the consultation stage.

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.
For the reasons already stated, there should be an automatic right to object not only for those with a demonstrable interest in the land, but also from those locals who would be impacted by the proposed installation.

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.
A notice clearly stating the range and intensity of radiation levels should, by law, be affixed in an accessible position to all such installations, and failure to do so should be 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.
It is obvious that the operator would need to lop vegetation as per sub-sections (2) and (3) but only in accordance with paragraph 10.3 above (i.e. to follow the practice of other utility-suppliers and engage with the landlord prior to lopping).

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) This depends very much upon what is meant by "upgrade". There should be no automatic right to enlarge, alter the appearance of, or increase the power of such apparatus without meaningful consultation, but clearly there will be a need from time to time to repair, modify or improve the apparatus, simply through the passage of time.

(2) If the operator intends to enlarge, alter the appearance of, or increase the power of such equipment then the law should require a further consultation process prior to an official approval just as pertains in ordinary town-planning applications.

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)There should be an obligation to share, strictly provided that the resultant increase in load does not increase the radiation levels, in which event, consultation and requirement as set out at 10.7 above.

2)One is driven to the view that a land-owner should be entitled at law to agree or disagree with whomsoever seeks to use his land, so that there should be no such general right to share.

3)It follows that where the lessee arranges an unforeseen benefit, then the landlord should be able to enjoy the fruits of such benefit, or otherwise be able to refuse the sharing process.

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.

Please see responses to 10.16 above

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) Landlords and occupiers should be protected by the law from 'dominant' tenants.
2) Here again, Landlords and occupiers should be protected by the law from 'dominant' tenants.
3) The Landlord must be allowed (reasonably) to refuse to assign and, if he agrees, it should be for reasonable costs and a just proportion of any definable benefit deriving from the proposed assignment.

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.

I believe that the consultation appears to indicate a woeful lack of concern for the public at large and especially those who are often heavily impacted by the construction of this type of apparatus.

There should be a fundamental obligation to ensure meaningful consultation with local people and no telecoms site should be approved without adequate evidence of a meaningful consultation process.

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.
Operators can only blame themselves if they fail to ensure adequate access to their apparatus before construction. Please stop this "wet-nursing" of operators.	

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.
Certainly not. What sort of law would allow profit-seeking companies to ride so very rough-shod over the rights of the ordinary citizen ? What kind of community apart from a totalitarian regime would even begin to contemplate such a proposal ?	

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) Vandalism is not restricted to electronic communications apparatus.

2) If an operator chooses to ignore the rights of others, then it cannot expect much by way of co-operation from those impacted by its actions.

3) Certainly not.

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 and occupiers can already use the County Courts to enforce compliance with contractual obligations and, if justified, can obtain recovery of their costs. It seems thus that no new provision is necessary in this respect.

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.

There should be a completely standard provision for street works, to be observed by all utility companies including telecoms companies.

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.

Here in Cornwall, the Duchy of Cornwall manages very well thankyou, and takes profits accordingly on tidal land and elsewhere. It needs no extra encouragement and none should be given.

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) Tidal waters and lands should be regulated in exactly the same manner as all other lands in the 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.
There should be no change in the existing provisions for linear obstacles and/or oversailing

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.
If, by authority, you intend a public ‘authority’ other than an Operator or utility company, the answer is 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
I have laboured here long and hard to convey that the existing Code is sadly lacking in its obligation toward the public at large, and particularly that section of the public directly impacted by the installation of telecoms apparatus. The opportunity to require operators to properly fulfil the duty of meaningful consultation should not be missed.

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.
I repeat : I have laboured here long and hard to convey that the existing Code is sadly lacking in its obligation toward the public at large, and particularly that section of the public directly impacted by the installation of telecoms apparatus. The opportunity to require operators to properly fulfil the duty of meaningful consultation should not be missed, whether or not the network is at risk. Failure in this would be a disgrace upon those who make these decisions.

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, but it fails to recognise the rights of those referred to in 10.32 above.

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.
Subject to 10.33 – 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 they do not strike an appropriate balance. If someone wants to knock my house or factory about, I want to have the opportunity to just say "No".

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.
Landowners should be required to fully meet those contractual obligations into which they have freely entered. They should not be allowed unilaterally to interfere with or remove apparatus if the operator is fully compliant with the terms of the contract.

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.
The onus could certainly be left with the Landlord but there should also be an automatic right to require the enforced removal of an illicit installation by any aggrieved party.

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.
These matters should be simply contractual but the code could suggest reasonable guidelines to be taken into account by the Courts if necessary.

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.
Again this should be a matter of contractual terms, but with even-handed guidelines to be taken into account by the Courts if necessary.

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.
With the rare exception, I would seldom agree, in principle, that retrospective legislation is a good thing. One simply cannot conduct business on the basis that the law relating to that business is subject to change at the whim of politicians. A deal is a deal, and it should be left at that unless there are compelling reasons of public welfare for the terms of the deal to be changed.	

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.
If, by all persons, you include the local public, yes, but otherwise, no. This of course presumes that the local public, once consulted, may be awarded compensation simultaneously.

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, as 10.42 above and elsewhere in this submission.

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, on the assumption that the anticipated rentals are taken into the evaluation.

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.	
Yes, and here again, for the benefit of those members of the local public who will be impacted	

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.
Definitely No. In any event, the County Court will require to be shown that the issue has been the subject of an ADR (Alternative Disputes Resolution) process before going to Court.

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.
There is no reason why these alternatives cannot be included as 'options'.

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.

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.
I would reject any provision that suggested the rights of parties should be ignored solely on the grounds of 'speed'.

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
Costs should (if not agreed by the parties) be decided with by the Courts.

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.
Just as with the Courts – why reinvent the wheel ?

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, please follow the Court procedure – again, why reinvent the wheel ?

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.
As 10.54 above and in accordance with property statute generally.

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 intensity and range of radiation should be mandatory information for all parties.

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.
The Companies House usage of “Table A” [the style of course, not the substance] would be a good example of how a revised code could be woven into all new telecoms contracts.

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.
I believe that all the provisions of the Landlord & Tenant Act 1954 should apply, so that the parties would always and automatically thus know where they stood.

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. Just allow the Land Registry to make its record in the standard manner.

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.

I know of no such circumstance locally.

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.

In the light of the current furore about hacking and general maladministration, should there not be a whole new code of conduct controlling all electronic communications by radio, t.v. and landline, so that there would be just one single point of reference for us all ?

5

Original

High Warden Farm Ltd
High Warden, Hexham, Northumberland. NE46 4SR
[redacted]

The Law Commission
Steel House
11 Tothill Street
LONDON
SW1H 9LJ

23 July 2012

Dear Sirs

Electronic Communications Code Review

I understand from Ofcom that the Law Commission is currently conducting a review of the Electronic Communications Code.

In that I am an individual land owner who has been severely affected by this piece of legislation, I feel it necessary to set out for the record how the Code has affected us and its use by various operators.

We entered into a lease for an area of land [redacted] for a period of 20 years, [redacted]. At the end of this tenancy we served a valid Section 25 notice in terms of the Landlord and Tenant Act 1954 [redacted] served a notice under Paragraph 21 of the Code.

As you will be aware, all the tenant needed to do to protect its security of tenure under the 1954 Act after service of such a notice was to apply to the Court by the stated date. [redacted] relied upon their Code Powers to remain on site.

As a result of the lack of action [redacted] to comply with their obligations under Paragraph 1(2) of the Code, I instructed solicitors who wrote [redacted] advising that it was [redacted]'s intention to make an application to the Court [redacted] under Paragraph 21 (6) of the Code given that more than a year had expired since the original counter notice [redacted]. In [redacted] my solicitors raised an action for possession and the matter eventually came before Liverpool County Court for a hearing in [redacted]. On the day of the hearing at 11.00 hrs, [redacted] settled the matter on terms they had been offered over two years previously.

[redacted]

This then left us with the task of regularising the position with the sharers. To date [redacted] has made no meaningful attempt to obtain a written agreement to operate electronic communications equipment, despite knowing full well that it had no written agreement [redacted].

1

Despite having knowingly been in breach of the Paragraph 1(2) of the Code now for nearly four years, [redacted] remain on site. [redacted]. We have since been informed that [redacted] are seeking a replacement site in the locality notwithstanding SI 2553 (2003) which places an absolute obligation on operators to site share on existing sites wherever practicable.

[redacted] we wrote to Ofcom. I enclose a copy of that letter and their response declining to take any action.

It appears strange that the very body responsible to Government for granting Code rights to private companies and for administering the Code should consider it has no duty to police compliance. This is ridiculous and leaves little or no protection for a landlord affected by the actions of such companies.

I am told that the Law Commission is reviewing the Code and that operators are seeking wider powers. We are appalled by this prospect. It appears to us that the Electronic Communications Code already provides minimal protection for landowners and a wholesale review of operators' powers and especially Ofcom's role in policing the industry is necessary. I would be happy to provide further details of the full circumstances and would be grateful if you could take note of this situation in your review of the Code.

Yours faithfully

Philip Straker
Director

[redacted]

Ofcom

12 July 2012

Mr PH Straker
High Warden Farm Ltd
High Warden
Hexham
Northumberland
NE46 4SR

Natasha Connors
Competition Investigation

Direct line: [redacted]

[redacted]

Dear Mr Straker,

I refer to your letter of 12 June 2012 regarding your complaint [redacted] knowingly operated electronic communications apparatus without a written agreement since 25 September 2008. Your complaint [redacted] compliance with the Electronic Communications Code ("the Code") and requests that Ofcom investigate the matter and 'where appropriate, serve enforcement orders'. [redacted].

The Code is set out in Schedule 2 to the Telecommunications Act 1984, as amended by Schedule 3 to the Communications Act 2003 ("the 2003 Act"). Prior to taking a view on the merits of this case, we have considered the extent of Ofcom's duties and powers in relation to the Code. Ofcom's main functions relating to the Code are to apply the Code to Code applicants [redacted] and to administer the Code; however, Ofcom's functions do not include a role of policing compliance with the Code more generally. Parties to whom the Code applies and occupiers of land affected by the exercise of rights under the Code are able to enforce their legal rights directly against each other through the courts. Ofcom does have certain powers of enforcement and a power to impose penalties in sections 110 and following of the 2003 Act, but these powers apply only in relation to conditions and restrictions imposed by the Secretary of State under section 109 of the 2003 Act. The current relevant conditions and restrictions are set out in the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (SI 2003/2553 as amended by SI 2009/584) ("the 2003 Regulations").

Having assessed your complaint, it does not appear to suggest there has been any breach of any of the conditions or restrictions in the 2003 Regulations. As such, Ofcom's powers of enforcement in sections 110 and following of the 2003 Act do not appear to be applicable to your complaint.

Ofcom does not have any general power or duty to monitor [redacted] compliance with the Code or to enforce the requirements of the Code. Disputes between landowners and Code operators over their rights under the Code (as opposed to under the 2003 Regulations) should be resolved by negotiation or, where appropriate, through the courts. If you wish to pursue these matters further we would recommend that you seek independent legal advice.

(3)

Given the circumstances which led to your complaint, it may also be of interest to you to know that the Code is currently the subject of a consultation by the Law Commission[1], who are conducting a general review of the Code at the request of the Government (Department of Culture, Media and Sport). The closing date for responses to this consultation is 28 October 2012.

Yours sincerely,

[redacted]

[1] http://lawcommission.justice.gov.uk/consultations/1863.htm. See in particular Part 7 and Appendix C of that consultation which address the issue of enforcement of the Code.

Consultation response 6 of 130

E-mail Message

From:	Milne, Patrick [redacted]
To:	LAWCOM Property and Trust [redacted]
Cc:	Gray, John [redacted], Gurajena, Carol [redacted]
Sent:	15/08/2012 at 13:30
Received:	15/08/2012 at 13:30
Subject:	Law Commission Consultation Paper No 205

Dear Mr Linney,

Please accept this as Land Registry's response to the consultation paper on the Electronic Communications Code.

The only aspect of the consultation paper that seems to affect Land Registry is how the code fits with land registration in terms of the affect of "code rights" on third parties. Among the proposals is the following:

8.33 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.

The consultation paper asks if consultees agree.

Although it might not be ideal in terms of creating a "comprehensive register", we do not see that this recommendation can realistically be questioned – in effect, that the effect of code rights on third parties (that is, anyone apart from the Code Operator and landowner/occupier with whom the agreement is made) should be governed by the terms of the code and not by the land registration legislation where the code rights happen to be interests in land. It would achieve what the current code apparently attempts to achieve, and so would remove the uncertainty that exists at the moment.

The difficulty, however, would be in how this might be achieved. It seems to us that one solution would be for the code rights, in so far as they give rise to proprietary rights, to be overriding interests. This would mean adding them to Schedules 1 and 3 to the Land Registration Act 2002. There would then be the question of whether they should automatically qualify as such or whether this should be subject to the sort of exception found in paragraph 3(1) of Schedule 3 to the Act.

One of the problems with code rights is that, as acknowledged by the consultation paper (paragraph 8.27), there is not "a universal register of code rights" and no real possibility of one (presumably, at least in part, because of all the Code Operators that exist from time to time). In these circumstances, it might be thought more satisfactory to go for the second option – only allowing the code rights to operate as overriding interests if actually known about or reasonably obvious. This would not be entirely consistent with the unqualified recommendation that the code's provisions should prevail over the land registration legislation, although it could be made consistent if the revised code itself provided for code rights to be lost in these circumstances.

We are, of course, happy to discuss this matter further.

Regards,

Consultation response 6 of 130

Patrick Milne

??????????????
Patrick Milne
Assistant Land Registrar

Registration Legal Services Group
Land Registry Head Office

Trafalgar House, 1 Bedford Park, Croydon CR0 2AQ
[redacted]

landregistry.gov.uk | @LandRegGov | LinkedIn

[redacted]

Consultation response 7 of 130

E-mail Message

From:	Stuart Stackhouse [redacted]
To:	LAWCOM Property and Trust [redacted]
Cc:	
Sent:	31/08/2012 at 14:41
Received:	31/08/2012 at 14:43
Subject:	Electronic Communications Code - consultation.

Dear Mr. Linney

I am replying on behalf of Chelmer Housing Partnership, a registered provider of affordable housing in Essex, that has contracts with telecommunications companies.

1. First of all I am shocked at the bias shown in your report towards telecommunication companies, the deference shown to their views and the Law Commission appearing to be an advocate for the private companies. That you should include so early on in the report a “whinge” from the communications companies as follows is incredulous:

“As matters stand, we have heard from a number of operators who 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. In the absence of a code, such problems would only increase”.

The use of anecdotal statements by the Law Commission is highly regrettable in such an important document and about such an important principle. Can you demonstrate that owners demands have been “unreasonable” “ or an unfair “ransom”.

The communications companies are almost supported by the report as being “altruistic” – rather than motivated by profit. So what proportion of any additional profits made should reach owners of land affected – or is it all to be kept in performance related salaries and shareholder dividends?

2. You consider that there is no legal basis for challenge under terms of Human Rights Act. Whilst we do not have a problem with this it is not balanced in your report by the need for both parties to an agreement to be satisfied. Your report proposals give too many rights to the communication companies. Perhaps I can illustrate the real world of how communications companies act to the Law Commission to illustrate my point:

CHP owns a multi-story block of flats. We purchased the block with numerous

communication companies operating equipment off the tower. The terms of the contracts were contracts known to us in advance and complied with.

We are receiving unilateral attempts from several of those companies to revise the terms and conditions of the contracts with us to:

Reduce annual payments to CHP for continuing to cite equipment on CHP property. The communications companies cite the terrible toll on their financial viability from competition (which seems absurdly ` Lewis Carrollesq) and how much they have had to pay the UK government for their franchises. At the same time as expecting CHP to take less money (indeed in one case 2/3rds less per annum) " one company reported "vastly increased profits" for their companies to their shareholders. CHP has responded to say we will not accept a reduced payment.

They will now require un-restricted access at all times. We control all access to the roof space on which the accommodation is sited because of working at height regulations and because we have had unauthorised access to the roof space from the public and "radio pirates". We are not – under any circumstances going to comply with their "unrestricted access requirements"; There is also the need to have due regard to the rights for quiet enjoyment of our tenants in the block.

We have never charged for facilitating access – although we can – but now they want (or should I say "require") access to be free at any time – unilaterally. We will not agree to this revision;

They want unrestricted rights to install any equipment in any location. The roof can only take so much equipment. It has a special insulated surface that requires care and attention to ensure its weatherproofing is not breached. We have residents who live in their homes 10 feet under where aerials are located. The location and output of equipment – some of which is high level microwave emission – could be a health risk to residents. We could never allow unrestricted rights to place equipment wherever the communications wanted to.

One company has used three different consultants to discuss unacceptable, revised terms with us. The documents have been sent through the post without any prior contact. The consultants have no relationship with CHP – have no idea of the location of equipment, fees, services provided. They merely want to get the unilateral deal signed – which they have not been successful arranging.

One merged company wants to CHP to reduce its payment to CHP because it is two companies merged. Why would we accept this without query?

CHP appreciates the notion that individuals should not be able to stand in the way of the greater public good. However, there is little if any mention I can see by you of a need for the communications companies having to justify the uniqueness of the site they wish to place their equipment upon - to the owner. Will owners have sight of the "business case" / alternatives available / considered?

Consultation response 7 of 130

The references made within the report to consideration of disputes by the Courts fills us with horror. The costs for both parties are horrendous, lengthy and complex. We have a dispute with one communications companies that has been with solicitors for 2 years and there are no signs of an end. The Communications companies are so huge they have no idea, and I mean no idea, of how to have a relationship with owners. Our experience is that they are like any oligolopy - they think they can get what they want when they want it.

The Law Commission is therefore requested to ensure there is a balanced approach between owner and provider. At present your proposals are undoubtedly biased towards the providers.

If you require any further information or need clarification on any issue raised in the email please do not hesitate to contact me direct

Stuart Stackhouse
Chief Executive, EMT
[redacted]

Consultation response 7 of 130

Avon House
82 Wellington Street
Thame
Oxon
OX9 3BN

[redacted]
www.tpcl.co.uk

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

By e-mail

3 October 2012

Dear James

Law Commission Consultation Paper No 205 – Electronic Communications Code

I enclose a response sent on behalf of TPCL (Telecoms Property Consultancy Limited). This is the response of TPCL and does not necessarily represent the views of our clients, which will follow in due course.

Please do not hesitate to contact me should you require any further clarification.

Yours sincerely

Mark East BSc(Hons) MRICS
Director

[redacted]

Your details

Name:
Mark East BSc(Hons) MRICS
Email address:
[redacted]
Postal address:
Avon House 82 Wellington Street Thame Oxon OX9 3BN
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):
Telecoms Property Consultancy Limited
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.
It is agreed that Code operators need the support of statute in order to enable the acquisition or retention of property rights for the efficient roll-out of networks and to maintain reliable electronic communications throughout the UK, however, the Code needs to ensure that there is a fair balance between the parties respective interests.

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, with particular regard to security of tenure, should be reduced to encourage more land and property owners to make more sites available for telecoms use.

10.5 We provisionally propose that code rights should be technology neutral. Do consultees agree? Consultation Paper, Part 3, paragraph 3.18.
There is no objection to a technology neutral approach provided that consideration and market rents reflect the type of technology and equipment deployed.

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 include a requirement to reinstate land or property to the condition it was in prior to the installation. The Code should include a requirement for the operator to compensate landlords for providing access procedures over and above consideration and to compensate landlords for administration in providing power to a site and recovering power consumed.	

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 current definition was revised in 2003 and is sufficiently broad.	

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.
A telecoms operator should be obliged to seek the consent of all parties with an interest in the land or property. If they are not inclined to do so then they should plan ahead on the basis that once the agreement expires of the party that granted consent then they have no Code protection. It is not fair that a party that had no knowledge of an installation should then be bound by it. Examples are microcells where Code operators agree with shop tenants rights to install equipment on the façade of the property and in the basement. Despite being a breach of their shop lease the shop tenant agrees on the basis that the Code operator will remove it if the landlord discovers it and objects. On discovery the landlord is reluctant to take action as he wants to keep his shop tenant but he then has to invoke paragraph 21 and a Court Order to have the equipment removed in preparation for marketing his shop to the next tenant or to refurbish. Head-leaseholders of hotels and offices enter into similar agreements with operators for rooftop equipment. This may even be permitted under the hotel lease or ground lease but a freeholder still has the costs and delays of Court proceedings to remove equipment on reversion. He may not be aware of any installation until the property reverts to him and cannot plan ahead. The freeholder has received no consideration during the Code operator's use of the property and his reversion is blighted by the equipment's presence.	

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 Access Principle should be based on two criteria:

1. The operator should be required to test that there is no reasonable alternative to the land or property in question, as under planning law. Why should one rooftop or plot of land be blighted by a telecoms installation when an adjacent property is not? This could be dealt with easily where, for example, an operator is being prevented from providing fibre or radio services to a commercial tenant of the obstructive landlord (where there is no alternative).
2. The operator should be required to show an audit trail of the approach to the landowner and the subsequent negotiations to prove that there is no reasonable prospect of reaching agreement with a landowner or to prove that the landowner is being unreasonable and delaying matters. Provided unreasonable delay can be proven then it should be possible to dispense with the landowners agreement.

An operator would not install equipment unless it will generate revenue for them. Their customers will drive that decision, therefore by default, there is a public interest in all installations. The question is one of degree. An installation underground that has no impact on the future use of land will be unlikely to outweigh the benefit to that customer, but an eye-sore of an installation on a rooftop may well do so.

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.
There should be some responsibility on the part of the operator to seek the consent of all interested parties. It would be unreasonable for the rights granted to bind a successor in occupation or reversioner when the grantor is no longer in occupation.

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.

No comment.

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 our experience all telecoms agreement already contain provisions regarding upgrades. Most are flexible and provide for future use, the only common restriction being the amount of apparatus permitted on a roof to maintain aesthetics. Unfettered upgrades could create too much uncertainty for a landlord who may want to know the health and safety implication of any upgrade or the size of the equipment being deployed for the upgrade. There are too many variables to make this a statutory right. Both the question of upgrades and consideration for upgrades should be addressed within a telecoms agreement from the outset. The operator then has the opportunity to balance equipment rights against consideration that they are prepared to pay.

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.

The telecoms market started with each Code operator building their own stand-alone network and site sharing has taken place from the outset. The market developed so that a landlord would receive a percentage of the rent received by the incumbent telecoms Code operator. So for example, Vodafone may build a mast. Orange then ask to install equipment on that mast for their network. For this benefit Orange pay Vodafone a licence fee. The landlord agrees to the sharing provided he can have a share of the fee received by Vodafone. On rooftops the situation was different because the supporting infrastructure (the building) is owned by the landlord, not Vodafone as in the example mast given above. Each operator therefore entered into a separate agreement with the rooftop landlord.

Matters became more complex when RAN sharing was agreed between T-Mobile and Hutchison 3G. Agreements were then assigned into joint names in order to allow sharing despite any contractual prohibition against sharing. Landlords were aggreived and felt mis-led but had no choice.

Whilst a landlord has no visibility of the payments being made directly or indirectly between operators it is not unreasonable for a landlord to request a proportion of any profit rent being generated by the host operator of a site.

Companies such as Arqiva, WIG and Shere base their business on developing telecoms sites to let to Code operators and non-Code operators to generate income and capital value in masts and rooftop sites for which there is an active investment market. Code operators are in the business of providing telecoms services to their customers and that is what Code is there to facilitate. It is not there for them to generate additional revenues from site sharing at the expense of landlords and landowners.

It is worth noting that Everything Everywhere have previously sold mast sites to Arqiva. If sharing is automatically permitted under Code existing Code operators could profit from a site sharing business that is not related to the provision of a public telecommunications service in any way. This is contrary to the intended purpose of the Code.

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 intention of section 134 seems to be to make sure that subscribers are not prevented from taking electronic communications services from whom they choose to ensure competition is maintained. This should only apply to Code operators if they seek back-haul services e.g. from BT, as in such circumstances they are the occupier.

If L&T Act protection is removed then all agreements will be by licence or wayleave which will leave section 134 with the intended benefit to a commercial property occupier.

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.

In practice the vast majority of telecoms agreements have the right to assign the whole. If anything landlords feel that they have been mis-led where Code operators then assign into joint names. Something that was not envisaged at the start of a agreement.

The market has already developed to permit assignment of the whole without further consideration and there seems no need for further interference in this area.

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 comment.

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.
Where the subscriber requiring an electronic communications service is a tenant of the third party landlord the landlord will be servicing his own tenants and enhancing the property for future marketing by allowing the code operator on site. There may be circumstances where the landlord and tenant are too distant or have fallen out and in those circumstances there could be a case for a wayleave at no consideration provided that the wayleave route does not impact on the landlords interest and costs are paid by the Code operator for the wayleave agreement. Where the third party landlord owns adjoining land then the situation is different and it would be reasonable to expect consideration for granting rights across your land for the benefit of subscribers with which you have no contractual relationship.

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. The market will determine who receives service.

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.
I am not aware of any instances where this has been 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.
The only occasions in which a landlord might consider in breach of a contractual arrangement are denying access to a site or turning off a power supply, however, this is usually where the Code operator remains in occupation beyond the term of their expired agreement and refuses to negotiate for a new agreement or demands terms that the landlord considers unreasonable. Such action can bring a Code operator back to the negotiating table. One main issue is a landlord being obliged to maintain their own power supply to an Coe operator and incurring costs in doing so. The Code operator always has the right to install their own power supply but uses a landlords supply because it costs less. The operator could have a statutory right to install their own supply but should not have a statutory right to force a landlord to maintain theirs. There are examples of landlords planning a redevelopment and clearing a building of all occupiers except a Code operator that cannot be removed from the roof without a court order. The landlord wants to save costs by cutting off the power supply to the building but the Code operator threatens an injunction and the landlord must incur the continued costs of maintain that supply, thus subsidising the Code operator at his own expense. A landlord incurs time loss and costs in dealing with operators access requests. Often they need to be escorted or have a permit to work. A statutory obligation to provide this whilst struggling to agree new agreement terms would be unduly onerous on the landlord.

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 Code does need to indemnify landlords against all power costs and access costs including all costs incurred in seeking reimbursement plus statutory interest payments for late payment. If holding over under Code, Code operators must also insure and indemnify the landlord against any third party claims.

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.

No comment.

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
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.

Para 20 does not add balance, it adds confusion. A landlord would not expect to be able to relocate a telecoms operator or remove a telecoms operator if an agreement previously entered into did not allow it. Similarly Code operators would plan their network based on the contractual arrangement that they have entered into and would not expect a landlord to use statute to override an agreed contract. Landlords usually include terms at the outset that provide for either "lift and shift" onto the same landlords land or for termination if they have no alternative site to offer. If neither contractual obligations are included in an agreement then they would expect a negotiation and would expect to pay costs to relocate or remove a Code operator within the term of an agreement. In the context of there being an existing contract between the parties Para 20 and 21 need not apply and the contractual arrangements should override statute.

Where a contractual arrangement does not already exist or has expired, Paragraphs 20 and 21 are of particular importance. For example:

1. Streetworks masts installed on the public highway but directly outside a landlowners property can frustrate development. The mast may be in the only position that can provide access to a larger development and may need to be moved for an entrance splay, for example. A developer may be willing to factor into the cost of the larger development a sum for the operator to relocate the mast further up the street. Under the background of para 20 there are examples of this being agreed by negotiation. This is a relocation and not a removal from the landlords land.
2. There are instances where the "occupier" has granted consent and the land or property reverts to a superior interest. The occupier may not have sought superior landlord's consent to the sub-letting despite this being in breach of an existing lease. In such circumstances the superior interest may want to relocate or remove an operator. If the Code is not amended to ensure that Code operators obtain the consent of all interests in land then a lift and shift or termination provision needs to apply and on short notice as the reversioner would not be able to plan ahead. The reversioner can decide whether a lift and shift is feasible or whether a termination is the only option. In such circumstances costs should not be borne by the reversioner, who had no knowledge of the Code operators occupation in the first place.
3. If Code operators are permitted to hold over under Code it needs to be clear that the provisions of any expired agreement are overridden by Code which would permit a landlord to exercise lift and shift provisions or terminate occupation. Once an agreement has expired it would be unfair to expect a landlord to pay costs for a lift and shift. If the contractual arrangement has expired there should be no requirement for a landlord to pay costs for a lift and shift nor for vacant possession.

There is confusion regarding the application of para 20 and para 21 when it comes to removal. The right for parties, not bound by contract, to remove or relocate an operator (currently Para 20) needs to remain but perhaps be specific to third parties not otherwise bound by agreement in writing e.g. for neighbouring landowners and superior interests. Where a contractual arrangement exists or has expired and an operator is holding over then another provision (currently Para 21) with the amendments proposed below should apply. Both paragraphs need to be redrafted to add clarity as to in what circumstances each applies and to be clear that it's either one or the other and not both. Currently solicitors take a belt and braces approach and serve both notices.

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.

There is no reason to include it where a contractual arrangement has been entered into and subsists.

Otherwise it strikes a fair balance for adjacent landlords in that those wanting the equipment relocated have to pay for its relocation. There is some dispute as to what these costs are and whether these extend to the costs of building a replacement site or just the cost of reinstating the subject site. Capital costs for a new site can be quite substantial. Also any simultaneous upgrade and/or network consolidation should be discounted from any costs incurred i.e. any situation where the operator uses the move to offset costs that would have otherwise been incurred in any event.

Where a superior landlord finds a telecoms Code operator on his land without his consent it would be inappropriate to then expect him to pay for the costs to lift and shift the equipment or remove it from site. In such instances all costs should be borne by the Code operator. To avoid such costs they would need to contract with all interested parties from the out-set.

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.

If a contract exists between the parties then that should take precedence over any statutory provision. Telecoms agreements often include provisions for lift and shift or alterations. Landlords only seek to contract out of para 20 because, currently, it includes a provision against removal of the apparatus which may contradict any break options willingly agreed between the parties within an agreement. Para 20 should only apply to neighbouring landlords or landlords that have no contractual interest with the operator e.g. superior landlords and not to contractual arrangements that already include provisions for “lift and shift” and “break options”.

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.

The first point to make is that, without doubt, Para 21 is the primary reason why a significant number of landlords refuse to entertain telecoms equipment on their land and property. The revenue they can generate from a telecoms installation is relatively low and the perceived difficulty in regaining possession could adversely affect their core business. If they can let space with certainty more sites would be opened up to telecoms use. The only way to achieve this is to allow the parties to agree to contract out of the security of tenure provisions of the Code.

Having said that, contracting out should not be allowed without good reason. Using the lack of security as a negotiating position to improve terms for a landlord would not provide a fair balance either. Thus contracting out should only apply to situations where to remain would adversely affect the landlords interest. For example redevelopment, refurbishment or improvement of a property, change of use (particularly residential where perceived health and safety/marketing issues remain) and occupation by a landlord or one of their commercial tenants for their own purposes.

The second point is that without Para 21 security Telecoms operators would have to spend significant capital in relocating equipment to alternative sites and landlords might use this fact to negotiate a higher rent on renewal than market rental value. However Para 21 goes further than it should and Code operators use the cost and uncertainties created by Para 21 to demand improved agreement terms and rents lower than market rental value. With rents at a low level it is simply not worthwhile issuing proceedings at the County Court.

The need to protect the network is understood but the need to provide the Code operator with an advantageous negotiating position is not.

A suggestion for dealing with this is to have two procedures rather than one which is in line with that under the Landlord and Tenant Act 1954. Firstly, a hostile notice procedure where the landlord requires vacant possession at the end of the term and secondly a non-hostile notice where the landlord is willing to grant a new agreement but simply wants to agree terms in a timely and cost-effective manner.

10.38 below suggests a procedure for this.

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.
Comments under Para 10.36 above suggests the splitting of Para 21 into hostile and non-hostile notices to deal with enforcing removal and renewing agreements on a separate basis. If the Landlord serves a hostile notice for vacant possession and his intention is true then if he has a contracted out agreement his position is clear and both parties have clarity and no surprises. If the agreement is not contracted out then any potential claim for loss and damages incurred by the landlord would need to remain within the Code provisions to encourage the telecoms operator to move on time where a telecoms agreement is not contracted out and if not then either party can apply to the Lands Chamber to decide the matter. Vacant possession notices should always be served in good time. 12 months is suggested whether or not an agreement is contracted out. To plan effectively a Code operator needs 12 months to find, acquire, obtain planning permission, build and integrate a replacement site into their network. The current notice regime of a landlord's notice at any time followed by a counter-notice within 28 days is of little use to either party. To allow sufficient time a Code operator can serve notice within 3 months of receiving 12 months notice from the landlord stating whether or not they will vacate and, if the request for vacant possession is not accepted by the Code operator, then an application for a Lands Chamber decision can be made any time thereafter. As mentioned above, the issue here is not simply about removal but that para 21 applies where the parties want to renew an agreement and para 21 is the only recourse left for a landlord even where the landlord does not want the equipment removed but simply can't agree renewal terms. In such circumstances a non-hostile notice could be served without any need for a counter notice. An application to Alternative Dispute Resolution or Lands Chamber could be made at any time on the basis that the new agreement will commence from expiry of the old, removing and delaying tactics from either party where sites are over or under-rented. The problem for landlords is that on renewal of a telecoms agreement the telecoms Code operator knows that they can remain in occupation for any length of time beyond expiry of a agreement and renegotiate terms at their leisure or until the landlord agrees to the terms that they want. This occurs even though the Code requires them not to be dilatory and apply to Court for a new agreement. The only option for the landlord is to agree their terms or go to Court. Para 21 is not suitable for these circumstances as the landlord may be willing to renew on reasonable terms but para 21 is a request for removal of the apparatus. If terms are eventually agreed the problem is that back rent then becomes another dispute. There is a financial incentive for Code operators

to delay agreement renewals if they are under-rented and a financial incentive for landlords to delay renewals where they are over-rented. Neither party wants to use para 21 because of uncertainty, costs and delays.

A two pronged approach could deal with this: 1) The valuation date for all new telecoms agreements should be the day after expiry of the old telecoms agreement and 2) the rent shall be payable (or reimbursed) from the date of valuation (with interest). Thus there is no financial incentive for either side to delay. Rents and all agreement terms should continue during the period of holding over with payments reconciled on settlement of the new agreement. Accruals on either side might also encourage speed in dealing with matters.

The intention that L&T Acts shall not apply to telecoms agreements removes the issue of double protection and any periodic tenancy being inadvertently created during a holding over period. Telecoms operators have been known to delay negotiations regarding a new licence or agreement for 12 months and then claim it is a lease with L&T Act protection and this negotiating tactic needs to be removed. However, the removal of L&T Act protection does raise the question upon which Code agreements should be renewed and the Code needs to provide more guidance on this. A further point is that if the removal of Landlord & Tenant protection (as covered in section 10.58 below) is not retrospective then perhaps in existing documents the use of the word “lease” should mean a lease and the words licence or agreement should mean that L&T does not apply. After all, that would have been the original intention of the parties.

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.

Should this occur then the passing rent at expiry of the Code rights should be paid until removal and reinstatement to the landowners reasonable satisfaction occurs. A long-stop date of 12 months after expiry of Code rights should be included after which the apparatus is considered abandoned and can be removed by the Landlord and the cost of removal recovered from the Code operator. Any “change of mind” due to a change in circumstances and requests for the Code operator to remain after-all would be captured if the new agreement is back-dated to expiry of the old as suggested in 10.38 above.

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.

Many landlords are discouraged from making sites available for telecoms because of the security of tenure rights under Code and this results in a lower supply of sites and higher rents for those landlords that are prepared to enter into contracts.

Conversely, landlords need to be prevented from gaining ransom value by the knowledge that it costs considerable capital for an operator to relocate unnecessarily. In order to remove such a negotiating tactic the parties should be allowed to contract out of para 21 but for redevelopment, refurbishment, improvement, change of use and occupation by a landlord or one of their commercial tenants for their own purposes. This is a common provision in many current telecoms agreements particularly where landlords have the right to break for redevelopment. No work around (penalties nor indemnities) would be needed if para 21 does not apply to these specific circumstances. Evidence of the landlord’s intent at the time would need to be provided.

The reality under the current Code is that an operator will always relocate if there is a genuine intention to redevelop as they do not want to face a claim for the damages and losses incurred for delaying or preventing a redevelopment. The new provision needs to reflect this reality and make it clear that no operator would intend to remain where intent to carry out a genuine redevelopment exists.

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.

It would be right for the onus to fall on the Code Operator to establish Code rights and not to automatically have Code rights imposed by OFCOM where they had misled the landlord into believing he was dealing with a party that had no Code rights. For that party to build up a comprehensive network on the back of that understanding and at a later date to then apply for Code, thus binding all of their unsuspecting landlords would be unfair. Where a party has had no opportunity to contract out or thought they did not need to as Code didn't apply it would be unfair to then bind them by para 20 and 21. Any renewal, then to be bound by Code, would have to be by negotiation and the non-code operator would be taking a conscious risk at agreement end and would have to plan for a new agreement well in advance or be prepared to move. If they do not like that thought then they should apply for Code rights before rolling out their network. It is their choice to apply to OFCOM for Code rights and should be their choice whether to have agreements bound by Code or not.

If it is decided that to protect an existing non-Code network is important then perhaps for all agreements pre-dating the OFCOM decision there should be an automatic application of the proposed right to contract out of Para 21 as proposed above, thus landlords not expecting to be bound by Code rights would at least have the initial intention of the parties remain in place should they want to redevelop, refurbish, improve, change use or allow the landlord or a commercial tenant in occupation after the site becomes Code protected.

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.
Disagree. Compensation includes loss and damages incurred as well as diminution in value and may be applied in entirely different circumstances to consideration. As compensation usually refers to a lump sum it is inappropriate for continuing contractual arrangements over long periods of time. Consideration is more appropriate for agreements over a period of years especially where the length of occupation by the Code operator is not determined by contractual arrangements but by statute. Also, consideration gives both parties the flexibility to agree terms that are appropriate to the property or land in question as well as meeting the current needs and future needs of the Code operator, thus enabling the Code operator to react to their subscribers and market conditions.

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.
The Code operator should have a responsibility to identify the superior interests and to ensure that they are party to any contract, within which they will receive compensation and consideration, if appropriate. Those with reversionary interests in the property will then be aware of the Code operators occupation when the property reverts to them and can plan ahead and notify the Code operator whether vacant possession will be needed well in advance allowing the Code operator time to respond and protect or reconfigure their network. The Code operator should not intentionally avoid seeking the consent of a superior interest and should not knowingly seek to induce a breach of contract, see Crestfort v Tesco [2005] EWHC 805 (Ch), where the court made it clear that damages could be awarded as well as – not just instead of – an injunction, and that the unauthorised subtenant or assignee would be liable for the tort of inducing a breach of contract, as well as Tesco (for breach of covenant)]. Currently the Code encourages breach of contract by only requiring the consent in writing of the occupier who is often a tenant and is sub-letting part to the Code operator in breach of their occupational agreement. This does not sit well with this case.

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.

The telecoms property market has developed over a period of 28 years (since 1984) and the valuation of telecoms installations by reference to market rent is now well established. The market between ducts and fibre in the ground is entirely distinct from the market in wireless telecoms equipment which is installed above ground and this is reflected in the market rents payable for each type of installation. Comments made by the Law Commission in paragraph 3.13 to maintain a consistent approach across all technologies are noted and whilst the two markets are distinct both can be subject to market adjustments to reflect the type of equipment deployed and the resulting impact that that equipment may have on the use of the land or property rights granted. However, the Law Commissions conclusions seem to be very much based on the fixed mobile market and duct and fibre in the ground with limited reference to the wireless market for mast and rooftop installations above ground not to mention inside buildings, shopping centres and airports. One of the failings of the 1984 Act is that it could not have predicted the explosion in mobile and wireless telephony and data use. We now have the benefit of hindsight to rectify many of the issues faced by both Code Operators and Landlords and can use the practical solutions that have developed within contractual arrangements over the last 28 years as a guide to how a revised Code could work more effectively in future to facilitate electronic communications networks.

The main distinction between fixed and wireless apparatus is that wireless installations always have another option so the market is more open than for fixed fibre/duct links. If one landlord refuses access to his rooftop then a landlord next door may do so. Thus there is competition. Contrast this to fibre service to a block of flats (as depicted in paragraph 3.95) where there is no choice but to cross a landlords land. Similarly to roll out broadband to a rural community may need fibre to cross land to serve a community. There may be another route but that is significantly longer and more costly to the operator. The question of a ransom value arises more readily and this is the value that needs to be removed from the equation by the Code, not market value. This can be achieved by the definition of market rent, as defined below in the RICS Valuation Standards ("the Red Book"). This is in line with the Mercury case which specifically excludes any ransom value or profit share, the main issue in that case being whether consideration includes any revenue share and it being determined that it does not.

The Brookwood Cemetry (Cabletel) case followed the same line as the Mercury case.

In this section, the consultation paper does not mention the Bridgewater Canal case [2010] EWHC 548 (Ch) where David Elvin QC and Nicholas Taggart acted for GEO Networks and where Justice Lewison stated "the use of the phrase "fair and reasonable" precludes the extraction of a ransom payment, as Mance LJ observed in Cabletel. Once that objection has been cleared out of the way, I do not consider that there is a compelling argument against the payment of consideration by an operator".

The Law Commission make extensive reference to the Bocardo case which concerned the extraction of oil under the ground and not telecommunications. The two are distinct as one is a natural resource and the other a man-made product. Whilst fixed apparatus are also installed underground, wireless apparatus are not and cannot be treated in the same way. The Bocardo case seemed to centre around a claim by the landowner for the value of the oil extracted. In the Mercury case, London and East India Dock Investments Ltd were also looking for a revenue share. In this respect both cases drew the same conclusion; that revenue/profit share was not appropriate. It is also noted that not all of the Judges in the Bocardo case agreed with applying compulsory purchase principles where they were not expressly incorporated.

There are two concerns with relying on this judgement. Firstly, oil extraction and the deployment telecoms networks are entirely different – one being a natural resource and the other being a man-made product. Secondly, the reason for referring to the Bocardo case is that the wording is similar, but not the same, as under the existing Code, but surely the object of the exercise is to develop a better Code that is fit for purpose and not to allow this one case to dictate how future telecoms network roll-out should be enabled?

Also, the comparison with Bocardo does not fit with wireless networks which occupy property above ground and are very visible. It is interesting to note that the only access to land/property cases that have reached Court under Code all relate to ducts and fibre under the ground where the operator had no other option to serve their customers. Where wireless rooftops or masts installations are concerned there are always other options and Court proceedings have not been required with both sides preferring to negotiate terms.

According to the Mobile Operators Association there were 53,300 mobile base station sites in the UK at the end of 2010 and the evidence to date shows that initial access to these sites has been established without a single recourse to the Courts under the current Code regime. The body of comparable evidence is, therefore, well established and available to all operators and landlords in the market. There is no lack of comparables as claimed under para 6.49.

Consideration is the reality of how landlords and operators determine rents for occupation. Paragraph 6.43 acknowledges that all parties are comfortable with the concept of consideration so why change it? Taking a view on how telecoms agreements have developed over the years, there are two methods of rent/fee review that have dominated. One of these is indexation by RPI and the second is market rental value. Both Code operators and landlords have agreed on these since 1984 and continue to use both as a basis for valuation today. Rent/fee review clauses define market rental value and make certain assumptions and disregards. Is there any reason why the Code cannot do the same?

The proposed use of market value using compulsory purchase rules is not currently in use in the telecoms market and a new market will need to be established. This could take another 20 years to develop. It is surely preferable to refine and iron out issues in the currently established rental market value that both sides are happy to work with, which leads onto a definition that is better than the word “consideration” but includes the established principles of willing parties and reasonableness.

The RICS valuation standards (“the red book”) defines market rent as “The estimated amount for which a property or space within a property, should lease (let) on the date of valuation between a willing lessor and a willing lessee on appropriate lease terms in an arm’s-length transaction after proper marketing where the parties had acted knowledgeably, prudently and without compulsion”.

The definition removes the element of compulsion and it also takes no account of a special purchaser, which may pay above market rent.

For further clarity it may be worth ensuring that unique sites, such as the one cited under para 3.95 are valued on the basis that there is more than one option. This is unlikely to impact on the wireless market as there is often an alternative property or plot of land available, in fact mobile operators always run more than one option during the acquisition process. It will, however, emphasise the removal of any ransom value and special purchaser value placed on sites by some landlords where they know there is no other option or, for example, only a very capital intensive alterative fibre route.

For this reason it is proposed that the RICS valuation standards (“the red book”) definition of market rent be amended to reflect the above and Judge Lewisons comments in the Bridgewater Canal case: ““The estimated amount for which rights over a property, should be granted, on the date of valuation between a willing licensor and a willing licensee on appropriate licence terms in an arm’s-length transaction where the parties had acted knowledgeably, prudently and without

compulsion and on the assumption that there is more than one suitable property available to the licensee".

However, even then, this has to be backed up by a quick and cost effective dispute resolution service to prevent either side having any tactical advantage and to ensure minimal delays to network roll-out for Code operators.

The main issue is how the market rent is arrived at where the parties cannot agree. The delays and costs in determining the market rent have been the main reason for delays in establishing electronic communications networks and not the basis of calculation which has been established over a 28 year period of comparable evidence.

On the one hand the Law Commission want to encourage the opening up of properties for electronic communications use by introducing contracting out to the Para 21 provision and on the other they are seeking to depress rents to a level where landlords do not receive a market rent. The two contradict each other as landlords will not willingly let rooftop space or land at anything other than a market rent under Code.

In a no scheme world rents for a 10m x 10m area of a field for a mobile mast may be valued as grazing land at £50 per annum. A rooftop may command £500 per annum. It is difficult enough to persuade landlords to deal at current market rental levels. At such low income levels they simply will not deal with Code Operators.

If compulsory purchase provisions are introduced the telecoms property market could disappear overnight. Landlords will withdraw all properties that they have made available for telecoms use and for existing sites where they can expect a greatly reduced rent on renewal they will seek vacant possession. The rent payable has to reflect the reality of the occupation. This is not just a rent for space underground but for large visible steel structures, intrusive rooftop installations and for access rights across adjoining land or through buildings to access a roof.

A further issue with the proposal to use compulsory purchase is that not all rooftop users or tower users are Code operators. This will result in the creation of a two tier market. Those paying a market rent and those paying well below market rent. A landlord will seek out and have a preference for non-Code operators, if at all possible. This contradicts the Law Commissions earlier stated objective to ensure a level playing field between how telecoms is provided, whether it be by fixed links or wireless links. Effectively, Code operators will be offered a subsidy paid for by property owners, whereas a non-Code operator must pay a market rate. Many new start-ups may not have Code, for example Wireless Broadband providers using open 2.4 GHz and 5 GHz frequency bands, and they would be at a disadvantage, which would reduce competition in the market for the incumbent Code operators and help protect their market share.

The result of lower rents and a two-tier market means that the Code operator applications to access property will be resisted by landlords and actively discouraged, reducing the amount of sites still further from the position today. The result will be that operators will need to resort to Code rights far more frequently and possibly on every site they want to acquire. This will put a huge pressure on the Lands Chamber to confer rights on the landlords in every case. This will cause significant cost and delays when the objective of this Code review is surely to reduce costs and speed up the roll-out of new superfast broadband and rural broadband.

This will be further complicated by the Code operators need to prove to the Lands Chamber that there is no viable alternative. Why should one landlord have a site blighted when the landlord next door does not? Which landlord must accept £500 for his site to be accessed 100 times per year? For example, [redacted] accessed the roof of [redacted] Hospital on 44 occasions between 8th Feb and 20th July 2012? It is surely difficult to prove that a number of street-works installations which are already rent free, will not be able to replace a single rooftop. The potential for a Code Operator to save significant capital costs by establishing one efficient rooftop site against four inefficient street-works sites will be removed by the proposed compulsory

purchase method of valuation.

Another economic factor to consider is the active investment market in telecoms installations. Third parties often own portfolios of masts and rooftop sites which they then sub-let or sub-licence to both broadcast and telecoms providers. To allow Code Operators to pay a nominal subsidised rent would result in the value of portfolios being decimated overnight. Companies such as Wireless Infrastructure Group, Shere Group and Arqiva could find that telecoms income would be reduced to a level where the business, in its current form, is no longer viable. This could also have an adverse impact on sites that currently co-locate with digital TV and Radio, which Arqiva also broadcast. The business case for all such companies could suddenly become unviable or will require a significant shift in emphasis, away from facilitating telecoms networks.

There are also other site providers that will see a reduction in income. Not all sites are run by companies for profit. Hospitals, schools, housing associations and charities all have installations on their rooftops and land and the loss of income would have to be replaced from other sources.

Contrast this situation to the above proposal to agree a well-defined market rent under Code with the unambiguous removal of special purchaser and ransom values. This together with a right to contract out of para 21 in certain circumstances will open up all rooftops and land to operators at a rent that reflects the benefit to both parties. The result will be more options and opportunities to look at various competing options and taking the lowest rent that works technically for their network. The increased supply and competition between landlords together with the certainty of regaining vacant possession, when justified, will reduce the risk to a landlord and the rents that operators pay will remain at sustainable levels.

In order to achieve this and to make sure the market rent definition is adhered to the dispute resolution options available under paragraphs 7.1 – 7.55 need to be appropriate in time and cost.

Finally, it is worth recording that within the mobile telecoms market landlords and site providers have recently experienced a reduction in willing lessees from five to two. On the one hand Vodafone and O2 now have a Radio Access Network Sharing agreement. On the other hand T-Mobile (now Everything Everywhere Ltd) and Orange Personal Communications Services Ltd have merged their UK businesses and T-Mobile has a Radio Access Network Sharing agreement with Hutchison 3G UK Ltd. Landlords are already faced with a duopoly that are driving rents down. Surely a duopoly does not need rental subsidies from landlords and property owners, enforced by Central Government?

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.

Compensation is not appropriate nor is an uplift on compensation. Market rental value and a quick and cost effective dispute resolution process will improve network roll-out.

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 comment.

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.
The need for this is unclear as I am not aware of any landlord that has sought to use para 20 when there is an existing contractual right for the Code operator to be in occupation. Of course had consideration only been granted by the Tribunal no excess payment would have accrued except for perhaps a small proportion of rent paid annually in advance. If there is no benefit for a right previously paid for then it seems logical that a proportion should be repaid or the case reconsidered by the Lands Chamber. If the alteration is a removal under Para 20 then any costs incurred by person seeking the alteration/removal should be offset by the benefit of any payments made in advance.

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.

By far the majority of disputes are over the market rent. Landowners that are in a monopolistic position by owning the only piece of land over which cables and ducts can be laid are in a strong position to demand above market rent, particularly where that landlord derives no benefit from the use of his land or property. This can be a landlord's position despite the case law that has consistently rejected ransom payments and revenue sharing. In order for landlords to maintain a fair and reasonable view on the true market rent there has to be a good prospect that the operator can resort to a third party and within a short timescale and at appropriate cost. As stated in the report, Code operators are reluctant to take action under Code due to delays, costs and reputation. With an increased likelihood that an operator will resort to Code a landlord will take a more balanced view.

The County Court does not fulfil these criteria but the Lands Chamber preceded by an alternative dispute resolution process would much reduce time and costs and it would only take a few decisions before parties start to recognise precedent cases.

Although, the following County Court Case was for a lease renewal under the Landlord and Tenant Act 1954, it did involve an electronic communications mast and the response of the judge suggests that the County Court is not the right forum.

Vodafone Ltd v John Bryan Roberts (2011) [ref:OAF01290] was heard at the Aldershot County Court where the costs of the Claimant were £32,000 and the costs of the Defendant £21,000. In dispute was a difference in rent of £2,430. The trial bundle amounted to 575 pages. The Recorder N J Murphy, stated "in my view each party's costs, as disclosed by the scheduler, are disproportionate".

How can the County Court be the right forum for disputes over such low levels of rent?

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 first solution and the most used method of agreeing terms for telecoms agreements is by negotiation, however, to encourage reasonableness, this must be set against a backdrop of both parties knowing what the next stage is if negotiations fail.

If negotiations are inconclusive and the parties are in dispute then the next stage should be alternative dispute resolution (ADR).

The appropriate form of ADR will vary depending upon whether it is just market value that is in dispute or whether other terms of the agreement are also in dispute. If it is just the market value and the parties have agreed the heads of terms for occupation then Arbitration or referral to an Independent Expert may be appropriate. If not, then mediation to agree the terms of occupation

should be considered and for for the terms agreed under mediation to be automatically referred to an Arbitrator/Independent Expert for the determination of market value, if this is not already agreed as part of the mediation process. Under mediation each party should bear their own costs, but for matters of valuation that are referred to Arbitration/Independent Expert, costs can be allocated by the Arbitrator/Independent Expert (under the Arbitration Act or as set out in the Code for an Expert).

If the parties cannot agree the terms of occupation by mediation then the Code Operator may refer the matter to the Lands Chamber for the determination of all terms and the allocation of costs. If the Code Operator does not proceed beyond mediation or withdraws from negotiations or mediation then he should be required to reimburse the landowners reasonable costs incurred.

The above steps could be set to a timetable, however, negotiations should be as flexible as possible so that both parties can set aside enough time to agree terms voluntarily, however, if the Code Operator feels matters are being delayed then they can apply for mediation by a trigger notice, which would set any timescales in motion, provided that, at all times the parties must be able to jointly agree to an extension of any timescales.

The same process could apply to renewals under the Code with either party being able to trigger mediation if negotiations for a new telecoms agreement break down or are delayed.

A Party Wall dispute procedure would only be suitable for the most basic of disputes and will take some drafting. Party Wall disputes do not involve consideration and are one off settlements rather than an on-going lessor and lessee arrangement. It is difficult to see how this can be adapted for use in telecoms agreements which can be significantly more complex.

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.

Where time is of the essence it should be possible for a Code Operator to use negotiation, mediation, ADR and the Lands Chamber to achieve a quick resolution to terms and get occupation. Quite often this will need to be run in parallel with planning permission or a GPDO notification.

However, if terms cannot be agreed, permitting the occupation of the site without an agreement, leaves too many uncertainties on the terms of occupation and the rights of either party will be unclear, especially on indemnity and insurance issues as well as a host of other terms.

Also, any early occupation may override any other interests in the land whose consent should be sought but may be unreasonably delayed. How would their interests and rights be considered, especially as statute would override their contractual rights.

The risk is that this could become the default position for operators who then decide to use it more frequently when faced with the slightest resistance over occupational terms that the operator might require but that a landlord may be reluctant to agree. There is no rush for them to agree any terms when they are on a site, operating and generating revenue for their business.

I would suggest that this should only be possible in circumstances where the terms of occupation are fully agreed save for market rental value (i.e. post negotiation or mediation) at which point the Lands Chamber could agree to the operator taking occupation whilst an Arbitrator or Independent Expert determines the market rental value.

If terms and conditions are ordered by the Lands Chamber to permit occupation it is hard to see how this can be a quick process.

In any event if an operator does choose this route then all costs should be ordered against them as they are imposing their will on others without full recourse to negotiation, mediation and the Tribunal. This would ensure that they do not make this request without some thought and not as a default mechanism.

One further concern is that this would give Code Operators an unfair advantage over competitors that could not occupy unless they negotiate terms first.

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 proposed ADR suggestions mentioned above (Mediation, arbitration and independent expert) should result in a significant reduction in delays from parties unreasonably withholding consent.

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

With the introduction of alternative dispute resolution and on the basis that consideration should be payable in return for the grant of Code rights costs should follow the event. The exception may be for a mediation phase, where costs should be split between the parties. Also there is an argument that reasonable abortive fees should be paid by a Code operator should they withdraw during or after mediation.

However to avoid either party incurring disproportionate costs at a single case the costs should always be reasonable and in line with the value of the rent finally determined. It is not reasonable for an operator to apply resources to a single case to the point that they far exceed a landlord's merely because it could set a precedent for several hundred other Code operator sites but the landlord only has one or two relevant sites. Perhaps a cap on costs based on a multiple of the final rent agreed should be considered, the parties will then ensure that costs are appropriate to the amount in dispute and neither side is subjected to the negotiating tactic of excessive costs. The same principle could be applied to ADR disputes as reasonable costs is a principle of Arbitration in any event.

Should the matter reach the Lands Chamber then the Civil Procedure Rules adequately deal with costs.

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.
Where para 20 is used by any party that has had no contractual relationship with the Code operator and yet that party is bound by Code or the interest in his adjoining land is impacted by Code all costs should be borne by the Code Operator. In other cases costs should follow the event with a requirement for recoverable costs to be reasonable or subject to a cap based on a multiplier of the rent in dispute and for abortive fees to be recoverable by a site provider from the Code Operator.

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.

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.
They are far too long and don't use 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.
Code operators should be obliged to notify any landlord of a proposed new installation that their occupation falls under Code and the implications of that. See BT's wayleave application which is clear and concise.

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.
Situations and operators requirements are different at every site. Similarly every landlord has different priorities over different sites that vary from time to time. On the basis that Operators change their agreement terms every 6 months a standard form would be out-of-date very quickly and will not be able to move with changes in technology. The parties already agree precedent documents where possible and use multi-site agreements to try and standardise terms across a portfolio of properties. Therefore, there is no advantage to either party in having to agree a standard agreement.

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, provided that it excludes any commercial property that the operator occupies and the method of valuation under Code is market rent. It is common market practice for telecoms agreements to be excluded from the Landlord and Tenant Act provisions. If part II of the L&T Acts no longer applies to Code agreements then agreements can revert to Licences or Wayleaves which are more appropriate for the types of installation installed by Code operators.

Code operators do not just occupy land and property for network purposes. They also occupy shops, offices and industrial units. In many instances they install network equipment within or on top of those buildings. It would be wholly wrong for them to claim that a microcell within a shop is part of their network and therefore the shop lease is renewable under Code and not the L&T Acts. Similarly, for switch sites within industrial units or offices, otherwise, landlords could simply refuse to lease any commercial property at all to Code operators. To avoid this the L&T Acts should continue to apply where the primary use of the property is for standard commercial purposes and where network equipment is ancillary.

Finally, if the Landlord and Tenant Act 1954 ("L&T Act") is deemed not to apply then it must not apply for the duration of that telecoms agreement as assignment may take place to Non-Code occupiers and it would be a nonsense for the L&T Act to then apply following assignment as the Code operator has fallen away. Similarly a Code operator could in theory request non-Code status from OFCOM to seek L&T Act protection on all sites. This is another instance where the two tier market between Code and non-Code operators needs to be addressed.

If the L&T Acts will no longer apply then there will need to be more guidance within Code on the procedure to be followed at renewal. The proposed changes, in this response, to Para 21, regarding hostile and non-hostile notices at the end of telecoms agreement would go some way to addressing the issues on expiry. A presumption that the new agreement will follow the form of the old agreement save for modernisation and licence fee will also assist the parties in agreeing terms for renewal and thus protecting the existing telecoms networks or providing Code operators with sufficient warning to enable an alternative site to be acquired. Any disputes could follow the same process suggested for access to property: negotiation, mediation/arbitration or Lands Chamber.

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.
As the Code will provide the Code operator with security of tenure it is important that those acquiring property with Code rights attached are aware of the presence of Code operators and registration is one way of achieving this. Other Legislation: <u>Landlord and Tenant Act 1987</u> Code operators should be expressly excluded from the notice requirements under section 5 of the Landlord and Tenant Act 1987 so that Landlords do not have to serve notice on all residential tenants giving the right of first refusal to acquire a rooftop telecoms agreement that they will never use and in the process delaying or frustrating the Code operators network roll-out. <u>Limitation Act 1980</u> Code operators failing to complete leases within 6 years or to renew leases within 6 years should not be able to rely on the statute of limitation to avoid paying back rent due for their occupation of a property.

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.

The Law Society

Law Society response to the Law Commission's consultation on revising the Electronic Communications Code

September 2012

1. Introduction

The Law Society is the representative body of over 120,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and lobbies regulators, governments and others.

The Law Society welcomes the opportunity to comment on the Law Commission's proposals for revising the Electronic Communications Code (Schedule 2 to the Telecommunications Act 1984) ("the Code").

2. General

We can see that the Commission is endeavouring to ensure that a balance between access and the land owner's rights is achieved. We think that what is suggested here provides a broadly fair balance between the competing interests, although much will depend upon how the code operates in practice.

In practice, to date there have been a number of concerns in relation to the operation of the Code and it is useful that the Law Commission has made proposals to aid the operation of the Code. The Law Commission considers that there must continue to be legislation under which the requirement for a landowner's consent for an operator to place apparatus on the owner's property may be overridden. The Commission states that electronic communications services are considered so important to society that such compulsion is justified. The owner is of course entitled to financial recompense. The Law Commission thinks this is compatible with the European Convention on Human Rights.

The Law Commission asks whether the Code should contain general obligations alongside Code rights, such as the operator insuring against damage to land, arising from the presence of apparatus. There are concerns in relation to this particular example that this may unwittingly lead to potential double insurance problems (where the owner also has insurance).

In this response "owner" may include "occupier". "Operator" usually means "Code operator".

3. Access Principle

A key principle of the Code is that no person should unreasonably be denied access to an electronic communications network or to electronic communications services, which the Law Commission calls the "Access Principle". The Law Commission considers this principle unclear and, potentially, out-of-date and asks whether, at a time when many areas do have access to electronic communications services, the Access Principle should also focus on the need for those systems to be fast, high quality, robust and modern. This raises the question whether, although it may be justifiable to override private property rights to ensure access to electronic communications services, it is justifiable to override rights (merely) to allow for the latest technology to be installed? The Law Commission is, potentially, moving into areas of policy in its suggestion, which may be beyond its law reform remit.

4. Upgrading, sharing and assignment

The Law Commission asks whether ancillary rights of upgrading, sharing and assignment should be expressly included in the Code.

4.1 Upgrading

Should the owner be entitled to a sum if the operator exercises a new Code right to upgrade? There are some discussions to be had as to whether an owner should be compelled to accept such an upgrade right (in the absence of any such provision in an existing agreement) and, if it is agreed that they should, there should be some financial recompense for the owner.

4.2 Sharing

In relation to sharing, should any Code right to share be subject to the provisions of any agreement between the operator and owner? That is the current position. The Law Commission asks whether s134 of the Communications Act 2003 (which turns an absolute prohibition on sharing into one that requires the landlord's consent, not to be unreasonably withheld) could be extended beyond a landlord and tenant situation. If the Code is to incorporate a sharing right, this should be subject to the provisions of any agreement

between the operator and owner. The Law Society is not totally convinced that s134 should be extended to an operator/owner situation. It would be useful to understand some of the background to the introduction of s134 and whether the motivations were related to the landlord and tenant relationship - if so, this may be a disincentive to an extension of the section. If a provision in an agreement that an operator is prohibited to share, is converted into a provision that any sharing by the operator is subject to the owner's prior consent, not to be unreasonably withheld, this may simply lead to a clash between the respective commercial interests of the owner and operator in determining what is reasonable. Further there is a somewhat confusing statement in the first sentence of paragraph 3.85 on page 35 of the full paper, to the effect that, where an agreement conferring a Code right is a lease, it may be caught by s134. Is it not the case that s134 relates more generally to leases and licences, that, of themselves, may well not be agreements conferring a Code right?

4.3 Assignment

The Law Commission asks whether operators should benefit from a general right to assign Code rights to other Code operators, regardless of what any agreement between the owner and operator provides. The Law Society does not favour such a provision; the owner may only have agreed to the agreement and application of Code rights, because they were content with the particular operator. Another operator who might engender a different reaction should not be forced on the owner.

5. Paragraph 20 of the Code

The Law Commission considers that the alteration regime in paragraph 20 of the Code is essentially fit for purpose. One concern with the current para 20 is the extent to which it can be amended by agreement. Para 20 is not specifically mentioned in paragraph 27(2) (which specifies the Code provisions that cannot be excluded by agreement), although para 20(1) does provide that the right to give the notice requiring alterations under para 20 applies, notwithstanding the terms of any agreement binding the person requiring the alterations. So it would appear that that right cannot be "contracted out", although some of the detail of para 20 may be amended by contract through for example a "lift and shift" provision. Can the parties contract out of the operator's right to serve a counter-notice under para 20 and, ultimately, take the matter to court? The position is unclear and it would be useful if this could be clarified.

The Law Commission proposes that it should not be possible for operators and landowners to contract out of the alterations regime in a revised Code. This proposal would deal with the uncertainty point mentioned above, but is it correct that the operator and owner should not be able to agree to disapply whole or part of the Code's regime on alterations for their own transaction/situation? We refer below to the Law Commission's proposal to allow the owner and operator to "contract out" of paragraph 21. If countenanced for that paragraph, why not for paragraph 20? Should the parties have, potentially, to go to Court for an alteration to go ahead? Could a third party (such as a subscriber) require them to go to Court, even if the owner and operator are happy not to?

6. Para 21 and interaction with para 20

Paragraph 27(2) in effect provides that paragraph 21 is not without prejudice (i.e. it is with prejudice) to rights or liabilities arising under any agreement to which the operator is a party. That in effect gives operators "security of tenure" in relation to the apparatus, which they have installed at the owner's property.

There is a potentially interesting point on the interaction between paras 20 and 21. As stated above, there is an argument (on which there is as yet no definitive position) that, in the case of an improvement, para 20 can be used to remove apparatus without needing to go to court. The argument is based on an assumption (which may be fallacious) that the parties can by agreement contract out of the operator's right to serve a counter-notice under para 20 and, ultimately, take the matter to court to try to prevent the alteration of the apparatus.

Since "alteration" is defined in paragraph 1(2) to include "removal", it would, therefore, appear that the Code allows the parties to remove the apparatus pursuant to paragraph 20 without having to go to court (where there is an improvement). However, this undermines paragraph 21, which the code clearly states cannot be contracted out.

The position is ambiguous, resulting from the drafting of the existing Code. Common sense suggests that para 20 applies to a relocation situation and para 21 to a permanent removal, but this is not definitive. Operators may use para 21(12) to argue that an owner is not ,under para 21, entitled to remove on the ground only that he is entitled to give a notice under para 20. There is some strength in this argument, but para 21(12) could be interpreted to mean simply that an owner cannot use a para 20 ground in a para 21 application, leaving open the

possibility of removing the apparatus by a para 20 application as described above (in the case of an improvement).

It would be very useful if this ambiguity could be dealt with in the revised Code. Even if there is provision for contracting out of para 21 of the revised Code (see paragraph below), this ambiguity should be clarified for the situations where para 21 is not contracted out.

7. Contracting out of para 21

The Law Commission proposes that the operator and owner can, by agreement, contract out of the "security" provisions of para 21, either absolutely, or on the basis, for example, that there will be no security if the land is required for development. As the Law Commission suggests, if the parties can contract out of para 21, owners may be more willing to have apparatus installed at their properties. We are not convinced of the need to refer to development which may over-complicate the position. Would the owner need to prove the land was required for development and, if so, how?

The owner may not want there to be security, even if there is no development. Also wouldn't the owner and operator want to know up front whether the agreement is contracted out of para 21, which gives them greater certainty? The Law Society would prefer that there were absolute contracting out, akin to that for Part II of the Landlord and Tenant Act 1954.

8. Compensation under the Code

On the subject of compensation, paragraph 27(3) of the Code provides as follows:

"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."

This indicates that:

- where the operator lawfully exercises its Code rights, the only liability that the operator will have in respect of compensation or loss and damage will be pursuant to the Code, and any provision in a wayleave agreement or other document imposing further liability on the operator in those circumstances will be in breach of the Code;

- where the operator unlawfully exercises its Code rights, the operator is liable not only pursuant to the Code, but also subject to any further contractual liability contained in the agreement.

This Code provision could be useful for operators in warding off aggressive attempts by landlords to impose liabilities in wayleaves going beyond the Code. There is, however a tension between paragraph 27(3) and 27(2) referred to above. The failure to refer to 27(3) in 27(2) would suggest that the parties can contractually override the effect of 27(3). However, in the absence of case authority, the position is not definitive. It would be useful if the revised Code could clarify this point.

The suggestion in paragraph 6.83 of the paper about re-visiting previous financial awards made under the Code may be perceived as undesirable because of the uncertainty this may create.

9. Land Registration

In terms of the proposal regarding registration of interests at the Land Registry – there does need to be greater clarity on which interests are binding.

One alternative might be to say that where a document conferring Code rights requires registration at the Land Registry but is not so registered, the Code will not apply. Perhaps the Code will instead simply continue to be an exception to the primacy of the registered title. We are not aware that this has caused major problems in practice to date.

10. Forum for adjudication

The suggestions for alternative dispute resolution procedures to be used as a way of resolving valuation issues are welcomed as a means of reducing delays and expense.

We have some reservations about the proposal to split the dispute resolution between the Lands Chamber and a prescribed procedure/arbitration depending on the nature of the dispute.

We understand that there are proposals to have only one forum, the Upper Tribunal, to deal but then it is suggested that the conferral of rights is dealt with by the Lands Chamber and payment/valuation issues are addressed under a prescribed procedure of adjudication with appeals to the Upper Tribunal. It may be preferable for the Court/Tribunal to resolve valuation issues and for one forum to deal with everything.

11. Standard terms for operator/owner agreement

While the revised Code can facilitate standardisation of agreements between owners and operators and may be beneficial, any use of standard terms should, as the Law Commission suggests, be voluntary for the reasons highlighted.

12. Interaction with Part II of the Landlord and Tenant Act 1954

The Law Commission rightly highlights the problems relating to the interaction between paras 20 and 21 of the Code on the one hand and Part II of the Landlord and Tenant Act 1954 on the other. Currently, owners will often seek to contract the lease out of sections 24-28 to avoid the problems. We therefore support the Law Commission's suggestion that, where an operator leases land for the placement and use of electronic communications apparatus, which is protected by the security provisions of the Code, Part II of the 1954 Act should not apply to the lease.

Affinity Sutton

Level 6, 6 More London Place,
Tooley Street, London SE1 2DA
www.affinitysutton.com

[redacted]

04 October 2012

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

Direct Line:
Fax:
E-mail:

[redacted]

Dear Sir

RE: Law Commission Consultation Paper No205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Your Faithfully

Ian Scott
Head of Development

CONSULTATION ON THE ELECTRONIC COMMUNICATIONS CODE

Introduction

The Law Commission is consulting on changes to the Electronic Communications Code. The Electronic Communications Code has its roots in the Post Office Acts and powers given to the GPO to be able to build the first telephone system in the United Kingdom. Although the Electronic Communications Code (formerly the Telecommunications Code) was overhauled slightly in 2003 its main form has not been altered since the liberalisation of telecoms in 1984. In 1984 a House of Commons in Committee spent more time debating Schedule 2 of the Telecommunications Act 1984 ("the Code") than any other single part of the Act which completely liberalised UK telecoms. This shows the inherent difficulties in this type of legislation, particularly when applied in a liberalised market. What may be, at least vaguely acceptable, in a situation where there is a single state monopoly operator may cause much greater difficulty where there are numbers of Code operators all trying to install different types of equipment.

In recent years the Code has caused all kinds of problems ranging from, for example, cable operators' subscriber contracts having to be executed as deeds (to avoid a perceived problem that gratuitous promises did not constitute agreement pursuant to paragraph 2 of the Code), property developers being given extreme redevelopment difficulties because of unknown Code protected apparatus was present on a building. There have been questions of compensation and consideration which are known to be vexed and operators have been sometimes flummoxed by not being able to cross private roads. On the other hand there have been some spectacular difficulties for land owners associated with apparatus built in the wrong place (and you would have thought unlawfully) and the difficulties with what the consultation describes as the Access Principle (i.e. that nobody should be unreasonably denied access to a telecoms system).

For a substantial land owner or telecoms operator there is nothing for it but to read the whole of the consultation document and look at all of the questions. Not one of which might not be of relevance. In what follows we have simply looked at some of the issues raised and what experience says might be shown about them.

Ted Mercer first came across the Telecoms Code in 1985 as Secretary of the Cable Authority liaising with the DTI on the grant of Code powers to cable operators.

Over the succeeding period he has dealt with numerable problems and questions relating to the Code and generally to the installation of systems. He has dealt with the land cables on shorelines, linear obstacles and even apparatus that finds itself where it should not be. That experience, he hopes, comes out in what follows.

Fundamental underlying problems

1. When the Code was "born" sometime well before its adoption into the Telecommunications Act 1984 the world was different. Mobile telephony was a dream (we all too easily forget that the mobile phone was only 25 years old last year). The Post Office did licence some use of wireless and used some itself, usually for point to point linkage. A major use of wireless, however, was broadcast from sites acquired by the BBC and for independent television companies – at least until 1990. Although undoubtedly the pre-1984 Code dealt, in terms of the definition of apparatus, with mobile telephony that form of communications was not uppermost in the draftsman's mind. He (and in those days it probably was a he) was to be thinking about the installation of twisted copper pair probably flown or underground. Moreover he would be thinking about

direct burial of cable rather than it being inserted in ducts which in fact as an obligation were only brought in in the mid 1980's.

2. The problem is that a four foot stretch of twisted copper pair is not quite in the same class as a 90 foot aerial. Tranting all systems the same (i.e. complete technological neutrality) does not take account of the fact that in fixed systems there needs to be geographically located exchanges, street furniture and runs of wire into the premises occupied by a subscriber. Mobile telephony requires much more substantial investment in, as it were, base stations of height and antenna to serve the same number of homes as the district exchange. Positioning is much more important because of the need to prevent interference and provide appropriate reach. Now some localised mobile telephony apparatus such as Pico-type cellular apparatus serving single buildings is not that big but the average mobile mast is a considerable piece of kit much bigger than a piece of street furniture (a large portion of which can go underground in any event) and is more obtrusive in the main than laying wires. Installing wires that generally go under the street because of the present paragraph 9 of the Code means that they do not require the consent of the land owner – or at least that is the commonly held view.

3. Therefore whilst one should always promote technological neutrality in drafting regulations, the size of the relevant equipment must be borne in mind. The existing Code does not differentiate between, for example, pieces of wire installed to serve premises from pieces of larger kit. There is a pretty good argument to be made in saying that unless it causes significant difficulties in terms of installation or space apparatus installed of a relatively minor size and nature to enable the service of premises or nearby premises or premises in the same block might be made subject to standard conditions including compliance with the conditions imposed by Ofcom on all Code operators in respect of installation. It is also not clear why a charge is to be made for such installation provided as it should be removed when it is redundant any damage made good. The corollary of this should be an ability on the part of land owners to get apparatus more readily moved (and more cheaply) on redevelopment and that might work out for everybody. It might get land owners and occupiers quicker access to competitive services and it would not really do any harm to the land owners if in fact their major fear is very probably not being able to get rid of the apparatus and/or who pays for its relocation.

4. That would leave, quite properly, where land is exclusively occupied for the purposes of the apparatus a much "bigger" discussion. A differentiator would not be technology but size and exclusivity. That would mean some fixed line apparatus would be caught, most present mobile installations, either rooftop or stand alone, would be caught but minor apparatus of all technologies would be much easier to deal with.

5. The definition of what constitutes what is covered by the Code (i.e. the installation and keeping and inspection of apparatus) probably does not need to be changed much, there just needs to be division in the way in which rights work based on the size.

Who should be bound by the rights?

6. The view is that all people should be bound by permission given by an occupier for apparatus that serves the premises itself. Where it comes to apparatus which serves others, and this is the larger category we talk about above, then the owner of an interest in land should be bound only if he has consented to creation

of the right. It should be bound up with some obligation to register the fact that as a superior interest (i.e. where a lease for a fixed term of a year or freehold or other interest has been bound). There is one area of doubt. That is whether consent given by a freeholder binds a mortgagee not in possession where the mortgage predates the grant to the operator. In addition all those who take from those who agree to be bound should be bound for the period of the agreement given.

The crucial tests

7. The crux of the present Code is in fact paragraph 5 (and the little used paragraph 6) which set out the circumstances in which the County Court will presently grant consent for installation of the apparatus. The Law Commission paper describes the basic test as the Access Test which is that no person should be unreasonably denied access to a public telecommunications system. Code powers can only apply to those to whom they are granted so we assume that whoever is granted Code powers has passed a stringent test set by Ofcom for taking on that role. In other words they will have made sure that it is a substantial and public system.

8. More difficult questions occur, however, where (let's take an actual example) a road like the A23 is well covered by signals but with the capacity that a degree of congestion occurs. Does the Access Principle justify not just access but better access?

Have you been unreasonably denied access to the system?

9. Operators should be permitted access as long as the "rent" is and unless it is possible to erect further equipment on an existing site to improve capacity?

10. Then the generality of a test that relates to whether or not somebody can be compensated by money on money's worth probably means is something aesthetically damaged beyond the reasonable by the apparatus or relates to health and safety of those near the mast. Various courts have determined at the present time that health is not a valid reason for objecting to the erection of, for example, wireless equipment while the Stewart report says what it does and supposing that radio equipment complies with its licence terms in respect of emissions, strengths etc. Perhaps this test should be related more to the question of whether there is to be a substantial effect on visual amenity or the circumstances of the land and the installation mean that it would be not in the public interest to install the apparatus at that place.

11. An answer would be a general presumption that installation should be permitted but that has to be coupled with methods that will quickly and easily determine what the terms should be. That would mean that the Access Test would be reset to the presumption of access on the part of the operator where that is to provide services to the public or to the premises concerned or premises adjacent. That could be subject to an exception where there are circumstances which properly and reasonably should be taken to override the general presumption, such as significant damage to visual amenity. Most arguments are not about whether or not something should be installed but the price and the terms of that installation. A radical move away from the present test is probably needed to give greater certainty. We do not know of any case where any landlord has tried, let alone been successful in, arguing that apparatus should not be installed for reasons of aesthetic damage. Planning control probably does that job.

Questions of access

12. Probably it is a better way to deal with things for what we suggest below as being a model standard agreement to deal with questions of access terms rather than set these out in the Code. These are ancillary rights which should be the subject of either a negotiated agreement or in the absence of that a set of standard terms.

Overhead lines

13. We consider that this is a matter for conditions set by Ofcom in respect of which the Code operates by then (and that has been traditionally the case) and for local planning requirements. Questions as to whether notices should be fixed to overhead apparatus is a general question relating not just to telecommunications apparatus but to all forms of utility apparatus which should be dealt with jointly.

Upgrade, alteration, renewal etc.

14. It is a fact of life that mobile operators, for example, are constantly evolving their networks as time goes on and the forthcoming 4G auctions demonstrate that. The nature and type of the apparatus changes over time as technology evolves. Again the problem is not likely to occur where the apparatus is of a minor nature but this is a substantial question for, for example, mast sites. This links in with equipment and network sharing. Like for like renewal or replacement is not a problem. Changing one 2G aerial array for a 4G aerial array may lead to less equipment not more. The question really arises prominently in respect of long term consents to install apparatus usually granted as easements in the 50s and 60s. a recent example in the electricity field shows the difficulty. Replacement of 4-way cables can now be achieved by 3-way cables but they are bigger and they emit more radiated power. Was that what those in the 1960s anticipated would be the subject in the easement? Probably not. So the answer is that replacement or renewal should be permitted provided that the size of the apparatus and its visual impact is not greater than that currently found. Where the size of the equipment is greater or the visual impact greater then that should lead to a question of whether or not further payment should be made which, in the absence of agreement, should fall into the appeal procedure about which we will write further.

Sharing with other Code operators

15. In our opinion the Code has got to deal with sharing as a requirement at a European and national level of regulation. Where this consists of the same apparatus being used both on a system run by x and a system run by y that is fine. Where, however, further apparatus needs to be installed then that should be subject to the rule that the option is that further payment should be made unless it has been agreed already that no payment will be made. However, it should be made clear that no separate right in the apparatus exists. That is to say you want to avoid the classic situation that arose, for example, in 2002 in [redacted] where a landlord served notice successfully and operator A moved his apparatus but was unaware of operator B's apparatus on the same site which then required an entirely separate process to remove it. Apparatus of which the landlord is not aware should not be covered by the rights under the Code at all.

Crossing third party land to get access

16. It is a perennial problem. It comes in several forms:

- Access through dry risers to get access to particular floors of an office block.

- Access across private roads on science parks and business parks.

- Access across linear obstacles like railway tracks (this problem has diminished over the years. There was a time when [redacted] would not enter into communication over crossing railway lines which led to, at the time, [redacted] having two sections of their cable franchise unconnected.

17. Clearly there needs to be a right to lay apparatus in land to get access. More difficult is the question of what constitutes telecoms apparatus in the circumstances and whether that covers, for example, electricity. Certainly where electricity wires are contained within ducting installed under the definition of apparatus in the present Code that would seem to be apparatus itself and that addition to the description of apparatus probably needs to remain. Given the position that some landlords of industrial estates take as a matter of course we think it is important for tenants to be able to compel Code operators to use their powers to gain Code access against third parties in respect of access. We are aware of the use of the present paragraph 8 of the present Code as a threat against those who are defined as street managers to ensure the extensions of spurs to systems could be built.

Should there be an offence of interfering with electronic communications equipment?

18. There are two questions here:

- whether generally an offence separate to the present offence of causing criminal damages is required – and probably it is not; and

- whether a separate offence for interfering with apparatus so as to perhaps cause interception or interference with communications is required. That may also require consideration of whether or not it should be an offence to interfere with an electricity supply to such apparatus. We are not aware of any pressing need for new offences or rights to be created to protect land owners.

The Code and Street Works

19. There is an interesting and yet undecided question as to whether or not installation of ducting requires the consent of land owners of subsoil of a highway. In the majority of cases that will be the local authority but essentially consent to install in, under or over the highway is a corollary of obeying the Street Works Code – now somewhat more onerous than old Public Utility Street Works Act. There is, however, a mismatch in respect of major schemes of redevelopment between the New Roads and Street Works Act and the Code. The only way if you are a highway authority to force a Code operator to move is to use provisions in the Code and if you do that then the local authority for example loses the 15% large scale works discount they would have got by doing the works by agreement under NRSWA. In other words it is very difficult for a local authority to coerce a telecoms operator to move equipment except by using the Code powers which then means the local authority picks up a further 15% of the total bill.

Tidal waters

20. The present arrangements in respect of tidal waters and seabed seem to work very well. In particular when a couple of years ago an operator had to get an agreement within two or three days in respect of a particular landing in Cornwall that was achievable. There does not appear to be any problem in continuing to have a separate regime.

Linear obstacles

21. I am probably one of the few people in the country who has ever had to use the linear obstacle procedure to force access through a railway line embankment and it is the case that the procedure works and often it is used in quite extreme circumstances – in the old days because [redacted] quite often simply would not answer correspondence. In reality there is probably no real need for a separate regime and it is used relatively rarely. In terms of building large scale domestic networks it has had some use in the Midlands.

Redevelopment – alteration of apparatus

22. A standard practice is to ask for two possibilities of free lift and shift every ten to fifteen years. We would should differentiate between what has been granted exclusive use of a particular piece of property or again the size of the apparatus is substantial. In respect of long term exclusive use of land by a large piece of apparatus then there should be the power for the parties to agree what the terms of alteration should be, if any, and one should also make the assumption that the compensation is a rack rent in which case requiring alteration may be unfair on the operator. The problems, however, come in two areas.

    - Just moving small bits of apparatus should not really get in the way of any redevelopment and which should be moved frankly at the cost of the operator; and

    - Apparatus which is covered by Code powers protections but is not known by the landlord to be there and not consented to be there. In that case there needs to be a procedure for having the apparatus removed and relocated at the cost of the operator. There needs to be a presumption in respect of all apparatus that it can be moved at the cost of the operator where you are talking larger scale apparatus with exclusive use of land or parts of premises and the need for such a right does not arise as it should have been taken into account the value of the lease held in the first instance. It is not clear why one should not be able to contract out of what at the present time is paragraph 20 rights. You do not want to create a situation where redevelopment includes costs of relocating equipment for which no value has been received.

What apparatus should the Code apply to?

23. To be fair the Code should apply only to that apparatus which is installed pursuant to the Code by an operator who has Code powers. Apparatus installed by somebody who does not have Code powers should not count as part of the Code network. This prevents apparatus suddenly overnight becoming part of the Code system. That should be so unless any of the interests in land has agreed that it should form part of the Code system when Code powers are granted.

24. Neither should Code powers apply to apparatus which has been installed in the absence of agreement with the land owner unless, as it is suggested below, a new standard universal wayleave agreement applies. There have been at least two or there instances in the last few years of apparatus installed without any authority whatsoever in either the wrong place or the wrong side of a particular boundary and the land owner has had the most difficult time getting agreement and any recompense. It should be remembered that under the Code all apparatus even if only protected by paragraph 21 is deemed to be present for the statutory purposes and therefore one cannot sue for trespass. One has to sue for breach of statutory duty which is the duty under paragraph 2 to obtain an agreement. This is a most unsatisfactory state of affairs and in one case even though trespass was discovered in 2007 it took five years for the land owner to either get an agreement or indeed any money in respect of the installation of a quite mast considerable mast site. Indeed it took a threat of court proceedings to get any real response. Apparatus installed unlawfully should not be protected by the Code and neither should apparatus which remains in situ after the expiry of an agreement relating to its remaining there.

Entitlement to compensation

25. As much as it is a good idea to ensure there is a single payment or payments due in respect of compensation for a fall in value of the Claimant's interest in land and by the possible exercise of Code rights the land owner should be in a position to accept or refuse that. If they refuse to accept the compensation then arguably Code rights should not apply. Similarly if no payment has ever been made in respect of compensation for exercise of Code rights, Code rights should not apply. Alternatively a right to be indemnified for exercise of Code powers shall be applied.

How to assess consideration

26. We think that consideration should reflect a market value which should have regard to a special value to the Code operator. Moreover consideration should include a compensation element if a one off payment has not been made or compensation agreed.

Paragraph 20 alteration – who pays?

27. As we have suggested above we think that the person who pays for alteration will depend on what payments the landlord has received. Where it is small scale non-exclusive use then the land owner might pay unless they have not received any compensation for the existence of Code rights.

Standardisation of terms

28. This is an excellent proposal. As much as Table A of the Companies Act may be readily applied there is essentially a number of standard terms that much be include in a wayleave agreement which should be put into a national standard wayleave which applies until agreed otherwise and could apply even to apparatus installed unlawfully. Providing standard terms would considerably assist in negotiation and would cut down costs for minor agreements. It could be linked into a new expert determination process (see below).

Landlord and Tenant Act 1954 Part 2

29. It is unnecessary for the Part 2 of the 1954 Act to still apply to these installations. It is just an unnecessary trap for the unwary and a method for lawyers making

more money than they might otherwise do. This is particularly so if wayleaves granted under the Code could be made statutorily registerable.

Registerable interests

30. Making wayleaves under the Code registerable per se prevents wayleaves from either be counted as leases or easements will considerable ease/simplify matters. It is quite doubtful that the majority of telecommunications wayleaves are registerable as easements in any event with there being no obvious easement and servient tenement.

The $64,000 question – paragraph 21 of the Code

31. The problem with paragraph 21 of the Code is its process is put beyond that which is changeable by contract. If the national standard wayleave as a matter of form contained a provision whereby a court order had to be obtained for the apparatus to be removed except in certain circumstances that could turn the whole matter into a contractual one. In some cases that would apply and in other cases that could be negotiated out of in return, for example, for lower compensation whilst preserving the right not to have the equipment simply removed from the networks if that is what was agreed.

Assessing compensation - who should have conduct of the matters relating to the Code?

32. There needs to be a quick, simple and easy method of assessing compensation where it is not agreed and the simplest way to do that is to have a panel of experts who can take references from the parties or one of them where there is no agreement in respect of consideration and compensation. There is no need to have these matters referred to a court or to create expense and a national panel appointed by the relevant Secretary of State would work very well. The panel could also deal on an expert basis with minor disputes relating to agreements and the Code. Appeals about valuations could go to the upper tier Land Tribunal and general questions relating to interpretation and enforcement etc. of the Code and questions into there being an overriding reason for not installing should be tracked accordingly through the Civil Procedure Rules depending on the seriousness etc. of the matter. The number of matters, however, requiring the courts to deal with them would be pretty small under the regime suggested. The opportunity for third party assessment would be considerably opened up to, in particular, land owners in respect of value.

33. Expert determination would involve a reference by one of the parties to a single expert whose decision would be binding but appealable.

Conclusion

34. Where we come out on all of this is that by having a new national standard code that could apply in all situations where nothing had been specifically agreed or was no longer in force, a good many problems could be solved without the need for the draconian paragraph 21 which can quite often leave land owners up in the air not being paid any consideration or compensation for rights that are just used by operators with no incentive to really follow through on a paragraph 5 notice so as to create a new agreement. The emphasis, however, should be on the initial agreement. Where (and it is going to be a very rare case) no agreement with the land owner can be found or no land owner found then the standard national terms could apply subject to agreement of the price and subject to expert determination

unless the land owner is able to show that there is some exceptional circumstances such as a significant detriment to visual amenity. The problem is that the provisions of the existing Code are used by both sides to try and wring more money out of each other. If the subject of compensation and consideration could be dealt with simply and easily in the first instance by a reference to a single expert with an appeal to a further tribunal not on a judicial review basis but on the merits then there would be safeguards for both sides.

35. So what we think would work would be the ability in respect of large scale exclusive use wayleaves is for the terms to be decided by the court on the basis of not taking into account the presumption that access should be given. While such matters are decided access to the relevant land should be given on the basis of the standard wayleave.

E.P.O. Mercer
Matthew Arnold & Baldwin LLP
2 August 2012

E-mail Message

From:	Vincent Stops (Cllr) [redacted]
To:	Drummond, Elizabeth [redacted]
Cc:	Stephens, Victoria [redacted]
Sent:	04/10/2012 at 19:31
Received:	04/10/2012 at 19:31
Subject:	RE: Law Commission Consultation Paper: The Electronic Communications Code

Dear Elizabeth,

Thank you for consulting me and inviting my views.

As background it is public policy that pavements should be kept as clear as possible to facilitate walking and improve the streetscape. Much effort has been made over the last few years to remove footway clutter. Miles of pedestrian guardrail has been removed across London, thousands of bollards, poles etc have been removed by local highway authorities and Transport for London (TfL).

A couple of years ago I became aware of a new source of clutter on Hackney's pavements and more widely on London's pavements. TfL's Red Routes, the busiest of London's roads were a particular target for a phone company.
This was surprising as one imagines phone boxes were becoming virtually redundant with the rise of mobile phone use. Even stranger, these phone boxes remained unconnected or broken down for long periods.

On investigation it became clear to me that this was in fact a scam. A reasonable scheme to allow advertising on phone boxes to fund their continuing use as revenue declined had been seized on by an advertising firm. This firm had acquired a license to allow them to abuse telecoms companies rights to install large hoardings on the pavement under telecom permitted development rights. They had worked out they could navigate there way between telecom regulations and advertising regulations.

I had one success in making enforcement complaints to Hackney Council where the box had been installed in a conservation area where adverts are not allowed. The advert phone box was quickly removed and replaced by a cash machine phone box. I asked Offcom to deal with this, but they couldn't.

In brief this is a scam. Legislation should remove the privilege of being able to advertise on phone boxes for all but BT with their universal service requirement. Any phone box should have to be justified on the basis of use. Highway authorities should be able to refuse permission for a phone box that is not being installed to serve telecoms purposes.

I would advise you to consult the Association of London Borough Planning Officers who know of this problem.

I hope this is helpful. Please contact me if it is not clear.

yours sincerely,

Cllr Vincent Stops
L.B. Hackney

TEL

Response to the

Law Commission Review of the

Electronic Communications Code

By

I S Thornton-Kemsley MRICS

TEL

Index

1.0 INTRODUCTION

1.1 Statement of Relevant Experience

I work as an independent consultant specialising in compulsory purchase, wayleaves and telecommunications.

I am a Member of the Royal Institution of Chartered Surveyors (RICS), a Fellow of the Central Association of Agricultural Valuers (FAAV) and an Associate of the Chartered Institute of Arbitrators (ACIArb).

I have been involved in advising landowners regarding electronic communications apparatus agreements since 1993. I have acted on behalf of several large landowners and corporate bodies in telecommunication matters including [redacted].

I have been involved in a wide variety of compulsory purchase schemes including roads, pipes and pylon lines and sit on the Scottish Committee of the Compulsory Purchase Association. I have been invited to join the group advising the Scottish Law Commission on issues in CPO legislation in Scotland.

I wrote the chapter on the valuation of radio mast sites and telecommunication cables in the textbook *Valuations: Special Properties and Purposes* published in 2003 by Estates Gazette Ltd (IBSN 0-7282-0418-5). I was the author of the Scottish Rural Property & Business Association (formerly the SLF) advisory paper on radio masts. I assisted in the production of the Country Land and Business Association booklet C*ommunication Masts* (CLA 35) published in May 2004 and played a key role in the production of the Central Association of Agricultural Valuers' comprehensive guidance paper, Telecommunication Masts, published in September 2101.

I am regularly asked to give papers on telecommunication issues for lawyers and chartered surveyors including Greens Law Publishing, the Henry Stewart organisation, Central Law Training and the RICS.

I am acknowledged by the Law Society in Scotland as an accredited expert on telecommunication matters and by the RICS as a member of the Chairman's Panel for Dispute Resolution. I have given expert evidence in respect of radio mast and telecommunication valuations before the Court of Session (Commercial Division), various County Courts in England and Sheriff Courts in Scotland. Many of these have involved issues arising from the Code. I have acted as arbitrator in several telecommunications disputes including that regarding the application of the Code which resulted to the *Bridgewater* case[1] which, in part, led to this review.

[1] *The Bridgewater Canal Company Ltd v GEO Networks Ltd* [2010] EWHC 548 (Ch). Upon appeal this decision was overturned and my arbitration award regarding the correct interpretation of the Electronic Communications Code in those circumstances was upheld by the Lord Chancellor [2010] EWCA Civ 1348. Leave to challenge in the Supreme Court was refused.

TEL

1.2 The Need for Reform

I agree that electronic communications have come to play a vital part in our lives and endorse the fact that these depend upon an array of hardware, stretching across the country and that these networks of masts, cables, wires, servers, routers and exchanges make electronic communications possible. This equipment is however, more often than not, located upon land that does not belong to the private companies who own the equipment

In my opinion Schedule 2 to the Telecommunications Act 1984, (as amended by the Communications Act 2003), known as the Electronic Communications Code ("the Code") currently does not strike an appropriate balance between the rights and interests of landowners and network operators.

I agree with the Law Commission that the Code is generally regarded as confusing, and unduly complicated. I agree that it is not just the drafting that is a problem. There are fundamental issues in the Code regarding the balance of rights and interests of operators and landowners' and I endorse the Commission's view that these balances require re-appraisal. In my opinion it is the sheer uncertainty within the Code that is the reason that there have been so few cases under this legislation.

I therefore welcome the Law Commission's review of the Electronic Communications Code.

1.3 Summary of Principles

In considering the proposals put forward by the Commission I have had in mind certain fundamental principles:-

1. The revised Code should give clarity for users

2. It should be coherent both internally and with existing land, commercial and contract law

3. Its main driver should be access for the general public to an electronic communications network

4. It should strike a balance between the rights of individual property owners and the operational needs of the large companies to whom Code rights are granted

5. The obligations in licences granted to operators and imposed under the Code should be monitored and enforced.

6. The Code should recognise the rights and obligations that exist in existing agreements and not do violence to the marketplace

2.0 THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS

2.1 Rights and obligations within a revised code

This is where a balance needs to be struck.

The nature of the agreement

The principal Code rights under the current law are set out in paragraph 2(1) of the Code:

a) *to execute any works on … 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.*

So far as the need for the occupier's agreement is concerned it requires to be in writing. Schedule 1 to the Interpretation Act 1978 provides that:

> *"Writing" includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly.*

There is, therefore, no requirement for agreement to be given by deed; indeed, no particular formality is required. I am aware of instances when an occupier's written agreement has been unwittingly given simply by filling in an operator's application form or by signing heads of terms.

I accept that the focus of these rights is on physical works and the maintenance of electronic communications apparatus on land for the provision of the Code Operator's network.

It is significant there is no common format for agreements in this market they create different sorts of relationships: -

- Some are described as leases with rights of access, terms of 10-20 years with reviewable rents.
- Some are described as licences; with fixed terms and consideration payable in the form of a 'fee'.
- The majority avoid any label – being described as "*agreements*" with reference to "*annual fees*".

In practice, the great majority must be leases on their facts, irrespective of the label used or the absence of one. They appear to grant exclusive possession for a term for consideration[2]. In Scotland most "licences" are likely to be considered leases even if a different label is applied (cf *Brador Properties v BT* [3])

The situation is clearer in respect of underground fibre optic or BT cables in that these usually take the form of wayleaves or servitudes/easements. However in my experience it is wayleaves that give rise to the biggest issues.

Wayleaves are personal and tend not renegotiated when property changes hands.

BT agreements are in the form of wayleaves but many include exclusive possession of an area of ground for the erection of poles etc for which a 'rent' is payable.

[redacted].

The Law Commission 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.**

I broadly agree with this requirement

The Commission ask consultees to consider whether code rights should be extended to include further rights, or that the scope of code rights should be reduced?

I consider that the Code rights should not be extended and that certain rights (particularly in respect of the special regimes) should be curtailed.

It may be that the wording of the general regime should be extended to protect line of sight microwave links as discussed below.

[2] *Street v Mountford* [1985] AC 809. *Clear Channel UK Ltd v Manchester CC* [2005] EWCA Civ 1304, [2006] EGLR 27 (CA) etc
[3] [1992] SLT 490

The Commission propose that code rights should be technology neutral.

Underground cables etc for instance do not involve exclusive occupation but mobile telephone installations (in the form of radio masts do).

I note that the Law Commission are not minded to promote different rights in connection with different technologies. This means that here will be no differential in the revised Code for apparatus that requires rights of exclusive possession as against less intrusive rights. I consider that this may warrant require further examination in respect of the nature of the rights and the difficulties that may arise.

I consider that it should be possible, and indeed be desirable in some instances, to differentiate between various technologies on the basis of those which involve an element of exclusive possession and those that do not.

The Commission asks consultees to consider if code rights should generate obligations upon Code Operators and, if so, what these should be

There is significant disparity between the parties to electronic communications agreements which is significantly different from the wider commercial property market. In my opinion this, together with the polarised nature of the market, must be borne in mind in addressing the legislation.

The operators tend to be large commercial organisations. As the RICS i-surv telecoms resource states "*Tenants hold the greatest market share under the telecoms umbrella, and ultimately dictate the current trends*"[4] (my emphasis). In retail for example even the main players (Sainsbury etc) tend to have only 1,000 units. The main mobile phone operators have about 8,000 telecoms sites each. They tend to share the same agents and are increasingly entering into relationships between themselves (see 2.4 below) giving rise to very real competition issues.

A landowner usually has one agreement, he is not necessarily aware of the market; his core business is usually very different and he rarely has any other involvement with electronic communications apparatus, the issues involved or knowledge of the income generated. Landowners tend not to be properly represented in telecoms negotiations.

In April 2002 I was involved in a rent arbitration for a rural greenfield 15m radio mast site [redacted]. In his submission to the Arbitrator, [redacted] led evidence of 49 sites over a period from October 2000 to June 2001, with rents varying from

[4] http://www.isurv.com . I-surv is the RICS is an online information service for property professionals and contains technical information on a broad range of property related topics, as well as government legislation, RICS regulations, a case law library and property market surveys and research. The telecoms section was last updated in June 2008[redacted]

£2,000 to £3,500. In the time available for counter representations I wrote to the landlords of each of the sites led in evidence. The results illustrate the extent of professional representation; out of the 21 landlords who responded, only 8 were represented.

The Code should generate certain obligations upon Code operators as a consequence.

- **Duty to inform**
  The Commission should consider a procedure whereby the operator is bound to serve notice on parties with any interest in the affected property and given them adequate time to raise any objection before any agreement takes effect.

  I envisage a statutory form of notice as is required to be served on a residential tenant in the grant of Short Assured Tenancies (SAT) in Scotland or Assured Shorthold Tenancies (AST) in England and Wales or as the Town and Country Planning Act 1990 requires to be served on agricultural tenants affected by a development application.

  The notice should be in a form approved by Ofcom setting out the main provisos of the Code particularly in relation to Paragraph 21. There should be penalties for failure to provide such notices. [redacted].

- **Minimium impact on property rights**
  Paragraph 5 (5) of the Code provides that the terms and conditions for any agreement awarded under the Code should ensure that the least possible loss and damage is caused by the exercise of the right to persons who occupy, own interests in or are from time to time on the land in question.

  I consider that this obligation should be emphasised in any amended version of the Code.

- **Health and Safety**
  One aspect that the presence of a radio mast may impinge on persons who occupy, own interests in or are from time to time on the land in question has evolved from the EU Physical Agents (EMF) Directive 2004/40/EC. This was designed to protect workers who are exposed to EMF during their normal working practices, using the ICNIRP guidelines to set levels of acceptable exposure. The Directive was amended in 2008 (2008/46/EC) to allow member states more time to comply with this Directive, which I understand that must be done by 2012. The Directive places a number of duties on employers. The main ones being that it:

  - Places a duty on the employer to conduct a risk assessment and calculate EMF strengths.
  - Places a duty on the employer to eliminate or reduce as low as possible the risk of exposure; and where risk can't be eliminated that measures are devised by the employer to reduce the risk of exposure below ELV (Exposure Limit Value).

- Requires the employer to provide: the risk assessment to the nominated person responsible for health surveillance;
- Requires an investigation and medical examination where an employee is 'detected' as having been exposed;
- Requires that records of health surveillance activities are kept

Employers also have a general duty under the Health and Safety at Work Act 1974 to provide a safe working environment for employees. As this would include obligations in respect of the effects of electromagnetic fields (EMF), owners of mast sites therefore need to be aware of any implications for their own employees who routinely work near masts and their health and safety policies should cover such issues. This is however a specialist area and most landowners are ill equipped to assess such risks.

Given that any potential hazard is introduced by the presence of a mast there should be an obligation on operators to assist affected parties in the compliance of their duties under such EC Directives and the Health and Safety at Work Act 1974. Parties with no direct relationship with the operator may be affected and so the obligation should not only be to the landowner.

2.2 The definition of electronic communications apparatus

I agree that crucial to the determination of the extent of code rights is the definition of this. The approach taken in the current Code is to define "electronic communications apparatus" as:

(1) any apparatus (which includes any equipment, machinery or device and any wire or cable and the casing or coating for any wire or cable) which is designed or adapted:
(a) for use in connection with the provision of an electronic communications network; or
(b) for a use which consists of or includes the sending or receiving of communications or other signals that are transmitted by means of an electronic communications network;
(2) any line:
(3) any conduit (which includes a tunnel, subway, tube or pipe), structure, pole or other thing in, on, by or from which any electronic communications apparatus is or may be installed, supported, carried or suspended.

This is a very general definition, with equipment defined by its purpose rather than described specifically. It is important that the range of protected apparatus should be broadly stated; the electronic communications industry is reliant upon a variety of different technologies and this is a sector where there are frequent, significant evolutionary developments

The Commission ask consultees for 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?

I consider that the definition of electronic communications apparatus is sufficiently wide to capture most essential components of an electronic communications apparatus and do not consider that it should be further amended (save as identified above).

I do not consider that electricity supply cables, upgraded access tracks, fencing and other works should be included in Code rights. I consider that the definition of the existing definition is sufficiently wide to allow an operator to apply under the general regime for any rights necessary.

2.3 The creation of Code rights

I consider that this is an area where some rebalancing is necessary.

To illustrate the issue I have been involved recently in a situation where a shop tenant unbeknown to the landowner entered into an agreement with [redacted] for a microcell. The situation only came to light after the outgoing tenant who had granted that licence failed to give vacant possession. The landowner is now faced with an action to remove the operator, a claim against the outgoing tenant and difficulties with the incoming tenant who is seeking to revise the agreed lease terms due to the presence of [redacted] The cost to the parties to this litigation will far exceed the [redacted] offered by [redacted] for such equipment rights.

Who should create an agreement?

The Code currently provides that code rights can be created by the agreement of the occupier of land. The occupier may be the freehold owner, long leaseholder, or even a weekly tenant.

The distinction between 'occupation' and 'possession' is a familiar property issue (for example, *Lam Kee Ying Sdn Bhd –v- Lam Shes Tong*[5]; *Akici -v- LR Butlin Ltd*[6]; *Clarence House Ltd –v- National Westminster Bank plc*[7]) An 'occupier' may be a licensee who has no interest in the land in question and is not in 'possession' of it. It would seem to follow, on the face of it, that the agreement of a licensee without any interest in the land in question will be sufficient for the Code to apply. The reservations and terms of a conventional agricultural tenancy would not give the tenant the legal capacity to grant rights of this nature. Yet a written agreement given by any of these would be sufficient to confer Code powers in respect of apparatus on the land.

I consider that the Law Commission is entirely wrong to judge this issue on criteria that the occupier is the one most likely to want the supply of electronic communications services. Cables are normally crossing land as part of the larger network or to supply services to others while masts provide a general service and the operator may not be the one used by landowner.

[5] [1975] AC 247 (PC)
[6] [2005] EWCA Civ 1296; [2006] 1 WLR 201 (CA)
[7] [2009] EWCA Civ 1311; [2010] 1 WLR 1216 (CA)

It is my experience that the exercise of Code rights is predominantly applied against landowners who have little or no interest in the electronic communications service for which rights are sought and so have less reason to agree.

In my experience, operators at present make only cursory attempts to contact the landowner if they are able to secure an agreement with an occupier. Operators, particularly where wayleaves are concerned, make little or no attempt to check on the rights or capacity of the occupier to grant such an agreement.

I respectfully disagree that the occupier must remain the Code Operator's point of contact on the land. It should be the owner of the property in question who should be the person who can create code rights by giving agreement and the person to whom any application for the grant of code rights should be addressed. I consider that the Code needs to address those with long term legal interests in the land, not occupiers.

I do not consider that it would be impracticable to deal with the owner. It is important to stress that, in practice, operators do deal with landowners from whom they take their leases and other agreements. [redacted]

Whilst a key practical impact of the Code is that a person who has agreed to be bound, or is treated as being bound, by a paragraph 2 agreement cannot claim to be entitled to require the removal of apparatus and so cannot serve notice under paragraph 21, the impact of the Code goes further. Even where the landowner has not agreed to be bound the provisions of paragraph 21 apply. The right to require removal of the apparatus from the land cannot be enforced without following the procedures set out in the Code.

As the Law Commission's analysis identifies, while nothing in the existing Code enables an occupier to create rights that exceed his or her own interest in the land, the reality is that the Code agreements have a direct impact on the landowner's reversionary interest.

It seems to me preposterous that a seasonal grazing licensee or short term tenant could grant an operator the right to install equipment and that, at the end of the year, leave the landowner the problem of removal. That is one reason why Code powers have tended to be regarded with great suspicion by landowners.

Were the Code to require agreement with the landowner, the interest of any occupier would also be addressed in that the landowner would have to ensure that any legal interest he has granted over that land (to the occupier) was protected.

Who is bound by a right created by another's agreement?

The Code provides that where the court makes an order conferring code rights, the court may make provision for the rights to bind anyone else with an interest in the land. However, where rights are created by agreement with the occupier of land, the Code provides that those rights only bind specified other parties with an interest in the land. The Commission refer to those provisions as the "priority provisions."

The priority provisions go beyond the common law position. Under the common law, a licensee of land, for example, cannot grant a right that has any effect on someone with a proprietary interest in it. A lessee of land can bind sub-lessees (where the sub-lease is created after the interest that will bind it) but not his or her own landlord or anyone else with a superior interest.

The priority provisions of the Code extend the classes of person who are bound by a code right created by the occupier's agreement. They are:

(1) the occupier who conferred the right;

(2) anyone with a freehold or leasehold estate in the land who has agreed in writing to be bound by the right;

(3) successors in title of interests that were owned by the occupier who agreed to the right and all those who agreed to be bound by it;

(4) the owners from time to time of interests derived from interests whose owners are bound (for example, a sub-tenant of the lessee who agreed to the creation of the right); and

(5) any occupier who derives his or her right to occupy from a person who is bound.

These provisions enable third parties to be bound by a code right created by the occupier's agreement, because they too have agreed or because their position derives from someone who has agreed. More controversial is the provision in the Code that has the effect of binding those who have not agreed to the conferral of a right.

Whilst I accept that such provisions may prevent the interruption of services it is of considerable concern that the Code can prevent the removal of apparatus even where the grantor of the rights was in breach of the terms of his occupancy by agreeing to installation of the apparatus and the landlord has not agreed to it.

Landlords can be left with apparatus that they are unable to remove when occupiers who were granted such rights have left. The consequences for the owners of interests which are technically "not bound" is therefore far-reaching.

This appears to me to amount to a fundamental breach of basic property rights which should be carefully considered in any amended Code.

The Commission seek views about who should be bound by code rights created by agreement, and for experiences of the practical impact of the current position under the Code.

If the Commission are nonetheless minded to proceed on the basis that an occupier can grant rights I consider that there should be an obligation on any operator to investigate an occupier's title to grant such rights and operators should be statutorily obliged to indemnify the landowner against any loss arising from rights obtained from an occupier.

TEL

The test for the creation of code rights

The Code provides for compulsion where agreement is not forthcoming in terms of paragraph 5 of the Code. In effect, an agreement can then be imposed.

The benefits to society of imposing an agreement should be balanced against the private interests of those who own and occupy the land over which rights are acquired and who are being told what they have agreed. It is essential to consider the way that balancing exercise is carried out under the Code.

Paragraph 5(3) of the Code reads as follows:

> *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;*
>
> *and in determining the extent of the prejudice, and the weight of that benefit, the court shall have regard to all the circumstances and to the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services.*

The latter principle has been described by the Courts as the "overriding principle"[8]. The Commission uses the term "access principle". It is a factor to be taken into account, and is a tool for use in balancing public benefit against private prejudice. I consider this should remain the main purpose for the Code.

I agree that, with the exception of wayleaves acquired by water companies, other rights are granted on the basis of a test that balances public and private rights. The procedure for disputed compulsory acquisition of water rights is an application to the County Court (in England) or the Sheriff Court (in Scotland). All prescribe a procedure to be followed before a right may be exercised on the basis of the public interest weighed against private interests. It must be borne in mind that this is an instance where compulsory powers are being granted to private profit making companies. It is different from rights granted to former public utilities and the test should therefore be more stringent.

It appears at first sight that, under the Code, the court is to have regard to all the circumstances and to the Access Principle both in assessing the extent of the prejudice to the landowner (relevant to limb (a) and limb (b)) and in determining the weight of the benefit that would accrue from the order to those who would thereby get access to electronic communications services (relevant to limb (b) alone). The Access Principle is clearly relevant when weighing the benefit to

[8] Eg *Bridgewater Canal Co Ltd –v- GEO Networks Ltd* [2010] EWHC 548 (CH)

potential customers of electronic communications services against the prejudice to the landowner. I agree that it is not easy to understand how it could be of any assistance when only limb (a) is under consideration.

If the Access Principle is not brought into play under limb (a), the test under limb (a) would not involve any balancing of the public benefit against the private prejudice. In other words, if the prejudice is capable of being adequately compensated in money then the court would have to make the order even if the landowner resisted. That approach would seem not to be fully compliant with the European Convention on Human Rights, where a full assessment of proportionality is considered important even where compensation is available

In terms of the Code, private companies are therefore granted powers to impose rights that affect the landowner's interest but the balancing provisions are not clear.

In any revision of the Code the relevant test must be clear and readily understood; and it must clearly balance private prejudice against public benefit. The current test may seek to achieve that balance; but it is poorly framed.

The Commission seek 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 advise: -

(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?

The present Code *says "no person should unreasonably be denied access to an electronic communications network"* (Para 5(3)). This test has to be taken into account (alongside all circumstances) in *"determining the extent of that prejudice [caused by the order] and the weight of that benefit [accruing from the order]".* Lewison J considered this balancing act in his decision in the first court hearing of *Bridgewater*:

> *"Necessarily, as it seems to me, formulating the principle in this way entails the conclusion that there may be circumstances in which it is reasonable to deny such access."*

Any re-working of the test for imposing an agreement should allow for the possibility that the landowner's concerns are capable of outweighing any public interest and should cast more illumination on what those circumstances might be.

In my opinion, the appropriate test for dispensing with the need for landowner/occupier's agreement to the grant of code rights should be subject to a weighing of the public benefit of the order against the prejudice caused in respect of both recompense and benefit. Paragraph 17 sets out such a test; albeit this is currently only available after apparatus is installed. Moreover some form of judicial oversight is desirable of the use by Code Operators by the authority which granted them particularly in respect of what the public benefit for any paragraph 5 application might be.

Across the UK according to Ofcom[9] 99% of people live in postcode districts with at least 90% 2G coverage from one or more operators. 3G coverage is relatively similar. The Access Principle is therefore much more difficult to satisfy.

Under current Code it appears that the onus is on the individual landowners to establish that there is little or no public benefit. This is an unreasonable expectation on an affected landowner and a potentially costly exercise. The burden should be on the operator to establish public benefit failing which there should be an independent assessment of this issue. I consider that there is a definite role for Ofcom in this process given that they are already involved in assessing nationwide coverage etc as illustrated by their annual reports.

2.4 Rights ancillary to Code Rights

Access to neighbouring land

The starting point is that the grant of code rights over the land of a particular occupier has no implications for other land. The fact that a mast site is installed on X's land does not enable the Code Operator to run cables beneath Y's adjoining land; to do so the operator needs Y's agreement, or an order granting the necessary code rights. That principle should remain.

However, paragraph 3 of the Code makes a special provision about the ability to interfere with or obstruct access to neighbouring land. It follows the general law in stating that this cannot be done without the neighbour's agreement (or the neighbour otherwise being bound – including by an order of the court). It also provides that if that neighbour's agreement is given, then "sub-paragraphs (2) to (7) of paragraph 2 above except sub-paragraph (3)" shall apply. The main effect of this is that, once another landowner has given permission for access to his or her land to be interfered with or obstructed, that permission will, in accordance with the priority provisions, bind others with an interest in that land.

I do not consider that to be equitable.

[9] The Communications Market 2010 – Ofcom – http://stakeholders.ofcom.org.uk/binaries/research/cmr/753567/UK-telecoms.pdf

The Commission ask 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.

I do not consider there is a need for any special regime for access to neighbouring land.

For the reasons outlined above I consider that there are considerable dangers in enabling an occupier to bind others with an interest in that land (for instance the owner).

The right to install overhead lines

Paragraph 10 of the Code gives an apparently absolute power to overfly land subject only to basic minimum height restrictions.

In effect I consider that this amounts to a further special regime and I consider this issue in that context at 3.1 below.

The right to cut back trees

I accept that trees can interfere with a Code Operator's apparatus. Under paragraph 19 of the Code, Code Operators have the right to give notice to the occupier of land on which a tree grows requiring it to be "lopped" (that is, cut back), at the Code Operator's cost. This right only applies if the tree overhangs a street and it obstructs or interferes with the Code Operator's apparatus (or will do so).

The right in the current Code to have a tree lopped even extends to trees that are protected by a tree preservation order (TPO), as there is an exception in the TPO regime for "statutory undertakers" which in this context specifically includes Code Operators. The exception also applies to trees in conservation areas.

I understand that two suggestions have been made about the extension of this ancillary right:-

(1) that it should extend to vegetation generally; and

(2) that it should not be limited to interference with apparatus on a street.

A more radical suggestion to the Commission has been that there should be a general right for Code Operators to protect their wireless signals against obstruction, by vegetation or buildings, as they can protect the physical apparatus which transmits those signals; in effect a further special regime.

Wireless signals would include microwave relays and affect property rights well away from apparatus. As an illustration of the extent of such a proposal was an application [redacted] to fell a swath of timber over some 1,200 metres amounting to some 3.75 ha on the island of

Jura to enable line-of-sight for a microwave link. We understand that the apparatus which created this issue was some 2.4 km away. The issue was resolved by agreement. [Compensation for the timber affected was in the order of [redacted] and consideration agreed of [redacted] This should be considered in respect of the Commission's proposals regarding the basis of consideration.]

The protection of microwave links in the planning process is already giving severe problems with regard to the obtaining of planning consent for wind farms. The planning legislation provides that the mobile network operators are statutory consultees in any such application. In our experience some operators habitually lodge objections to windfarms on the grounds of microwave interference with only cursory examination of the issues; often on further examination these are minimal or non-existent or could be planned round. The impact of further protection for microwave links would have far reaching impact.

Consultees are asked to consider the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, and whether it 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?

I consider that any extension of these rights is an unwarranted and far reaching suggestion.

There should be no statutory right for an operator under the revised Code to lop or fell trees subject to a TPO or in a conservation area without complying with the normal procedures for such rights. That would again allow the balancing of public interests, those protected by the planning designation and those given by the Code.

I consider that any necessity to cut back trees and the protection of fibre optic links could be achieved by an appropriate widening of the general Code provisions rather than as a further special regime.

Upgrading

A Code Operator, after having installed equipment, may wish to use it for a new purpose or install new equipment in its place. The Code Operator may want to do this, for instance because:

(1) new technology has become available or because greater capacity is required and a different medium is better able to supply it (a physical upgrade); or

(2) it would like to expand the use of its apparatus, for example to transmit wireless signals on a different frequency or to supply another customer in a building without undertaking additional works (a purposive upgrade).

Any code rights that are conferred by agreement on the Code Operator must be *"exercised in accordance with the terms … subject to which [they are] conferred".* This means that a Code Operator may be prevented by the terms of its agreement with a landowner from upgrading its apparatus, either physically or purposively. Such contractual provisions should be preserved in any revisal of the Code. Having made or imposed its agreement, the Code operator should be limited by it.

This is an area where the Commission should be wary in that it impacts on rights already granted.

Any Code right conferred should be exercised in accordance with the terms in which it is granted[10]. The Code Operator can apply for upgrading through the normal process if such rights cannot be agreed with the landowner.

The Commission 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.

I do not consider that Code operators should benefit from a statutory ancillary right to upgrade their apparatus. At the point of the granting of any agreement it is difficult to envisage subsequent technological changes. Such an ancillary right to upgrade may give rise to additional compensation / consideration issues. Careful drafting will be required to establish what constitutes 'upgrading'.

In deciding whether or not to give consent to a tenant's request to carry out alterations, a landlord is entitled to consider what the effect of the alterations will be, not only on the demised property, but also on the value of any neighbouring property owned by the landlord. In *Sargeant v Macepark (Whittlebury) Ltd*[11] this principle was taken a stage further, finding that it may be reasonable for a landlord to refuse consent because of anticipated damage to his business interests flowing out of the use of neighbouring property, as distinct from a diminution in value of the neighbouring property itself.

A right to alter in a revised Code would impact on such normal property rights.

[10] Paragraph 2(5) of the Code
[11] [2004]

If however, the Commission were minded to recommend that ancillary rights to upgrade apparatus were to be permitted, then an additional payment mechanism must be included.

Sharing

The sharing of apparatus can take many forms. A Code Operator might allow another operator to install physical infrastructure (for example, to install fibre optic cables in the unused space in its network of conduits, or to install an antenna on its mast); or a Code Operator could allow another operator (or its customers) access to its infrastructure (for example, by allowing another operator's customers to use its apparatus for sending and receiving calls)

I recognise that sharing may be desirable or necessary for a variety of reasons. It may be useful where one Code Operator merges or enters into a joint venture with another; it may assist Code Operators to comply with regulatory pressures to open access to their infrastructure. Sharing apparatus can also help to reduce infrastructure costs and the visual and environmental impacts of apparatus; it is encouraged by both Government and the European Union. Sharing has been an obligation on Code Operators for some time arising from the terms of SI 2553/2003. Recently however sharing has become a hot topic within the mobile market as operators consolidate.

The Code contains very little on sharing, although paragraph 29 (introduced in 2003) is relevant; it applies where: -

(1) the Code has been applied to an operator ("Operator A");

(2) the Code expressly or impliedly limits the use to which apparatus installed under the Code can be put; and

(3) Operator A is (or becomes) party to an agreement to share apparatus installed under the Code.

Where this is the case, the limitation referred to in point (2) above is deemed not to preclude doing anything, or using any apparatus, in pursuance of that sharing agreement. Although convoluted, paragraph 29 may have the effect of permitting a Code Operator to share its apparatus with another operator. This has not however been tested in any case to my knowledge.

Paragraph 29 cannot and should not override the constraints of agreements with landowners and occupiers. So where a landowner includes a term in an agreement with a Code Operator that the rights conferred benefit that Code Operator only, paragraph 29 will not operate.

The Commission asks consultees: -

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

TEL

(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.

At present, about two-thirds of the mobile phone network in the UK is located on shared masts or other existing buildings or structure. The whole drafting of the Code is to protect an operator's network. Throughout the Code this key concept is followed. For example, a paragraph 2 agreement is required for conferring on an operator "*for the statutory purposes*" the right to execute works and to keep electronic communications apparatus installed. The "*statutory purposes*" are defined as "*the purposes of the provision of the operator's network*". It is not for the provision of facilities for third parties, even if those third parties are other operators.

The same concepts recur elsewhere in the Code; at paragraphs 9 (street works), 10 (power to fly lines), 11 (tidal waters etc), 12 (linear obstacles), 18 (obligation to affix notices to overhead apparatus), 19 (tree lopping). The Operator's network is also the key concept for paragraphs 17 (objections to overhead apparatus), 20 (power to require alteration of apparatus) and (with a slight but immaterial difference in language) paragraph 21 (restriction on the right to require removal of apparatus).

The Commission appears to be considering overturning that key principle by allowing operators to gain additional income/goodwill by a statutory right to share.

Currently the Code does not include a right to share with another network operator. That principle is correct. It goes beyond the agreement with the operator in question. It would be unreasonable to grant such a statutory right against a landowner. As evidenced in the open market, this is a valuable right and if the Commission were to make such a substantial change to the statutory provisions it is likely to cause significant difficulties in the market and impact on the property rights of landowners.

Many agreements for electronic communications apparatus are licences or wayleaves and therefore personal to the parties. That is right and proper given any right to assign of share is likely to affect the grantor's interest in the property.

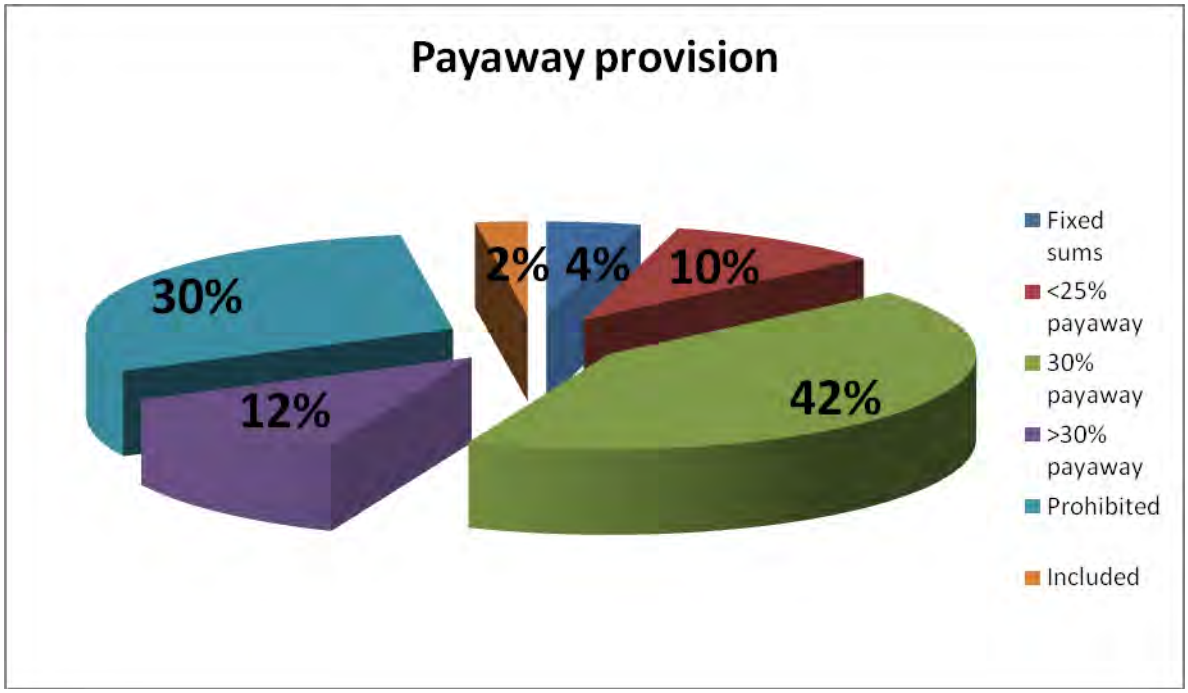
It is a general principle of property law that a tenant has the ability to sublet, assign or otherwise deal in the tenancy subject only within the terms of the lease and as allowed by any statutory intervention. It is also axiomatic that a tenant cannot grant rights greater than it possesses. A statutory right to share in any revised Code may affect this.

My research shows that in most new leases agreed over the past 5 years a substantial proportion (30%) prohibit site sharing or restrict third party occupation to the group company. This in itself does not suggest that there are difficulties in the current Code provisions. I am not aware of any evidence to show that the lack of a right to share is causing problems in respect of access to an electronic communications network. I am aware that operators are seeking such rights to increase profitability.

Sharing would lead to additional traffic to a site and, given the rights conferred under paragraph 21 in respect of each and every operator, would affect the landowner's reversion.

If the Commission were minded to grant such rights, it would be essential that additional payment be made to protect the landowner's interest. That should be based on market value and not on any other basis.

As illustrated by analysis of my database of over 4,500 sites where site sharing rights have been granted the market evidence is that this is normally dealt with by a payaway based on a percentage of the site share income albeit (probably because of the nature of inter operator agreements outlined below) an increasing number of transactions have fixed sums:-



The Commission must also consider carefully the balance of power between individual landowners and the operators in the drafting of any new Code. It must be recognised that the arrangements between operators place them in a dominant marketing position in negotiations with landowners.

Fixed line communications are effectively dominated by BT. There are a limited number of fibre optic operators (including Geo, Virgin Media, Cable & Wireless, SSE Telecoms, etc).

As I have already pointed out the position in the telecoms market is somewhat different from the wider commercial property market. The majority of telecoms sites are tenanted by relatively few operators (MNO's): Vodafone, O2, Orange, T-Mobile and H3G. Airwave, who provide emergency service coverage are also usually considered as a mobile operator.

Following competition approval there are now two groupings within the MNO's:-

- Vodafone and O2.

  Vodafone and O2 entered into an understanding in 2009 to share their combined masts called Cornerstone.

  In an application recently approved by Ofcom these companies have approval to form a joint venture and transfer existing all their infrastructure into this – effectively to share.

- T-Mobile and Orange (now Everything Everywhere) and H3G.

  H3G and T-Mobile (UK) signed an agreement in December 2007 to combine their 3G access networks and formed a 50:50 joint venture company called Mobile Broadband Networks Limited (MBNL). At the time T-Mobile's coverage was then put at 85% of the population through some 11,000 base stations and H3G's at 90% (7,800 base stations). The scheme has led to the decommissioning of about 5,600 sites. These companies wrote to landowners demanding the right to assign leases into joint names in many instances claiming that they had the right to so do despite contraindications in the relevant leases.

  In summer 2010, T-Mobile and Orange came into common ownership in a deal in which Deutsche Telekom (T-Mobile's owner) contributed T-Mobile UK (and its 50% share in MBNL with H3G) while France Telecom added Orange UK. The name given to the joint venture was Everything Everywhere.

  To muddy the waters with effect 1st July 2010, T-Mobile (company number 02382161 – originally One 2 One Personal Communications Limited) changed its name to Everything Everywhere Limited (EE Limited) and became the sole shareholder in Orange (Jersey) Limited which was the holding company for Orange. Orange (Jersey) Limited was subsequently dissolved in July 2012 and EE Limited own Orange direct. Effectively there have been no practical changes to the leases or business of what is T-Mobile – it has simply changed its name. Orange and H3G remain entirely separate legal entities.

Most operators have master agreements between themselves which set the rules for site sharing on individual sites – effectively an enabling agreement. These agreements are reciprocal (i.e. the same agreement applies to A sharing on B as B on A's mast). There is increasing evidence that operators are entering into reciprocal agreements at consideration less than market value. It is assumed that as such agreements are parts of much larger joint operations, the operators can "value shift" so that value will arise where it suits them, not where it might lie economically. This can be illustrated by comparing the National Grid Wireless ratecard (where there is no reciprocal arrangement) with a standard inter operator ratecard:-

The O2 / Vodafone Cornerstone "guidelines"[12] suggest that third party sharing should be as per the rooftop rate. In Cornerstone the guideline rental for rights to install more than six antennae on a rooftop is [redacted] Nonetheless the actual reciprocal site share agreement between these two companies appears to be that they pay 50% of the base rent (i.e. unequipped) rent of sites where they share occupation. A landowner under the Cornerstone agreement for a standard 15m mast would therefore receive in the order of [redacted] This is in marked contrast to arms' length transactions where values are based on equipped site rentals and the right to install say 6 antennae is in the order of [redacted] for which a landlord would receive [redacted]

Other operators in lease negotiations are currently demanding the right to share free of charge (or at best offering only 30% of an income they control with no transparency to enable landlords to check they are receiving a proper market value). It is unreasonable to expect a landlord not to have some measure of control over the income he receives or some ability to check that any declarations made by his tenant is correct yet that is exactly what is being demanded.

[redacted]

The ability to siteshare within any revised Code will alter the balance of power towards these conglomerates.

We are asked 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.

134(2) of the 2003 Act applies where a provision contained in a lease for a year or more has the effect of imposing: -

a) A prohibition or restriction on the lessee with respect to an electronic communications matter; or

b) A provision contained in an agreement relating to premises to which a lease for a year or more applies has the effect of imposing a prohibition or restriction on the lessee with respect to such a matter.

Where this is the case, the effect of the prohibition or restriction is qualified in relation to things done inside a building occupied by the lessee or for purposes connected with the provision to the lessee of an electronic communications service. The prohibition or restriction takes effect as though it were subject to the need for the landlord's consent, such consent not to be unreasonably withheld.

[12] See Appendix B

The term 'building' does not appear to be defined in the Code but would seem to include the operators cabin. It could however also include the railway station or airport in which electronic communications apparatus is installed internally (albeit the extent of occupancy may be a factor).

Because the prohibition or restriction is only qualified in respect of things done inside a building occupied by the lessee, or where it is connected with the provision of an electronic communications network to the tenant (in other words, the Code Operator) its application is limited. However, where it does apply, section 134 turns an absolute prohibition on sharing into one that requires the landlord's consent, such consent not to be unreasonably withheld.

Given the issues identified above this is an unreasonable infringement of the landowner's property rights.

Assignment of code rights

Code Operators are increasingly entering into joint ventures. Such arrangements may lead to a need for one Code Operator to transfer code rights to another.

The Commission should be wary as extension of code rights in this respect given that it may impact on existing agreements. Many Code rights are licences which by their nature are personal to the parties. A right to assign negates that principle.

The Commission 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.

As outlined above there have been recent mergers etc in the market leading to assignation demands and we consider that the impact on the existing market arising from a statutory right to assign are considerable.

The Commission should be aware of the practical issues that have arisen from the actions of Ofcom in approving the licence transfer between Orange and EE Ltd, as illustrated by one recent dispute.

On 24th August 2011, at the request of Orange, Ofcom issued a public wireless network licence (number 0861147/1) and a third generation mobile licence (number 0861145/1) to EE Limited, allegedly in accordance with regulation 7(5) of the Wireless Telegraphy (Mobile Spectrum

Trading) Regulations 2011. In *Arqiva –v- EE Limited*[13], Mr Justice Ramsay had to consider the impact of such changes on existing agreements between those parties. In addition he had to consider whether the purported transfer of the licence from Orange to EE Limited complied with Section 30 of the Wireless Telegraphy Act 2006 and whether the licence issued by Ofcom on 2nd March was void. Mr Justice Ramsay proposed a further hearing with Ofcom present to determine this issue, but his preliminary determination stated: -

> *I would indicate the preliminary view that I do see merit in the submissions put forward by Arqiva that what occurred on 2nd March 2011 is a transfer of the relevant licence from OPCS to a separate legal entity, EE, which has not been made in accordance with Section 30, in particular Section 30(4)(a) or (b) or the Wireless Telegraphy Act 2006 and would therefore be void. However that view is a preliminary one and although I have not referred to any provision which I consider would entitle Ofcom to make a change which affected the transfer between two legal entities, I am conscious that something may exist to justify the decision taken by Ofcom in their letter of the 25th March 2011.*

In my experience the issues which have been caused in respect of existing agreements as a direct consequence of this transfer include:-

- [redacted]
- [redacted]
- [redacted]

While it is the role of Ofcom to consider such applications in terms of competition it appears to have no duty to consider the effect on landowners. Once such mergers are implemented Ofcom have no further role and it is for landowners to deal with the impact of Ofcom's actions.

Once a right to assign a Code power is granted it may be assigned to more than one entity. There is no reason in principle to deny that it could be assigned to three, or to any number of operators; with every increase in the number of co-occupants, the additional burdens and the

[13] [2011] EWHC 1411(TCC). The dispute was settled after the issue of a preliminary judgement so the points raised in this case have not been satisfactorily resolved

problems of construing and applying any existing written agreement would be further aggravated.

The effect of an assignation to two or more operators may for example introduce a new Code Operator on to the site and accordingly affect the landlord's reversion due to the provisions of the Code.

The Commission should have consideration to the principle justification for the Code: the public interest in obtaining access to an electronic communication network.

There is already evidence to suggest that operators are using rights to assign in ways that give commercial advantage. The assignation of leases to joint names of T-Mobile and H3G (and the prospect of a similar situation between O2 and Vodafone) is to effectively circumvent payaway provisions in many leases.

The public benefit of such a right is difficult to balance as against the rights of the landowner. It appears to me that the only way of addressing this is for Code rights only to be exercisable by individual operators.

Further ancillary rights

The Law Commission has examined the ancillary rights already provided by the Code, and discussed some possible additions to that range of rights.

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

I do not consider that any further ancillary rights should be available under a revised code.

2.5 Code Rights and third parties

The Commission asks consultees to tell them 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.

Consultees are asked if there is 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

Consultees are asked to identify circumstances where the power to do so, currently in paragraph 8 of the Code, has been used?

I am not aware of any such difficulties.

TEL

2.6 Enforcement of Code rights

The Code does not make clear how code rights are to be enforced.

The Commission has considered how the Code may be enforced against landowners but in our experience the Code should also address the policing of Code rights once they have been granted.

There have been occasions where operators have been in breach of licence obligations and Ofcom have indicated that they had no power to intervene. [redacted]

- [redacted]

- [redacted]

TEL

[redacted]

Ofcom's website sets out its main legal duties which are to ensure that: -

- the UK has a wide range of electronic communications services, including high-speed services such as broadband
- a wide range of high-quality television and radio programmes are provided, appealing to a range of tastes and interests
- television and radio services are provided by a range of different organisations;
- people who watch television and listen to the radio are protected from harmful or offensive material
- people are protected from being treated unfairly in television and radio programmes, and from having their privacy invaded; and
- a universal postal service is provided in the UK
- the radio spectrum (the airwaves used by everyone from taxi firms and boat owners, to mobile-phone companies and broadcasters) is used in the most effective way

Under the Communications Act 2003: -

> *3(1) It shall be the principal duty of Ofcom, in carrying out their functions;*
> *(a) to further the interests of citizens in relation to communications matters; and*
> *(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition*

Ofcom licences Code operators. Only licensed operators have access to the powers of the Code. Ofcom do not appear to have any legal power or duty to monitor and regulate the use of the Code in this respect or have any form of sanction for non compliance in terms of sections 106 etc of the Communications Act 2003. Ofcom state that it is up to the dispute provision of the various regimes under the Code to police these powers.

While Ofcom has certain legal powers to suspend the application of the Code to an operator these circumstances are apparently strictly limited and relate only to breaches of the 2003 regulations.

This is clearly unsatisfactory and should be addressed in this review. It is unreasonable for Government to grant compulsory powers to private companies which have a considerable impact on private property without some effective form of regulation and monitoring.

The Commission ask: -

(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.

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

I am concerned that the Law Commission may be looking at this question from one side; that of the operators. In the light of the above examples I consider that revisals are needed to protect the interests of landowners and to ensure that those operators licenced under the Code conform to its obligations.

I consider that, while certain revisals to the Code will remove some of the issues that have arisen (.i.e the points raised in respect of the Paragraph 21 and Paragraph 5 provisions outlined below), the revised Code should also ensure: -

- Landowners should be one of the stakeholders to whom Ofcom have a legal duty to protect.
- Ofcom should have a clear duty to monitor the use of Code Powers (perhaps through an obligation on any operator triggering the Code having a statutory duty to report this (and the resolution) to Ofcom)
- Ofcom should have a duty to audit networks to ensure compliance with the Code requirement to have a written agreement in place.
- Ofcom should be able to impose financial sanctions on operators for breach of licence or wrongful use of Code powers.
- Ofcom should have a legal duty to ensure operators comply with competition legislation

It is unreasonable for Government to grant such powers to private companies without any effective checks or balances in place.

TEL

3.0 THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

As well as the General Regime set out in paragraph 5 of the Code, there are special regimes under the Code in respect of: -

(1) street works;
(2) tidal waters and lands;
(3) linear obstacles;
(4) the use of certain existing conduits; and
(5) undertakers' works.

The first four of these regimes set out special provisions where a Code Operator wishes to acquire a right in relation to a particular type of land. The final regime gives Code Operators rights where the infrastructure of other bodies[1] would interfere with a Code Operator's apparatus.

I consider that many of these special regimes are unnecessary and have grown out of historical circumstances which are no longer applicable. I believe that it would be easier for these to be incorporated into the general provisions.

3.1 Street Works

Much of a Code Operator's apparatus is sited on, over or under publicly maintained streets and roads. This includes cables, public telephone boxes, a variety of wireless infrastructure and much more. I accept that it may be essential for Code Operators to have access to the highway network to develop their own electronic communications networks but do not consider that this warrants a special regime.

This access is currently provided for by paragraph 9 of the Code. Paragraph 9 gives to Code Operators a broad right to install, inspect, maintain, adjust, repair and alter apparatus. It also includes ancillary rights to break up or open (and bore beneath) streets and to break up or open sewers, drains and tunnels.

These rights differ from the rights that arise under the general regime in that they are not contingent upon agreement, (or the court's power to dispense with agreement). Whilst broad, the rights are expressly limited by paragraph 9(2) which provides that they are:

(1) only exercisable in a street which is a "maintainable highway";

(2) subject to paragraph 3 of the Code, which prevents Code Operators from exercising their rights in a way that obstructs access to neighbouring land; and

(3) subject to the Code provisions that follow paragraph 9.

TEL

The Commission 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 and ask whether consultees agree.

I consider that the scope of street works should be restricted.

Paragraph 9 of the Code provides that: -

9. (1) The operator shall, for the statutory purposes, have the right to do any of the following things, that is to say: -

(a) install electronic communications apparatus, or keep electronic communications apparatus installed, under, over, [in, on,] along or across [a street or, in Scotland, a road];
(b) inspect, maintain, adjust, repair or alter any electronic communications apparatus so installed; and
(c) execute any works requisite for or incidental to the purposes of any works falling within paragraph (a) or (b) above, including for those purposes the following kinds of works, that is to say: -
(i) breaking up or opening [a street or, in Scotland, a road];
(ii) tunnelling or boring under [a street or, in Scotland, a road]; and
(iii) breaking up or opening a sewer, drain or tunnel;

(2) This paragraph has effect subject to section 11(1) of this Act, paragraph 3 above and the following provisions of this code, and the rights conferred by this paragraph shall not be exercisable [in a street which is not a maintainable highway or, in Scotland, a road which is not a public road] without either the agreement required by paragraph 2 above or an order of the court under paragraph 5 above dispensing with the need for that agreement.

The New Roads and Streetworks Act 1991 (the 1991 Act) gives powers to various utility companies and public bodies, including public telecommunication operators to carry out works in a highway. In particular Section 48(3) of the New Roads and Streetworks Act 1996 provides that authorised bodies may: -

a) Place apparatus on or in a street or footpath, or

b) Inspect, maintain, adjust, repair, alter or renew its apparatus, change the position of its apparatus or remove it, or to carry out works required for or incidental to any such works (including, in particular breaking up or opening the street including footpaths, or any sewer, drain or tunnel under it, or tunnelling or boring under the street including the footpath).

This provides operators with a valuable ability to install apparatus in the highway at no cost. In particular it should be noted that there is no differentiation between highways that are adopted and those that are privately owned but maintained by the public authorities.

I consider that the exception arising out of Paragraph 3 is too limited because it does not take account of the potential for a Code Operator to restrict future access to land from the public highway, for example where a landowner has planning permission for development that will result in a new access to the property being constructed. Such potential loss could however be overcome by providing for a lift and shift provision at the operator's expense.

The mobile telephone operators in particular are using a combination of permitted development rights under the Town and Country Planning General Permitted Development Orders (the GPDO) for the installation of apparatus less than 15m above ground level and paragraph 9 for commercial advantage. That there have been issues with the use of such powers is confirmed by the Local Government Ombudsman.[14]

In terms of SI 2001/2718 it would seem that permitted development rights are conditional on certain provisions including:-

> *A.3 (1) The developer shall give notice of the proposed development to any person (other than the developer) who is an owner of the land to which the development relates, or a tenant, before making the application required by paragraph (3): -*
>
> *(a) by serving a developer's notice on every such person whose name and address is known to him; and*
> *(b) where he has taken reasonable steps to ascertain the names and addresses of every such person, but has been unable to do so, by local advertisement.*
>
> and
>
> *(3) Before beginning the development, the developer shall apply to the local planning authority for a determination as to whether the prior approval of the authority will be required to the siting and appearance of the development.*
>
> *(4) The application shall be accompanied –*
>
> *(a) by a written description of the proposed development and a plan indicating its proposed location together with any fee required to be paid;*
> *(b) where paragraph (1) applies, by evidence that the requirements of paragraph (1) have been satisfied; and*
> *(c) where paragraph (2) applies, by evidence that the Civil Aviation Authority, the Secretary of State for Defence or the aerodrome operator, as the case may be, has been notified of the proposal.*

SI 2001 / 2718 specifically uses the word owner, tenant, freehold and leasehold notwithstanding the provisions of the Code which makes reference to occupier and apparently grants rights to install equipment in the Highway without any such formal legal agreement (cf 9(1)(a)).

[14] Special Report – Telecommunications masts: problems with 'prior approved' applications.

While private owners have had little issue with the installation of cables in adopted highways, Code System operators use this right to install masts in the highway because they do not have to pay anything to the Highway Authority yet the considerable foundations are often in privately owned soil while the surface, after installation of the apparatus, is no longer maintained by the Highway Authority.

The Supreme Court in *Bocardo* unanimously upheld both the High Court and Court of Appeal's decisions that deviational drilling constituted trespass affirming the Latin maxim *cuius est solum, cuius est usque ad coelum et ad inferos*[15] in respect of the landowner's property rights. This should be considered as against the rights granted in the Code to the *solum* where a mast is installed in maintainable highway. When a mast is erected the right for public passage is no longer exercisable; which is, arguably, the reason for the original expropriation of such property rights. In terms of ECHR there is no balancing of the rights of the landowner and public need in the current Code.

The removal of this special regime in instances where the land is no longer maintainable or useable as public highway following installation of apparatus would remove this issue and may give rise to a valuable income stream to assist in highway maintenance.

I consider that the current provisions should remain for apparatus buried underground (such as cables) in the Highway where the apparatus so installed does not prevent public access and the ground remains maintainable by the Highway Authority.

I appreciate that this may be, in effect, a differentiation between technologies but consider that such a differentiation is entirely justified given the circumstances

3.2 Tidal waters and lands

Tidal waters and lands are also of critical importance to Code Operators; in particular, submarine fibre optic cables represent a crucial means by which data is transmitted around the globe.

Paragraph 11 of the Code gives Code Operators the right:

(a) to execute any works (including placing any buoy or seamark) on any tidal water or lands for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus;
(b) to keep electronic communications apparatus installed on, under or over tidal water or lands; and
(c) to enter any tidal water or lands to inspect any electronic communications apparatus so installed.

[15] Whoever owns [the] soil, [it] is theirs all the way to Heaven and to Hell

This must be read in the light of the statutory regime governing coastal waters set out in the Marine and Coastal Access Act 2009. Under that Act a licence is required to undertake most actions that are included within the right established in the Code.

The Commission 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?

There is a dichotomy in the Code with regard to tidal waters that an operator needs the agreement of the Crown where the Crown is the owner but not the agreement of any other owner. Subject to the Secretary of State, the operator's rights are then absolute.

The effect is that whilst the Crown obtains valuable income, private landowners do not. I question why such a regime is necessary and, if for reasons not yet explained it is necessary, urge that all owners be treated equally.

With the current focus on both the leisure and conservation aspects of tidal waters this should be brought within the main regime as to consent and the terms and consideration for an agreement.

3.3 Linear obstacles

Paragraph 12 of the Code gives to Code Operators a right to cross certain types of land with a line and to install and keep the line and other apparatus on, under or over that land, together with rights to execute works and to enter and inspect. This special regime applies to land which is used wholly or mainly as, or in connection with, "a railway, canal or tramway"; commonly called "linear obstacles" (the term only used in the heading to paragraph 12 and apparently introduced in 1984).

In order to exercise the right the operator must give 28 days' notice to the person with control of the land providing specified details of the proposed works, unless the works are emergency works. If this person objects within the 28 days the Code Operator can only proceed with the works if: -

(1) neither party has, within 28 days of the notice of objection, given further notice requiring agreement to the appointment of an arbitrator;

(2) an arbitrator has been appointed and the works are being carried out in accordance with the arbitrator's award; or

(3) the works have become emergency works.

I have personal experience of the arbitration provisions of Paragraph 13 of the Code from the *Bridgewater* dispute. In determining what award to make, an arbitrator is to have regard to all the circumstances and to the Access Principle. But, unlike rights arising under the General Regime, the right to cross a linear obstacle with a line exists without requiring an agreement to be in place; consequently there is no balancing exercise to be undertaken between the prejudice caused by the right, the measure of compensation and the public benefit to others that will emerge. It is perhaps revealing that both parties in the *Bridgewater* dispute originally sought an award of terms more appropriate to the general regime; it was only the provisions of the special regime and the powers of an arbitrator pertinent to linear obstacles that prevented such an award.

The differences between the linear obstacles regime and the general regime do not stop there. Where works have been undertaken pursuant to the paragraph 12 provisions, the Code makes separate provision for an Operator's apparatus to be altered in certain circumstances. It is distinct from the alterations regime that is applicable to apparatus installed elsewhere.

Emergency works are widely defined in the Code to include:-

> *....works the execution of which at the time it is proposed to execute them is requisite in order to put an end to, or prevent, the arising of circumstances then existing or imminent which are likely to cause-*
>
> *(a) danger to persons or property,*
>
> *(b) the interruption of any service provided by the operator's network or, as the case may be, interference with the exercise of any functions conferred or imposed on the undertaker by or under any enactment or*
>
> *(c) substantial loss to the operator or, as the case may be, the undertaker, and such other works as in all the circumstances it is reasonable to execute with those works*

The Commission asks 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)?

I consider that the provisions of the general regime would suffice for the crossing of linear obstacles.

This provision of the Code gives operators the absolute right to cross land used as a railway, canal or tramway without payment of a consideration, provided that the length of the crossing is less than 400 metres (though they are liable to pay compensation if the crossing is, say, 401 metres) and was explored in *Bridgewater.* The Court of Appeal eventually concluded that no consideration was payable to the landowner as a consequence of the wording used in these provisions of the Code. Consideration would, however, be due to owners of other long strips of land that fall outside that definition.

There is no justification for retaining this separate regime within the Code nor for its overriding of the property rights of those particularly affected by it. The developing judicial interpretation of the valuation basis in my view removes any concern over ransom situations that may have underlain the drafting of this provision in that the *Brookwood*[16] and *LIDI*[17] cases confirm that any ransom element of market value is excluded.

3.4 Use of specified conduits

Paragraph 15 of the Code limits the effect of the Code insofar as the Code Operator's proposed activities would take place inside certain types of conduit. The conduits in question are those set out in section 98(6) of the Telecommunications Act 1984: -

a) any conduit which, whether or not it is itself an electric line, is maintained by an electricity authority for the purpose of enclosing, surrounding or supporting such a line, including where such a conduit is connected to any box, chamber or other structure (including a building) maintained by an electricity authority for purposes connected with the conveyance, transmission or distribution of electricity, that box, chamber or structure; or
b) a water main or any other conduit maintained by a water authority for the purpose of conveying water from one place to another; or
c) a public sewer; or
d) a culvert which is a designated watercourse within the meaning of the Drainage (Northern Ireland) Order 1973.

Paragraph 15 makes it clear that nothing in the earlier provisions of the Code authorises a Code Operator do anything inside a relevant conduit without the agreement of the authority controlling it. Paragraph 15 operates against the backdrop of the street works regime discussed above. Without specific provision, the wide rights granted to Code Operators under the street works regime would apply to many of these conduits.

[16] *Cable Tel Surrey & Hampshire –v- Brookwood Cemetery* [2002] EWCA Civ 720
[17] *Mercury Communications –v- London & India Docks Investment Co* [1995] 69 P&CR 135; [1994] 1EGLR 229

The Commission 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.

Consultees are asked if they agree.

I agree with this proposal. In addition to any specific or practical reasons for such a power, it reflects the general presumption that Code rights are given by consent. Those other reasons may then justify making that presumption absolute in these cases.

3.5 Undertaker's works

The final special regime relates to circumstances where an undertaker of public works needs to move or alter a Code Operator's apparatus. The list of undertakers expressly bound by paragraph 23 of the Code is relatively short; it includes other Code Operators, and statutorily authorised operators of railways, tramways, road transport, water transport, canals, inland navigation, docks, harbours, piers and lighthouse undertakings. However, the protection that it affords can be extended to "any person to whom [paragraph 23] is applied by any Act amended by or under or passed after [the Telecommunications Act 1984]". The paragraph has been applied in several Acts.

The Commission provisionally propose that the substance of paragraph 23 of the Code governing undertakers' works should be replicated in a revised code and ask whether consultees agree.

The list of undertakers should be amended to include parties authorised by the Highways authority (such as a developer constructing an access road).

3.6 Special regime: other rights?

The Commission do not propose to create any new special regimes and consider it important to limit the rights and powers that are unique to particular circumstances.

The Commission provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code and ask whether consultees agree?

I agree with this proposal but would go further. I consider many of the special regimes to be unnecessary and should be brought within the General Regime

As the Commission rightly points out, Operators benefit from permitted development rights and as a consequence there may have been no opportunity for a landowner or occupier to object to a grant of planning permission. In effect, the relevant General Permitted Development Orders

grant permission for works to be lawfully undertaken (subject to various exceptions, including where the apparatus exceeds certain prescribed heights which are, in some cases, significantly in excess of three metres). This may impact on potential development land and, given there is no provision for the landowner to obtain consideration or compensation, it is an infringement of property rights (cf *Turris v CEGB*[18]).

Under the current Code landowners and occupiers can give notice objecting to lines and other apparatus any part of which is installed three metres or more above the ground only within three months of its installation, provided that the apparatus does not substantially replace other previously installed apparatus. Application can then be made to court to have the objection upheld at any time within two and four months after raising it. In summary, the court will do this if:

> *The apparatus appears materially to prejudice the objector's enjoyment of, or interest in, his or her land; and the court is not satisfied that the only possible alterations of the apparatus will: -*
>
> *(a) substantially increase the cost or diminish the quality of the service provided by the Code Operator; or*
> *(b) involve the Code Operator in substantial expenditure (ignoring any expenditure that arises solely because the proposed alteration was not adopted originally or because the apparatus was unnecessarily installed): or*
> *(c) give to any person a case at least as good as the objector to have an objection upheld.*

In considering these questions the court is to have regard to all the circumstances and the Access Principle. However, the court must not make an order if the applicant is in fact bound by code rights; and it cannot do so unless it is satisfied that the Code Operator has sufficient rights to undertake the alteration, or that it would acquire them if it applied to court for them to be given compulsorily. That appears an onerous test for a landowner to satisfy given the circumstances.

Paragraph 17 does not seem to give sufficient protection for a landowner in this respect in that it only applies for the three months following construction.

Paragraph 20 is of no assistance since the operator will look to the landowner for the costs of removal but the landowner was never in a situation where he could impose a lift and shift provision at the operator's cost as would be usual in Paragraph 5 situations.

I therefore consider that the right to fly lines over private land should therefore be subject to the normal Code provisions under the general regime and that no special regime is necessary in respect of this.

The Commission have asked for the views of consultees about their experiences in connection with overhead lines or other apparatus and their views on the need for reform.

[18] [1981] 1 GLR 186

Consultees are asked for 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.

I have encountered difficulties in respect of overhead cables affecting development land.

I believe that there should be no automatic right to fly lines (save perhaps over the public highway) in that this interferes with the landowners property rights. The right to fly such lines should fall within the General Regime

Consultees are asked for their views about the right to object to overhead apparatus.

The objection period of 3m is too limiting.

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

Where a Code Operator installs equipment that is over three metres high, paragraph 18 of the Code requires it to secure a notice to every major item of apparatus installed or, if no major item is installed, to the nearest major item to which the apparatus is directly or indirectly connected. The notice must be secured within three days of completion of the installation and must be affixed in a position where it is reasonably legible; it must give the name and address of the Code Operator. Failure to comply with this requirement is a criminal offence.

The difficulties arising from this provision are well illustrated in the Court of Appeal's decision in *Sarah Lloyd-Jones v T-Mobile Ltd*[19] over the fixing of a notice to apparatus identifying the operator illustrates the need for this to be reviewed. This case found that there was nothing in paragraph 18 of the Code to suggest that the notice required to be affixed to the installation was intended to advise a potential objector that the operator had completed the installation or that the time for giving notice pursuant to paragraph 17(2) would run from the time when that notice was affixed. The potential objector would not be disadvantaged, because he would usually be able to see for himself when the installation had been completed. It would be then that paragraph 17(2) gave him the right to give notice of objection, and that right was not deferred until the operator affixed a notice pursuant to paragraph 18(1).

The Court of Appeal's decision in this case has been subject to trenchant criticism by Joanna Tansley in an article in the *Journal of Planning & Environment Law*[20]

The outcome of the appeal in *Lloyd Jones* is clearly unsatisfactory insofar as it contemplates that a notice which is illegible to members of the public may nonetheless be effective for the purposes of paragraph 18 of the Code. The revised Code must address this anomaly. Any notice needs to be in a position where it is genuinely accessible to those who

[19] *[2003] EWCA Civ 1162*
[20] Tansley, *Fence over the River Kwai—a comparative view of noticing under the Electronic Communications Code considered against planning noticing under the permitted development orders through a review of a recent case* [2004] JPL 273

might wish to rely on its information or some other means found to resolve the issue. I consider that a similar process to that adopted in planning legislation would be appropriate.

TEL

4.0 ALTERATIONS AND SECURITY

4.1 "Alteration" of Apparatus

The Code gives landowners the limited opportunity in some circumstances to have electronic communications apparatus altered (defined to include having it moved or removed) where the landowner is not otherwise entitled to do so.

Paragraph 20 gives an opportunity for any person with an interest in land to require the alteration of apparatus where *"the alteration is necessary to enable that person to carry out a proposed improvement of land in which he has an interest". "Alteration"* is defined to include *"the moving, removal or replacement of the apparatus". "Improvement*" is defined to include development and change of use. The landowner may be someone with an interest in the land on which the apparatus is installed or in adjacent land.

The right to require alteration can be exercised *"notwithstanding the terms of any agreement binding that person*". We take this to mean that it can be exercised by a landlord during the currency of a lease (where the landlord would otherwise have no right to require alteration), and that it can be exercised even where an express term of an agreement between the Code Operator and the landowner states otherwise.

However, if a landowner wants a Code Operator's apparatus to be moved during the currency of the lease that granted the right to install and use the apparatus, then it may be difficult for the landowner to satisfy the test in the Code under paragraph 20(4). The lease will entitle the Code Operator to possession of the land, which may itself prevent the development. It may be very difficult for the landowner to show an alteration is "necessary" where this is the case.

As with many procedures in the Code, the mechanism for requiring alteration follows a notice and counter-notice procedure. Where the court has to decide the question, it must make an order for an alteration only if, having regard to all the circumstances and to the Access Principle, it is satisfied that: -

1. *the alteration is necessary to enable the person requiring it to carry out a proposed improvement of his or her land; and*
2. *the alteration will not substantially interfere with any service which is or is likely to be provided using the Code Operator's network.*

Once again we have a situation where an operator can resist alteration on technical grounds that a landowner would have difficulty in establishing and challenging. The Code does not clearly establish a balance between the public benefit and prejudice to the landowners legitimate property interests.

The Court can order that apparatus be moved, modified, or replaced on the landowner's own land; or it can make an order that the apparatus be moved to a neighbour's land if the neighbour agrees. If the neighbour does not agree and the test for the creation of code rights is made out then the court can give the Code Operator the requisite rights over the neighbour's land. The

court's order may provide for alteration in a different way from that requested by the applicant, if the applicant consents – but if the applicant does not consent the court can refuse to make the order, depending on the evidence before it.

Where an application is successful, the order must include (unless the court otherwise thinks fit) a requirement that the applicant reimburse the expenses that the operator incurs in, or in connection with, the execution of any works in compliance with the order.

In our experience the issue often arises when a landlord seeks to repair/improve the fabric of a building upon which telecoms equipment is installed. Whilst we agree that the Code needs to produce a flexible regime protecting the network, it currently does not sufficiently protect the landowner's interest in maintaining or improving his property.

We have experience of operators using Code Powers to protect their position in respect of proposed alterations to land [redacted]

- [redacted]
- [redacted]
- [redacted]

I consider that some revisal of the existing Code provisions is therefore necessary.

The Commission 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 and ask whether consultees agree.

Consultees are asked to give their views about the alteration regime in paragraph 20 of the Code; and in particular if it strikes the right balance between landowners and Code Operators

The Commission provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code and seek views on this.

Given the potential long term effect of any telecoms agreement the provisions of paragraph 20 appear to be a welcome balance in favour of the landowner protecting his long term property interests. I agree that the operation of paragraph 20 has however been problematic. I have been involved in a number of cases where electronic communications apparatus has prevented development or repair of property.

The use of the word "*alteration*" in the drafting of the Code to include moving and removing apparatus as applied by paragraph 1(2) gives rise to one of the main problems. On matters of more substance: -

- the alteration has to be shown to be "*necessary*" not just "*desirable*" for paragraph 20 to apply
- the burden is on the applicant 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*"- an apparently tall order and likely in many cases to require great cost.
- the default presumption is that a successful applicant will reimburse the operator for its costs of alteration which may not only be large but hard to predict (they are reported to differ widely between cases) or cross check for reasonableness.
- the uncertain interaction between this power and the fixed term of any agreement as it may not remove the powers of the operator to re-impose itself on the site after the development but within the agreement. There seems to be no clarity as the status of the rights given to the tenant by the tenancy on the equipment being removed from the site. Have they ended as if the agreement has now been frustrated or repudiated? Is it still bound by the obligations of the agreement? Can it return once the reason for removal has occurred?

- this is compounded by the problems of interpreting the interaction of paragraph 20 operating "*notwithstanding the terms of any agreement binding on*" the landlord and paragraph 27 which says the Code is "*without prejudice to the rights and liabilities arising under any agreement to which the operator is a party*", saving only paragraphs 8(5), 21 and 27(1).

In contrast to paragraph 21, the Code has no provisions which preclude contracting out of paragraph 20 and I believe this should remain in any revised Code.

It is not clear why there needs to be two regimes for removal of apparatus as offered by paragraphs 20 and 21. I consider it would be simpler to ensure in any revised Code that the provisions for Paragraph 20, however defined, applied to genuine alteration of apparatus, with paragraph 21 applying to its removal.

In our experience, many of the contracting out provisions in current telecoms agreements are agreements which make the tenant liable for the costs of removal rather than the Code default provision that make the landlord responsible, and provide that the tenant to pay any landlord's costs associated with any notice etc.

If the Commission's provisional proposal were to proceed, it would make landowners extremely wary of allowing telecommunications operators to install equipment on rooftops, given the provision for security etc in terms of paragraph 21 and the effect that such equipment has on the ability to carry out mundane repairs to their property. The imposition of such a provision overriding the landlord's property interests would seem unwarranted. If that made roof top locations less available it would tend to lead to more greenfield masts (or increased Code applications in areas where greenfield sites were not available (e.g. in City centres).

The Court should have the entire discretion as to where the costs of removal should lie. It would, for example, seem unreasonable to award costs of removal against a landowner where the lease has a limited period to run for instance or where repairs have to be undertaken as a result of damage to the structure from the operator's actions.

4.2 Security for Apparatus

This is another area where we consider rebalancing is urgently required.

Paragraph 21 is often referred to as a security provision. It ensures that apparatus installed under code rights cannot simply be removed when code rights come to an end or when the Code Operator no longer uses it. It may result in fresh code rights being created. It is therefore analogous to the security of tenure provisions of Part 2 of the Landlord and Tenant Act 1954, albeit it lacks the same checks and balances. As the Law Commission has recognised, it is this paragraph that negates the apparent protection of owners and tenants who have not agreed to be bound by the paragraph 2 agreement giving security of tenure to operators.

The security provisions have given considerable difficulties for landowners. There is a lack of clarity over when a person is entitled to require the removal of apparatus. The procedure for

enforcing removal is inappropriate because the timescales for resolution are unclear and place the onus on the landowner to take action to remove apparatus rather than on the Code Operator to retain it. Currently parties are unable to contract out of such provisions.

In our experience, there have been instances where operators have invoked Code Powers and failed to take the requisite steps set out in their counter notice leaving the landowner in an uncertain position. [redacted]

- [redacted]

- [redacted]

- [redacted]

TEL

- [redacted]

Interaction with the 1954 Act

The existence of two statutory bases of protection for a tenancy of electronic communications apparatus gives rise to considerable difficulties and uncertainties.

It is my experience that operators serve counter notices under paragraph 21 of the Code in response to any notice of termination under the 1954 Act (even a non hostile notice). This gives rise to uncertainty as to which provision will take precedence.

I consider that agreements under the Code should not have the protection afforded tenants in terms of Part II of the 1954 Act. A minor consequence of that would be to create a common regime throughout Great Britain as the 1954 Act does not apply to Scotland. Consideration of this proposal would have to involve a judgment as to whether it would only apply to new Code agreements or to existing ones as well.

Security provision in paragraph 21 of the Code

Paragraph 21 of the Code restricts the right of anyone entitled to require the removal of a Code Operator's network apparatus. It applies to apparatus that is being used, is likely to be used, or has been used for the purposes of the operator's network (whether or not the apparatus is owned by the operator); it therefore applies to equipment that has been abandoned.

The protection of paragraph 21 is extensive: apparatus is deemed to be kept on land lawfully during the time that paragraph 21 restricts its removal; so a landowner who would otherwise be

entitled to sue in trespass or nuisance cannot do so until the paragraph 21 procedures have been pursued.

Often operators use the paragraph 21 procedure to protect their business interest (generating revenue from the site) whilst exploring alternative sites. They then remove, leaving the landowner with abortive costs and no obvious remedy.

Paragraph 21 states that a person can be *"for the time being entitled to require the removal"* of apparatus: -

(1) if they are so entitled under any enactment
(2) if the apparatus is kept on, under or over the person's land otherwise than in pursuance of a right binding that person; or

(3) for any other reason.

The procedure required under paragraph 21 is as follows: -

(1) A person entitled to remove the apparatus must give notice to the Code Operator requiring the removal of the apparatus – only after 28 days with no response is the person entitled to enforce the removal.

(2) The Code Operator can serve a counter-notice within the 28 days:
a. stating that the person is not entitled to require the removal; or
b. specifying steps that the Code Operator proposes to take to secure a right against the person.

(3) If a counter-notice is served, then removal of the apparatus can only happen where a court orders it; where a Code Operator has indicated that it intends to take steps to secure a right against the person, a court cannot order the removal unless:
a. the Code Operator is not intending to take steps to secure a right or is being unreasonably dilatory in taking them; or
b. the taking of those steps has not secured, or will not secure, any right to keep the apparatus installed or to reinstall it if it were removed.

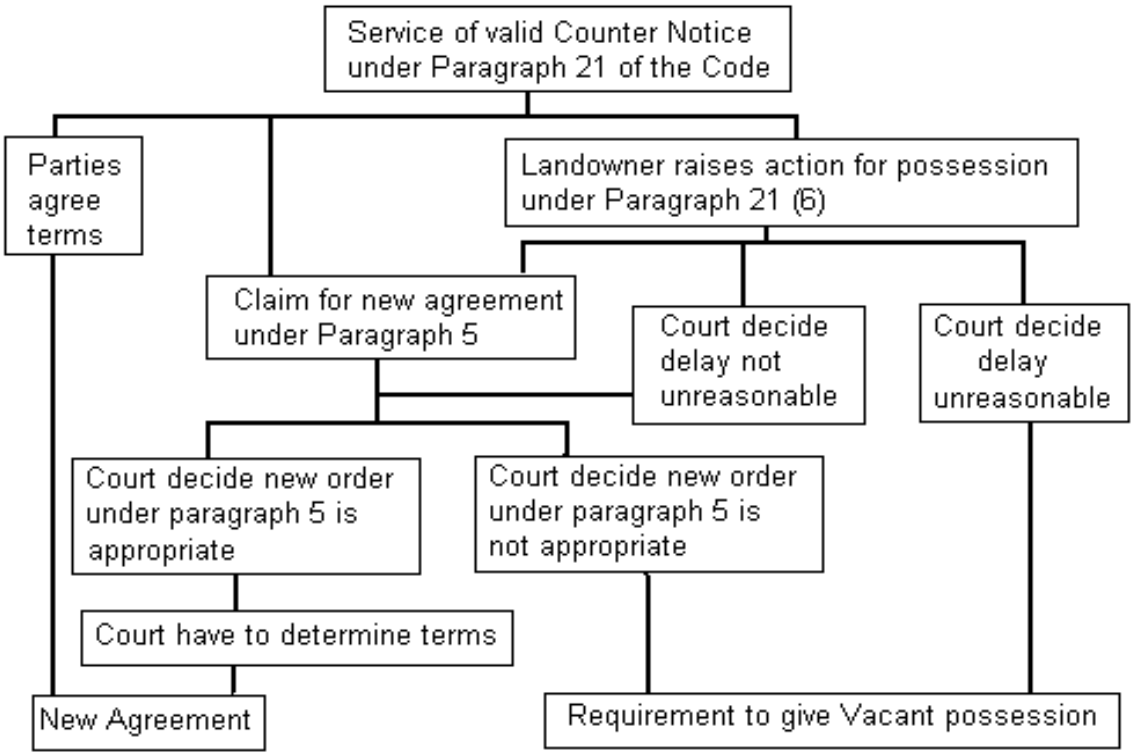
The steps that a Code Operator can take include an application to court for a right binding the person who has requested the removal of the apparatus. The Code Operator will not be required to remove the apparatus if the court finds that the operator is going to take steps to obtain the right to keep the apparatus on the land and is likely to succeed.

Paragraph 7(3) of the Code makes provision for the financial consequences of the retention of apparatus on land during a period where the landowner was entitled to remove it but could not enforce removal because of the provisions of paragraph 21. So where the operator is able to acquire code rights to retain the apparatus on land, some time after the expiry of an earlier agreement, the consideration and compensation ordered for the landowner must take into account the time during which the apparatus stayed on the land between the expiry of the old

rights and the grant of the new. This, however, *only* comes into play if the matter proceeds to Court.

Paragraphs 21(7) and (8) provide for a landowner, having been through the paragraph 21 procedure, to apply to the court for authority to remove the apparatus and to recover expenses incurred in doing so from the operator, and indeed to sell the apparatus and retain the proceeds against expenses.

There is considerable interaction between paragraphs 5 & 21 of the Code as illustrated schematically:-



The procedure for enforcing removal

Where a notice is served on a Code Operator requiring the removal of apparatus, the operator can serve a counter-notice within 28 days; if the Code Operator wishes to keep the apparatus on site, then it must indicate in a counter-notice what steps it intends to take to secure a right against the person seeking the removal. After that point, there is no requirement for the Code Operator to do anything to secure its right to keep the apparatus on site; 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]". There is no public interest justification for the grant of such rights to a commercial company.

There is no clear definition of what would constitute an unreasonable delay. Operators habitually state that the provision of heads of terms to a landlord, however unreasonable, constitutes "negotiation".

Paragraph 21 is therefore a source of major concern to landowners.

When a counter notice is served, the onus of progressing the matters then lies entirely with the landlord (by contrast to the position under Part 2 of the 1954 Act in England and Wales). As a result, there is no pressure on an operator to act further once it has served a counter notice. They can simply continue to operate lawfully from the site which has the undesirable effect of diminishing their incentive to negotiate new terms with the landowner on the expiry of an agreement.

It is our experience that there is usually very little realistic attempt by operators to negotiate a new agreement, save setting out their proposals which frequently fail to properly address the provisions of paragraph 5 (5) of the Code. The only action then open to a landlord to progress matters (even if both parties intend there to be a new agreement) is to obtain a court order to enforce his notice to remove. The court can enforce the order if the operator is found to be "unreasonably dilatory" in taking steps to secure the right to keep the apparatus on site, but there is no definition of what that means. In practice, it can take many months or even years to progress negotiations on a new lease.

The Landlord and Tenant Act 1988 (the 1988 Act) applies to commercial leases in England and Wales. It places upon a landlord a statutory duty in relation to the granting of consent to assignment. Under section 1(3) a landlord must decide a tenant's application for such consent within a reasonable time. We are conscious that the Law Commission report that led to the 1988 Act suggested 28 days as being a 'reasonable time'. This was clearly not adopted into the statute and subsequent case law defined what was reasonable.

The Code allows 28 days for the landlord to accept terms offered under paragraph 5; the same period as that allowed for a counter notice. 28 days is the time limit specified elsewhere in the Code for various actions (paragraph 19 for a counter notice from the landlord objecting to tree lopping, paragraph 21 – counter notice to a landlord's notice to remove).

In *Dong Bang Minerva (UK) Ltd* v *Davina Ltd*[21], one month was suggested as a reasonable benchmark. In *NCR Ltd* v *Riverland Portfolio No 1 Ltd (No 2)*[22], the Court of Appeal held that three weeks was not inherently unreasonable, particularly in view of the August holiday period in that case. In *Blockbuster Entertainment Ltd* v *Barnsdale Properties Ltd*[23], the Court held that consent could have been given within a week. The Court of Appeal in *Go West Ltd v Spigarolo*[24] held that 'reasonable time' must be considered in light of all events. This case was

[21] [1996] 31 EG 87
[22] [2005] EWCA Civ 312; [2005] 22 EG 134
[23] [2003] EWHC 2912 (Ch); [2004] L&TR 13
[24] [2003] QB 1140

followed by *Mount Eden Land Ltd v Folia Ltd*[25], in which the High Court held that a period of five weeks between a request and the decision was too long. Such cases appear to make it clear that 'a reasonable time' in these circumstances depends on the circumstances of the case but the Courts have suggested it is very limited (and probably less than the 28 days as previously suggested by the Law Commission).

I particularly note that in *Riverland* it was held that amongst the factors to be borne in mind in assessing whether a reasonable time has elapsed is that the purpose of the 1988 Act is to "*enable there to be fair and sensible dealing between landlords and tenants [and] a state of certainty to be achieved at the earliest sensible moment*" [my emphasis]. I consider this apposite for circumstances where a Paragraph 21 counter notice has been served by an operator given the state of limbo occasioned by the counter notice.

I fail to see any justification why timescales for an operator to take steps set out in any counter notice should not be clearly defined in the manner adopted for other aspects of the Code. We consider that any review of the Code should clearly set out timescales for what might constitute unreasonable delay.

The onus within any revised Code should be reversed so that Code Operators have to take positive steps to secure their position and to establish the public interest element that warrants their being granted the rights sought.

There should be costs sanctions where Operators fail to take action to secure written agreement to comply with the Code.

Where new Code rights arise later, paragraph 7(3) provides for the financial consequences of the gap between the expiry of rights and the grant of new ones. The provision at paragraph 21(8) of the Code for payment of the landowner's expenses in removing the equipment however fails to deal adequately with the period between the expiry of rights and the subsequent removal. There is no clear mechanism for compensation/consideration for when an operator serves a counter notice, delays and then removes before the court can enforce terms. In our review, there should be clear liability for exemplary damages if an operator remains in occupation after the expiry of a notice to quit and subsequently removes before a Court determines terms. We consider that exemplary damages would be an appropriate means of compensation in such instances because during such period the operator would have no written agreement in place for the operation of telecommunications equipment as required but would be free to generate income from the site. The provision for exemplary damages in such circumstances would ensure that operators used the provision of the Code properly.

There is no ability to contract out of the effect of paragraph 21

It is not currently possible to contract out of the security provisions of paragraph 21. This causes concerns for both landowners and Code Operators.

[25] [2003] EWHC 1815. See also *Blockbuster Entertainment Ltd v Barnsdale Properties Ltd* [2003] EWHC 2912 (Ch)

As matters stand, landowners have no certainty that they can recover possession of their land on a particular date. Landowners are reluctant to deal with Code Operators because of the security provisions. Whilst the Commission suggests that forces Code Operators to pursue proceedings under paragraph 5 (with time, cost and reputational downsides), it is our experience that Operators look for an alternative location for their network apparatus suggesting that their preferred location was not the only option available. It should be possible for the parties to contract out of security.

A Code Operator would then be free, but not be obliged, to agree to an installation for a fixed term, on the basis that it would have to remove the apparatus at the end of that term. We agree that, for contracting out to be meaningful, removal would have to be obligatory even in circumstances where the Code Operator would otherwise be able to secure rights under a revised code to install the apparatus afresh. Both parties would then be able to plan ahead: the landowner for development or re-use of the land, and the operator for re-siting the equipment.

The Commission provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators.

They 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.

I consider that it is nonsensical that Code operators are able to install electronic communications apparatus unlawfully and that a local authority may be unable to enforce removal in such circumstances. The planning system is for (I am told) public interests.

This issue should also be considered in terms of a landowner's ability to remove an operator for breach of contract as illustrated above or the ability of a Code Notice to effectively 'trump' an order for possession under say the 1954 Act.

In the same way as the 1954 Act contains provision that enables a landlord to resist attempts from a tenant to renew a lease when there has been a persistent breach this should be a relevant matter for the Court to consider in the granting of rights under any revised Code.

The Commission seek views about the procedure for enforcing removal. They ask whether the onus should remain on landowners to take proceedings and, if so, what steps, if any, should be taken to make the procedure more efficient?

Experience suggests that, with the current statutory background, operators can serve their counter notices under paragraph 21 and then take no action confident that their interests are protected. There is no countervailing force against this inherent bias to inertia. This is unsatisfactory in both operational and contractual terms and is essentially an artefact of the present drafting of the Code.

In a normal contractual relationship, an operator would have an incentive to take matters in hand before the agreement expires to protect its interest. However, where an agreement is

under the Code, the protection afforded by the provisions of Paragraph 5 is a stimulus to procrastination.

The onus should be on the operator to agree terms or bring a Court action within a restricted timeframe (say a maximum period of 28 days for the reasons set out above).

The Commission 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.

The provisions of paragraph 21 are currently drafted in terms of an operator actively taking the process through to the conclusion of a new agreement in terms of Paragraph 5. There is no express provision (save an action for damages) to deal with a situation where an operator exercises rights under Paragraph 21 by serving the counter notice but does not follow through the process.

I consider that there should be provision for damages in connection with any period between the expiry of a valid notice to quit and the removal of apparatus by an operator without having obtained a written agreement for the period of such use.

The Commission 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.

I agree with this proposal.

4.3 Retrospectivity of the Code

Paragraphs 20 and 21 of the Code, relating to alteration and removal, apply to the apparatus of a Code Operator, regardless of the status of that operator when the apparatus was installed. Accordingly, in a case where electronic communications apparatus is installed by agreement at a time when the operator has not had the Code applied to it, the legal position of that apparatus will change if that operator later becomes a Code Operator. From that point onwards everyone with an interest in the land will have such benefit as paragraph 20 may offer for the alteration of the apparatus, and the Code Operator will have the benefit of the security provisions set out in paragraph 21.

The Commission seek views on whether 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

It is clear that the existence of the Code is poorly understood by landowners and occupiers. The Code is, however, used by commercial companies with considerable financial interest and knowledge of the workings of the code.

Many of the issues with the operation of the Code have arisen because the exercise of its powers by the operator, notwithstanding contractual agreements, have come as a rude shock to occupiers and landowners

While the retrospectivity of the Code is in a sense inevitable, we consider that many of the issues would be overcome if there was a clear and mandatory obligation on a Code Operator (either at the onset of an agreement, or when Code becomes applicable) to serve a statutory notice outlining the provisions of the Code on the occupier and landowner. Similar such notice provisions exist elsewhere as we have identified at 2.3 above.

There should be provision for the payment of damages (to be assessed by the Court if not agreed) in the event any failure by an operator to serve such a notice when it subsequently arises that there has been an effect on those with an interest in land.

TEL

5.0 FINANCIAL AWARDS UNDER THE CODE

5.1 The meaning of "Consideration" and "Compensation"

The Code contains a number of provisions about payment, described in a number of different ways. Key to these provisions are two terms: -

- **Compensation**

  I agree that "compensation" as it is used in the Code indicates a payment that compensates for a loss. This is a familiar basis of compensation from contexts where compulsory purchase powers are used to acquire rights over land and loss arises from the disturbance of having work done or the loss in value of the payee's land at the end of such operations.

  Where the value of the land subject to the acquired right is less than it was worth beforehand, the landowner is compensated by being paid the difference. The term often used in the context of compulsory acquisition is diminution in value. The same provisions are found in the legislation governing the acquisition of "statutory easements" by the traditional utilities of gas, water and electricity. Such compensation leaves the landowner no worse off, but no better off.

- **Consideration**

  It is clear that the draftsman intended that "consideration" was something more than compensation given the separate wording. It is a price.

  This is not a new concept as is often suggested. The expectation of the Admiralty (Signal Stations) Act 1815 appears to have been that, where private land was used (whether by purchase or rent) for infrastructure for semaphore purposes (referred to as signal or telegraph stations), the parties were to treat and agree, with disputes referable for determination. The Telegraph Act 1892, which dealt with a need to develop a network of lines to private properties by a number of private companies, provided for a fair market value not compensation for loss.

  There is therefore a long history of communications legislation providing for consideration where installations on private land are concerned. The 1984 Act was therefore no departure.

Ransom or profit share

A ransom payment is one that can be demanded when the payee is in a unique position, usually because he or she is the only one who can sell what is wanted: there is no "market" of other potential sellers. The only limit on the price is therefore the level of profit that the payer anticipates. The classic example is a "ransom strip" in a typical development situation.

The Commission appear to consider that, without regulation of price, a landowner who held the only land through which a cable must be passed in order to get electronic communications to a particular area could demand a ransom price or profit share.

Those who seek a change to this basis of valuation (particularly incorporating CPO principles) appear to have overlooked the clear judicial guidance arising out of the few cases under the existing Code:-

- ***Mercury Communications Ltd –v- London and India Dock Investments Ltd***

  In the *LIDI* case Mercury, wished to lay and use telecommunications ducts under a private roadway in the Isle of Dogs which was owned by the respondent. The sole issue to be determined, was the 'consideration' that the operator would be required to pay under paragraph 7(1)(a).

  Mercury's argument was that compulsory purchase principles were applicable and that, under those principles, only the value to LIDI could be considered. They argued that any increase in value to LIDI due to the scheme under Mercury's acquisition had to be ignored (effectively the *Point Gourde* principle) and that the consideration payable was therefore nil or nominal.

  LIDI argued that compulsory purchase principles did not apply, that the rights to be conferred were equivalent to a 'ransom strip' of the kind identified in *Stokes v Cambridge Corporation*[26] and that LIDI was entitled to a percentage share of Mercury's anticipated profits from its Canary Wharf operation.

  HH Judge Hague QC looked carefully at the wording of paragraph 7(1)(a) and came to the view that:

  (1) The words 'willingly given' referred to the grantor, who must therefore be a 'willing' grantor, but a 'willing' grantee also had to be assumed.

  (2) It was necessary to consider what would be '*fair and reasonable*' terms as between the applicant and the respondent, rather than as between a hypothetical grantor and a hypothetical grantee.

  (3) Deciding what would have been '*fair and reasonable*' if agreement had been willingly given necessarily involved an element of subjective judicial opinion,

[26] (1952) 13 P&CR 77

for there can be no proof or objective determination of what is fair and reasonable

(4) There was, therefore, a distinction between this formulation and a determination of 'market value'. What the court had to determine was not, therefore, the same as what the result in the market would have been if the grant had been given willingly.

(5) The market result was not however irrelevant and could provide no guidance. The market result was the obvious starting point; and in most cases it will come to the same thing as what is *"fair and reasonable",* because prima facie it would be neither fair nor reasonable for the grantor to receive less than he would in the market or for the grantee to have to pay more than he would in the market. There might, however, 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*".

(6) The word 'willingly' in paragraph 7(1)(a) *('such terms … as it appears to the court would have been fair and reasonable if the agreement had been given willingly …*') could not be taken in isolation, since it was a meaningless concept if considered apart from the financial terms of the grant. The price or consideration was relevant to the concept of the grantor being willing.

The learned Judge went on to hold that compulsory purchase principles did not apply, not least because, unlike previous legislation, the Code did not expressly incorporate the compulsory legislation (save in certain specific cases), and that the applicable principles were instead those derived from the words '*willingly*' and '*fair and reasonable'*

He also rejected *LIDI's* submission that the occupier was entitled to claim a percentage share in the Mercury's profits on a 'ransom strip' basis. Nor did he consider that LIDI was entitled to a share of the increased value of the development site.

- ***Cabletel Surrey and Hampshire Ltd –v- Brookwood Cemetery Ltd***

Both parties in this case adopted HH Judge Hague QC's statements of principle in *LIDI* and so the Court of Appeal did not hear argument in relation to these matters. Mance LJ (with whom Longmore and Aldous LJJ agreed) however stated that:

> *[7] … the exercise required by paragraph 7 is not one of ascertaining market terms or value, although any market terms or value are a relevant consideration to take into account. The test, when fixing terms with respect to either the payment of consideration or the exercise of the rights to which the order relates, is what "it appears to the court would have been fair and reasonable if the agreement had been given willingly". This formulation was no doubt chosen because of the public interest in enabling ordinary members of the public to be offered and to obtain new telecommunications services without individual landowners being able to insist on perhaps excessive sums, for example because of the need to use what might in some cases amount to no more than ransom strips.*

> *[8] However, as His Honour Judge Hague remarked at page 144G, this formulation does introduce an element of subjective judgment into the process of fixing of terms. His Honour Judge Hague found that assistance was to be obtained when making such a judgment from examining comparables, and so did the experts called in the present case. When considering comparables allowance should, however, be made if it could be shown that the paying party had, for whatever reason, been ready to concede a high value for pragmatic reasons.*

Market value

Any Code Operator is usually able (and does) "shop around". The market value of the right is the price that would have to be paid to acquire the rights needed. This is the same concept as the open market value of a house, of shares, or of any other commodity.

Crucial, therefore, to the ability of a valuer to determine market value is the availability of "comparables"; that is, information about similar deals. The Commission appear to have been told that there is limited market evidence. I do not agree with any such assertion.

In the 20 years or so of this market, a significant body of comparable evidence for telecomunications and wireless masts has arisen and firms such as Strutt & Parker, Batchellor Thacker (now Batchellor Monkhouse) etc provide regular surveys. In fibre optics, less open market evidence has arisen purely because the market has been 'fixed' in that operators will generally only agree rates agreed with the CLA/NFU notwithstanding the fact that these are recommendations only. That does not mean that such market evidence does not exist from other transactions for easements and wayleaves for cables and other rights.

Market value on compulsory purchase principles

I accept that when land is acquired by compulsory purchase in other regimes the market value stems from the provisions set out in the Land Compensation Act 1961 and considers a "no scheme" world, ignoring the acquirer's use. In most situations that is effectively based on existing use value. We agree that a strong body of legal principles has been derived from judicial decisions These are all based on existing use value for the rights being acquired (i.e. compensation) in situations where there is no ongoing relationship which is not necessarily the case in this sector.

The statutory framework in the current Code has been in place for 28 years (since it was brought forward from the preceding legislation by the Telecommunications Act 1984) and explicitly states that the valuation of the right acquired should be assessed on the basis of what would be fair and reasonable between a willing grantor and a willing grantee. This follows the principle of rights being by agreement and is in contrast to a variety of compulsory purchase legislation which specifically states how compensation is to be assessed[27]. There is a wide body of evidence from which to derive a value. An important industry has been successfully

[27] For example, s.63 of the Land Clauses Consolidation Act 1845, the Gas Act 1986 or the Channel Tunnel Act 1987

established on this basis and has in turn generated a web of economic relationships on the basis of this understanding.

The commercial approach to payment has led to the rapid development of electronic communications networks for public use over the last generation. Competing companies, developing their individual networks, have made commercial agreements with landowners in which the consideration paid has generally been the most important component for landowners and has actively encouraged their co-operation at a time when there has been ready public concern over the possible health implications of masts and their visual appearance.

The Commission now appears to be considering a radical change in this historic approach. If such proposals are implemented, they will have a considerable impact.

In *Bocardo* the final decision of the Supreme Court on the actual measure of damages in this case held that the general principles of compulsory purchase, and in particular the *Point Gourde*[28] principle, applied to the valuation. Under that principle, the value of the right that is to be compulsorily purchased is to be considered with regards to the value to the owner and not to the potential purchaser. As a result any increase in value attributable to the existence of the licence granted by the Secretary of State for the exploitation of the petroleum was disregarded. This final decision was reached on a 3-2 majority.

One could argue that the valuation of the right acquired between a willing grantor and grantee would produce the same results as that under the general principles of compulsory purchase. However, it is submitted that the results would in fact be in stark contrast. On the one hand, in *Bocardo* where the general principles of compulsory purchase were applied to the valuation, the Supreme Court valued the necessary rights acquired at a sum of £1,000. As the general principles of compulsory purchase do not apply to Crown land[29] the Crown Estate is therefore in the position of negotiating rights in the way envisaged by the 1966 Act as between a willing grantee and a willing grantor. This gives an indication of the valuation of the rights that *Bocardo* could have expected to have provided if the valuation was conducted as specified in the 1966 Act. Information from the Crown Estate suggests a base rate of £32,700 per annum for such rights, with an additional rental rate ranging from £10,500 to £259,000 per annum[30].

In the case of a radio mast of say, 100 m^2 on land of value say, £5,000/acre, that would give rise to the assertion that the capital consideration for the granting of such rights should be £123! Prime agricultural rental values are in the order of £230 per ha (say £2.30 maximium for a 100m^2), yet the rental value of such rights are currently worth in the order of £5,000 per annum.

It may be felt that this is only in respect of rural radio mast sites. I do not believe that to be the case.

[28] *Point Gourde Quarrying & Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565.
[29] Stair Memorial Encyclopaedia, Compulsory Acquisition and Compensation (Reissue 4) at para. 44; the general rule that a statute is presumed not to apply to the Crown except by express statement or necessary implication. Neither the 1934 Act nor the 1966 Act fall within this exception,
[30] The Crown Estate, 'Annual Report 2010', available at http://www.thecrownestate.co.uk/our_portfolio/marine.htm.

It is difficult to see what the loss to the owner would be of an area of roof in central London yet values are in the region of £15 – 20,000 pa. Operators argue these are overrented yet I understand that call revenue may be in the region of £250,000 for such sites. In terms of the relationship between return to the landowner and income generated in other property markets that does not appear to support such a contention.

In the case of a fibre optic cable installed underground, there is arguably little or no diminution in value, yet there is open market evidence of rates equivalent to £1/metre run per annum.

The roll out of networks has been assisted by the consideration element as was the case with semaphore station in previous legislation. Operators assert that sites are over rented yet this is not borne out by third party determinations or by any evidence from then in support. There is no evidence to suggest that a move towards compensation rather than consideration will improve speed of roll out; on the contrary I believe it will impede as landowners without such financial incentive will resist the imposition of such rights.

5.2 Eligibility for payments

At present the Code provides for payments to be made in a number of situations. In most cases, these are payments made by the Code Operator to one or more landowners; in some cases they are made by a landowner to a Code Operator. We agree that the issues that arise on the subject of payment tend to be about the level of payment that should be made, and not so much about whether or not there should be a payment in a particular type of case.

For the purposes of this discussion the issues relating to payment are most conveniently organised into two groups, making use of the current provisions of the Code: -

(1) cases where the Code makes provision for the payment of both compensation and consideration;

(2) cases where the Code provides only for the payment of compensation.

In other words, the Code makes provision for a number of different classes of persons to receive compensation because of work done and so on; of those, a subset is also entitled to consideration.

The categories of those entitled to payment under the Code are: -

(1) persons against whom code rights are created, whether directly under paragraph 5 or as a result of another landowner's application for alteration under paragraph 20;

(2) persons against whom code rights are created in respect of linear obstacles;

(3) persons who are bound by code rights created under paragraphs 5 and 20;

(4) persons who suffer depreciation in the value of an interest in neighbouring land;

(5) Code Operators who are ordered to alter their apparatus (who can recover expenses incurred in doing so);

(6) Code Operators who are entitled to compensation under paragraph 23(5) and 23(6) for any loss or damage caused by effecting alterations which are necessary due to a relevant undertaker's works and for any expenses incurred in supervising or carrying out the alteration works;

(7) persons who are required to lop trees that overhang a street pursuant to a notice served by a Code Operator (who may recover their expenses incurred in doing so under paragraph 19(5)); and

(8) persons who are entitled to require the removal of a Code Operator's apparatus where the Code Operator does not effect that removal; such persons may apply to court for authority to remove it themselves and reclaim expenses incurred in doing so under paragraph 21(7) and (8).

Of those, persons falling into categories (1) and (2) are also entitled to consideration. In other words, when equipment is installed or retained on land, they are entitled both to compensation and to consideration; in all other cases, only compensation is in issue.

The creation of code rights, by agreement or by order, has far-reaching effects that extend beyond the occupier of the land. Where a right has been conferred by an occupier on a Code Operator in connection with the provision of services to the occupier, everyone with an interest in that land is bound by the right for as long as that occupier remains in occupation, pursuant to paragraph 2(3) of the Code.

As noted above, compensation is payable not only to those against whom Code rights are ordered, but also to persons who are bound by code rights created under paragraphs 5 and 20. So the installation of equipment on land generates an eligibility for payment, not only for the occupiers of the land, but for others with an interest in the land.

The Commission seek views on their provisional proposal 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.

The Commission asks 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.

The Commission' provisional proposal is for a single entitlement to compensation for all persons bound by Code rights, including compensation for loss in value to the claimant's interest in the land concerned or in any other land. We agree that this will ensure a more straightforward process of assessment. I should point out however that the interests of an occupier and landowner may differ and this makes it important that any agreement under the Code should be with the landowner.

I agree that the entitlement to compensation for loss or damage should be available to all persons bound by the rights granted by an order conferring Code powers and extended to Code rights when they are created.

5.4 Consideration and its valuation

Consideration, as well as compensation, is currently payable where apparatus is installed on land under paragraph 5 (generally), paragraph 20 (following alteration) or paragraph 13 (linear obstacles).

Should consideration be payable at all?

The main concern of operators appears to be about levels of consideration and also about the practical difficulties they encounter in reaching agreement with landowners because of the lack of a clear definition of consideration in the Code.

I find it difficult that Code operators should raise concerns about reaching agreement between landowners because of the lack of a clear definition of consideration in the Code. Despite these alleged deficiencies in the existing Code there are now over 50,000 telecommunication masts across the UK and over 10,000 kms of fibre optic cable, most of which have been agreed with landowners/occupiers as opposed to imposed under the statutory provisions of the Code. BTs entire network has been achieved by agreement. This simply does not support the position of such operators.

I am aware that there is currently a concerted effort being made by all the MNOs to reduce costs. The MNO's have all written to landowners in a similar vein seeking reductions to rents and improvements in lease terms. I view the representations made to the Commission on this point to be a similar cost saving exercise.

I do not consider a radical change to the existing mechanism is necessary or desirable.

The interpretation of the current law

The text of 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 *LIDI d*ecided that *"fair and reasonable"* consideration does not involve an element of profit share or ransom, but does go beyond a figure which simply reflects the diminution in value of the claimant's interest in his or her land. In other words it includes an element of price. In *LIDI*, 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. That of course requires the use of comparables; the best comparables available in *LIDI* were deals made between the same parties. However, the judge took the view that what was required was not simply market value.

He noted that his decision involved *"an element of subjective judicial opinion",* depending on his own perception of what is fair and reasonable; consideration was not to be determined simply by a determination of a right's market value, which would involve an *"objective assessment of a factual matter".* This was explained in the following terms: -

> *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".*

These points of principle were adopted by the parties in *Brookwood.* The Court of Appeal emphasised that it had not therefore heard argument on whether the approach taken in *LIDI* was correct and expressed no view on the point.

The standard pricing structures negotiated between organisations such as the Country Land and Business Association (CLA), the National Farmers Union (NFU), BT Openreach and Cable & Wireless were considered in *LIDI* as not including anything for the bargaining power of the parties. They are recommended rates only but still may be deemed uncompetitive under the Competition and Enterprise Acts[31].

Reform of the basis of consideration

I agree that the main problem with consideration under the Code is the lack of definition. A clear basis for the valuation for consideration would provide the parties with a firm basis for negotiations.

I agree with the CLA comment that it would be appropriate to leave the assessment of consideration entirely to the market.

I agree that consideration, as set out in the current Code, is perhaps imprecise and should be defined in a more meaningful valuation terms.

Turning to the points identified by the Commission:-

(1) Profit Share or Ransom

We agree with the approach, formulated in *LIDI*, that profit share does not provide an appropriate measure for assessing consideration.

[31] See OFT short term opinion under the Competition Act 1998 for the CLA/NFU on broadband rates dated August 2012 (attached as Appendix D).

TEL

(2) Market Value

Market value is a well understood concept.

Operators have made representation that this method of assessing consideration is too onerous and results in an artificially high price being paid on the basis that the right is very valuable to the Code Operator.

That assertion is entirely unsupported. The Law Commission should not accept such an assertion without evidence. Operators' income from radio masts is substantial, in the order of £60,000 per annum for rural radio masts and up to £250,000 for city centre sites. The rental value is a much smaller proportion of this than in respect of many other commercial transactions.

(3) Market Value Assessed using Compulsory Purchase Principles

Another alternative considered by the Commission is that the valuation principles of compulsory acquisition law should apply. The Commission suggest that consideration could be assessed on the basis of the market value of the right, but without taking into account the value of the right to the Code Operator.

This would mean that the price of, say, a right to run a fibre optic cable under private land would be assessed on the basis of the market value of that right, disregarding its value to the Code Operator and the scheme pursuant to which the right is being acquired. In effect this is the existing use value and is equivalent to compensation.

(4) Uplift on Compensation

As discussed, the Code currently has a clear distinction between compensation and consideration.

The Commission suggest a compromise approach to the issue of consideration would be for a statutory uplift on compensation to be payable, to take into account the fact that the acquisition has taken place on a compulsory basis. As the Commission point out, there are precedents, Section 3(2) of the Petroleum (Production) Act 1934 (now repealed) provided for a 10% uplift in compensation to be awarded.

The differences between compensation and the rents currently obtainable in the market for masts on farmland is some 95%, as illustrated at 10.4 above. The uplift would need to be substantial to address such imbalance in order to avoid a radical imbalance of the current market. The ratios may be different for apparatus in other situations.

TEL

Evaluating the Alternatives

Consideration should be assessed on the broad basis of the market value of the right. We believe that follows the concept of historical legislation in this section and would not unduly affect the established market. We do not believe this to be unduly onerous.

I do not consider that a valuation based on market value would be difficult or unworkable. It is a concept well understood by valuers. In view of the doubts raised by the Commission, it may however be prudent to ensure that in any revised Code a clear precise valuation definition is provided.

The Commission seek views on their provisional proposal 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. They seek consultees' views on the practicability of this approach, and on its practical and economic impact.

Over the 20 years since the inception of the 1984 Act and the growth of telecommunications, a clear market value for such rights has developed. A substantial number of transactions exist in the marketplace, based on such values.

I accept that the meaning of "consideration" has been relatively little tested in the courts but cases such as *LIDI* and *Brookwood* point to it meaning a market value excluding any ransom element (the ability to ransom appears to be the main concern).

Deeming the nearest analogy to the agreement required to be a wayleave (the problem of understanding what a Code agreement is in other terms), and in looking for a wayleave rent Judge Hague QC determined that the payment:

> *"should in my view reflect the anticipated use of the right and thus its importance and the value to the grantee".*

In the circumstances, he found he that could only work from the evidence of comparable transactions. Over the past 20 years a large volume of comparable evidence has arisen (save for fibre etc where the open market is constrained by the practice of operators reaching agreement with the likes of the CLA / NFU and only applying such rates).

Both parties in *Brookwood* followed the *LIDI* approach and comments by the Court of Appeal added to the exclusion of ransom value, the exclusion of other elements of value in comparable transactions which reflected the concession by the grantee of "*a high value for pragmatic reasons*" such as: -

- time constraints
- the expense or uncertainty of litigation
- the small size of the works and any payment.

This approach already has wider judicial authority. In the Supreme Court decision in *Bocardo,* Lord Clarke in particular reviewed the bases for assessing the payment for an underground wayleave to have access to oil under another's property. This was subject to statute law, enacted as the Mines (Working Facilities and Support) Act 1923 as now replaced by the Mines (Working Facilities and Support) Act 1966. Section 8(2) of that Act provides that:

> *"The compensation or consideration in respect of any right … shall be assessed by the court on the basis of what would be fair and reasonable between a willing grantor and a willing grantee, having regard to the conditions subject to which the right is or is to be granted."*

Lord Clarke noted that the provisions of the main compulsory purchase regimes had clearly not been imported into these Acts and so "*I can see no principled basis for applying the provisions of the latter Acts [compulsory purchase] to the assessment of compensation under the former [the Mines Acts]*". He then expressly endorsed the approach taken in LIDI - "*I agree with the reasoning*".

He viewed this as: -

> *"essentially the same as is deployed by the common law in assessing wayleave damages. Its purpose is, again on the face of it, the same, namely to ascertain what would be a fair and reasonable figure for Star to agree to pay and for the appellant to agree to receive for the use of part of the appellant's land …"*

The ability to compulsorily purchase rights over land (or in this case require the imposition of an agreement), without automatically importing all of the compulsory purchase valuation principles has also been accepted by the Upper Tribunal (Lands Chamber) in *Potter –v- Hillingdon LBC*[32]

While ready comparison has understandably been made with compulsory purchase:

- the judge in *LIDI* held the principle of compulsory purchase did not apply under the Code not only because they had not been incorporated but because the principles to be used were those derived from the express use of the phrases "*given willingly*" and "*fair and reasonable*". This approach has now been affirmed in the Supreme Court.
- Code agreements can be distinguished in their practical effect from almost all compulsory acquisitions which are of freeholds rather than carving out a leasehold interest or imposing an agreement such as wayleave – in either case establishing a continuing long term relationship between the parties in which case it makes sense to have the agreement as near to a commercial arrangement as possible.

The Commission's proposals that, under the revised Code, the basis of market value should be assessed in terms of the Land Compensation Act 1961, without regard to the special value to the grantee or any other Code operator, would have a far reaching effect which we believe has not been properly evaluated.

[32] [2010] UKUT 212 (LC).

It is my considered opinion that if such a proposal were enacted operators would seek to terminate existing agreements at the earliest opportunity in order to renegotiate terms on more the advantageous rates that would prevail under a Code so amended. In my opinion landowners are likely to baulk at the substantial rent reductions that would be sought as a consequence of such revised wording. I consider that the effect of this would be a substantial increase in disputes as landowners resist the imposition of such rates by operators and a therefore a substantial increase in cases before the Courts. This is likely to make any new roll out slower and more difficult to achieve.

Such a change would not only affect the parties to agreements but have far wider consequences.

The present regime has sustained significant investment in telecommunications infrastructure by companies reliant on the current income streams. Examples include:-

- **Wireless Infrastructure Group**
  Established in 1995 WIG has built up a portfolio of over 1,400 developed sites by acquiring rights on the current basis of legislation. For instance in August 2007 WIG completed the acquisition of over 220 tower sites from Scottish and Southern Electricity (SSE) [redacted] WIG also purchased the Devon & Cornwall [redacted] in August 2007. In May 2008 Avon & Somerset Police sold their portfolio to WIG [redacted].

- **Shere Group**
  This is another infrastructure investor which has purchased numerous individual wireless sites and leases and is now one of the largest owners of communications towers and wireless sites in both the UK and the Netherlands. In December 2004 Shere acquired the telecoms portfolio of United Utilities plc (both water and electricity utilities) comprising about 250 telecom tenancies on more than 100 radio masts [redacted] located in the northwest of England [redacted]. In March 2008 Shere acquired a portfolio consisting of existing sites and potential telecom sites on Thames Water land [redacted].

- **Arqiva**
  In December 2004 a consortium headed by Macquarrie Communications Infrastructure Group acquired National Transcommunications Limited one of the leading independent owners and operators of broadcast transmission and site leasing infrastructure in the UK market, with access to more than 3,000 sites [redacted]. This was subsequently renamed Arqiva. In April 2007 Arqiva purchased National Grid Wireless [redacted]

We believe that the changes being considered by the Commission would have a potentially devastating effect on such companies.

The proposed revisal away from open market value to compensation would also affect local government finances through rates. The average rateable value for a radio mast is

approximately £1,300. Assuming rates of 50p in the £ and extrapolating that over the UK the drop in local government finances represented by this proposed change is in the order of £31M per annum. I do not see how this is in the wider public interest as opposed to the business interest of the MNO's.

For these reasons I am very seriously concerned about the impact of the Commission's proposal to revise the current provisions for compensation and consideration to a single entitlement for compensation. In my opinion such a proposal would do serious violence to this well established market. The Commission must carefully consider the ramifications of any such move.

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).

My analysis clearly points towards an approach that would be recognised in valuation terms as "*fair value*" – a concept that is distinct from "*market value*" as set out in the Commission consultation. We therefore consider whether there is a better definition than "market value".

European Valuation Standards 2012, in which the European Group of Valuers' Associations (TEGoVA) sets standards for real property valuation, opens its commentary on fair value (in EVS 2) 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."*

It defines fair value 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."*

Similarly, the International Valuation Standards Council (International Valuation Standards 2011 and adopted by the RICS) has defined fair value 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".*

It, thus, has regard to general market transactions but does not, of necessity, arrive at the same answer as the more demanding concept of market value with its more precise and exacting assumptions. In this context, one distinction is that fair value may be assessed as between specific participants, such as landlord and tenant or in this case Code operator and landowner. This means that there are many situations where fair value is a useful concept by which to address the value of a property.

The evidence for assessing this will (as for market value) differ in quantity and quality between the various sectors of the electronic communications market. A market exists for telecommunications mast sites and rents obtained can vary depending on, for example, location, height of the mast and site sharing arrangements and are quoted as comparables at reviews. It may be harder to discern objective evidence for more specific wayleaves but the fair value approach eases some of the problems of assessment that would be found with market value.

The references in IFRS 13 to market participants and a sale make it clear that, for most practical purposes, fair value is consistent with the concept of market value. Reference to a fair or reasonable value is not always the same as market value and would address the concerns of an operator being held to ransom.

A number of cases have already established the meaning of fair or reasonable in terms of rental valuation:-

- **Ponsford –v- HMS Aerosols Ltd (1979)**
  The rent review clause provided for the rent to be the higher of the passing rent or *'a reasonable rent for the demised premises'*. There was no express disregard for improvements. The tenant made extensive improvements with the consent of the landlord, and contended that they should be disregarded because of the reference to a '*reasonable*' rent.

  It was held by the majority of the House of Lords that the task of the expert was not to assess what would be a reasonable rent for the lessees to pay but what is a reasonable rent for the premises in the open market, regardless of who provided the improvements or paid for them. The use of the word '*reasonable*' would enable the expert to disregard someone who would be prepared to offer an exceptionally high rent or freak rent.

  If the lease had provided for determination of *'such rent ... as the court in all the circumstances thinks reasonable'* or *'which it would be reasonable for the tenants to pay'* the surveyor would have been entitled and bound to have regard to the particular circumstances of the tenant.

- **99 Bishopsgate Ltd –v- Prudential Assurance Co Ltd (1985)**
  The rent review clause provided for the rent to be 'amount which shall in [the arbitrator's] opinion represent a fair yearly rent for the demised premises ... having regard to rental values'.

  It was held that '*fair*' meant not fair between the particular parties to the lease, but what a hypothetical tenant would fairly be expected to pay if taking the premises from a hypothetical landlord.

- **ARC Ltd –v- Schofield (1990)**
  The rent review clause provided for the rent to be *'a fair and reasonable market rent'.*
  It was held that this required determination of a market rent, not having regard to the circumstances of the actual parties to the lease.

  Fair value, as defined for valuation purposes, requires the assessment of the price that is fair between two identified parties taking into account the respective advantages or disadvantages that each will accrue from the transaction.

Compensation and consideration: linear obstacles

Paragraph 13 of the Code makes provision for the award by an arbitrator of compensation and consideration where a Code Operator gives notice to a landowner that it wishes to exercise its right to cross a linear obstacle pursuant to paragraph 12. The arbitrator may make an award of consideration in respect of the right to carry out works for the initial installation of the apparatus; the arbitrator may also make an award of compensation in respect of any loss or damage sustained by the person in control of the land on which the linear obstacle is situated as a result of the Code Operator carrying out those works. Consideration under paragraph 13 falls to be assessed in the same manner as was discussed above, with the exception that consideration is awarded under paragraph 13 only in respect of the right to carry out the works, and not for the retention of the apparatus on the land.

For example, if a Code Operator applies to court for an order under paragraph 5 to give it the right to run a fibre optic cable through a conduit under agricultural land, the operator will have to pay consideration to the occupier of that land for the right to perform the works to install the cable and conduit and, importantly, to keep it there. If the operator subsequently wishes to run a second cable under the same land then, depending on the terms of the original order, another order under paragraph 5 may be required, and further consideration will be payable. In contrast, if the cable was being run under a linear obstacle, consideration would be payable only in relation to the works carried out to install the first cable and conduit. If, when a second cable is required under the linear obstacle, no further works are required because, for instance, the conduit now sited on the land can accommodate another cable, no further consideration will be payable.

The Commission provisionally propose that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle. Consultees are asked whether they agree.

Where a Code Operator needs a right to lay cables that run along (but not across) a linear obstacle, paragraph 5 applies and consideration and compensation is assessed under paragraph 7 in the usual way. It is only when a right is required to cross a linear obstacle that the special provisions are applicable. This seems to be a rather arbitrary distinction and was the essence of the dispute in the *Bridgewater* case.

I consider that, insofar as possible, the general regime should prevail.

TEL

5.4 Compensation and expenses: minor issues

The Commission considers two other minor issues: -

(1) compensation for expenses incurred in lopping trees; and
(2) a general discretion for the appropriate body to re-visit previous awards made for compensation and consideration.

The right to cut back vegetation

In Part 3 the Commission requested consultees' views on whether the tree lopping provisions in the Code should be extended in a revised code to cover private land as well as streets, and whether they should be extended to other forms of vegetation. If these proposals were put into effect, the compensation provisions would have to be extended to cover private landowners who are required to cut back vegetation on their land.

A power to re-visit previous financial awards made under the Code

There is currently no provision in the Code which allows a court to re-visit previous financial awards made under the Code.

Based on an example of a one-off compensation payment, the Commission believes that there is a case for a provision that enables the appropriate body to re-open awards of consideration in such circumstances.

The Commission 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.

The wording of this proposal is one sided. It suggests that any alteration would only reduce payments. I respectfully suggest that if any such provision is included in the revised Code then any increase in entitlement should also fall to be considered. It would be more in keeping with the principle of agreement for the figure that was agreed (or deemed to be the fair and reasonable figure for an imposed agreement) then stood and could not be revisited.

Of course, in most situations electronic communication apparatus is installed under agreements that provide for annual consideration (often reviewable) not for a one-off payment.

TEL

6.0 TOWARDS A BETTER PROCEDURE

The Commission considers that it takes too long to agree terms and to resolve disputes; disputes are resolved in various different forums, not all of which are appropriate in terms of expertise and of time taken; notice procedures are inconsistent; and there may be some more general problems of obtaining information.

I agree with this analysis but consider that this is not necessarily the fault of landowners (as illustrated above often it is the operators who prevaricate).

6.1 The forum for adjudication

The expectation of the Code seems to be that most disputes go to the County Court[33], but that some merit specialist adjudication elsewhere. For example, arbitration to an appointee of the President of the Institute of Civil Engineers is used in disputes that concern the crossing of a linear obstacle (presumably because it was envisaged such disputes would involve engineering issues). Disputes over sums payable are generally dealt with by the County Court, but the Lands Chamber is the first port of call in some specific circumstances such as where there is a claim for injurious affection. There is little rationale.

The Commission provisionally propose that a revised Code should no longer specify the County Court as the forum for most disputes and seek views on this.

The Commission seek 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.

Questions have long been raised over whether a County Court is the right forum for disputes involving valuation.

In *LIDI*, the first case under the 1984 Code to reach a court, the judge commented on the problem of the county court having jurisdiction:

> *"Presumably Parliament though that cases under the Code would be relatively straightforward and could be accommodated in the normal county court listings without difficulty. The hearing before me extended over seven full days. The papers are contained in eight lever arch files, some of them quite bulky. As well as considering the several reports from each expert and hearing their oral evidence, I have read statements from seven other persons and four of them also gave oral evidence. Counsel made their*

[33] Sherriff Court in Scotland

submissions to me with economy, but their written outline submissions together covered 60 pages. Further, the valuation issues which I have considered are of the kind which are familiar to the Lands Tribunal, but not to most county court judges".

I understand that when the Communications Bill was making its way through Parliament in 2003, efforts were made to persuade the then DTI to transfer jurisdiction for Code matters to the Lands Tribunal. However, as the Bill was running to a very tight timetable the Government's reaction was that there was no prospect of securing agreement to additional provisions and there had been so little use of the existing provisions that there was not enough evidence to prove that they did not work satisfactorily. To me this missed the point that the Code was considered so unworkable by both sides parties avoided it altogether! Not only are there now signs of more cases but there now seems general support for this change.

It was the widely held view at the Law Commission's Stakeholder Workshop on 29th March 2012 that the Lands Tribunal (in England now the Upper Tribunal (Lands Chamber)) was a more appropriate forum for the settlement of disputes than the County or Sherriff Court.

For these reasons I am not surprised that the Commission make this proposal.

The Code would undoubtedly benefit from a unified procedure. There should be a single forum for all forms of dispute (currently there are differing procedures for some regimes such as linear obstacles).

Notwithstanding this it may be appropriate to refer some disputes to an arbitrator. Rent reviews and other issues under many other codes are generally referable to arbitration by agreement. I therefore consider that the Code should make default provision for arbitration as a standard term on any agreement to which the Code applies. This should be under the relevant arbitration legislation in each jurisdiction.

There may be a case that arbitration might also be used for renewal of agreements in the same way that lease renewals under the Landlord and Tenant legislation in England can be referred to the Professional Arbitration on Court Terms (PACT) facility offered by the RICS and Law Society.

Such forums may allow greater expedition in determining cases. This is particularly important for operators anxious to meet commercial imperatives.

To avoid the issues that arose in *Bridgewater* and which have arisen in Scotland under Agricultural Holdings legislation it will be necessary that the Code is clear and precise in its language.

TEL

The procedure for dispute resolution

Disputes over the grant of code rights may be about the Code Operator's entitlement to the rights – applying the test currently found in paragraph 5, or it may be about the financial terms on which rights are granted. Where the only dispute is about financial terms, the operator's access to land may be delayed unnecessarily.

I note that section 159(4) of the Water Industry Act 1991 states that the power of water undertakers to lay, maintain, repair and so on a pipe over private land can be exercised after notice has been given to the landowner, without prior adjudication of the right to take access. Such a power is peculiar to water and sewerage authorities (presumably on public health grounds though now frequently abused for development purposes) and is not available to other utilities. I agree with the view that it would not be right to give that facility to Code Operators given my experiences outlined above.

I note that it has been suggested to the Commission that delay could be mitigated if adjudication procedures enabled Code Operators to apply for early access to land pending resolution of any dispute over financial terms.

That would involve provision for a two-stage hearing so that the appropriate body would consider first the need for, and scope of a right and who it should bind, but defer consideration of any financial award until a later hearing; that would enable the appropriate body to order, or the landowner and/or occupier to concede, that a right should be given, but not the sum that should be payable for it.

The Commission 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 and seek consultees' views on other potential procedural mechanisms for minimising delay.

Whilst I agree that often the issue is about payment that is not always the case. Any amended provision must protect the rights for a landowner to object to the right being granted or the other practical terms on which it is granted.

Where however, the parties agreed that the right to install equipment is not at issue, it should be possible for the Code right to be conferred at an early stage in proceedings.

TEL

Costs

That cost of litigation under the Code is illustrated by the application for a costs capping order in *Petursson v Hutchinson 3G*[34] in which Hutchinson expected its overall costs to be over £250,000. This is considerably in excess of any consideration / compensation that a landowner would receive in respect of an enforced agreement.

The Lands Chamber's general rule is that claimants whose land is compulsorily acquired are awarded their costs as long as they have delivered a notice of claim to the acquiring authority. However, the general rule will not apply where the claimant's conduct has unnecessarily increased the costs incurred by the authority. The Lands Chamber also has the general right to order one party to pay the other's "wasted costs". These include any costs which the Lands Chamber holds that it would be unreasonable to require the other party to pay.

The other option would be for costs to "follow the case": that is, to be paid by the party who loses the case, which might be more appropriate where the dispute does not relate to the compulsory acquisition of a right, or the exercise of a power by a Code Operator. It would give greater bargaining power to operators where a landowner does not have significant funds available and the outcome of the case is uncertain; but it could be seen as giving parties an increased incentive to settle without recourse to expensive litigation.

The Commission 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.

The Commission ask consultees whether different rules for costs are needed depending upon the type of dispute.

It is our experience that most Code disputes arise because of the mindset of operators not landowners. It is usual that where someone is seeking an agreement uninvited by the other party, then the one wanting the agreement will generally pay the reasonable costs of that other party. That is also, presumably on similar grounds, the general presumption for compulsory purchase where claimants whose land is compulsorily acquired are entitled to their costs.

I see no reason for departure from the general rule of the Lands Chamber in respect of land being compulsorily acquired on costs under the Code.

[34] [2004] EWHC 2609 (TCC)

TEL

6.2 Notice procedures

Currently, many procedural aspects of the Code (for example the process followed to dispense with an occupier's or landowner's agreement to the conferral of a right) are dealt with using a notice procedure. These procedures vary as to detail, but follow a broadly similar structure: one party is required to serve a notice on the other before it can carry out a particular act or obtain a particular right, and the other is given a set period in which a response can be made (save in one significant case in terms of Paragraph 21). Sometimes, the response can be to serve a counter-notice on the person who issued the original notice. The response, or lack of it, determines what further action can be taken by the notifying party.

The Commission provisionally proposed that a revised code should incorporate procedural mechanisms that are based on notice (and, sometimes, counter notice) procedures. A revised code should provide standardised notice procedures, rather than setting out the procedure separately for each type of negotiation.

I am aware of instances where operators have not served notice in the prescribed format. Given that Ofcom provide such formats and approve any amendments there should be a provision for landlords to check with Ofcom that any notice complies with these provisions (and that the party serving such a notice is entitled to do so). It is unreasonable to expect that a landlord should be forced to take a defective notice to Court to establish this (yet this appears to be the necessary procedure).

The Commission 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 and ask whether consultees agree.

The Commission ask consultees to consider that the forms of notices available to Code Operators and how they could be improved

Consultees are asked if more information is needed for landowners and, if so, what is required and how should it be provided

I agree that consistent notice procedures are essential.

I do not however think it appropriate to provide a standard form of notice for landowners. To force landowners to use a standard form of notice is unrealistic and will only increase the burdens which landowners currently face in seeking to understand and exercise their rights under the Code. Code Operators may sometimes have difficulties in assessing whether or not a letter, for example, amounts to a notice under the Code; but they are adequately resourced to consider, categorise and respond to correspondence in an appropriate manner.

The forms of notice produced by Ofcom contain detailed information, together with a warning that the landowner should take legal advice. I do not consider that further regulation is necessary although the revised Code should provide that a notice not in the prescribed format is invalid.

In the event of dispute as to validity there is a role for Ofcom in that only they are in a position to say whether any disputed notice complies with their requirements.

As outlined elsewhere I believe that there should be a statutory notice setting out the implications of entering into an agreement to which the Code applies in the same way a notice must be served on tenants entering into Short Assured Tenancies or Assured Shorthold Tenancies. [redacted]

6.3 The form of Code rights – standard terms

It has been suggested to the Commission that standard form agreements, or terms, would assist in delivering rights more quickly. Whether this would be the case would depend upon how such agreements or terms were produced, and on whether their use was mandatory or they were simply available as a precedent.

In practice the rights required, and the conditions on which they are conferred, will depend on numerous factors, including the nature of the technology that the Code Operator plans to install, the physical characteristics of the site and the importance of the apparatus to the Code Operator's network (including any anticipated future use). Given the considerable variaition in the nature of the rights that could be required mandatory agreements could not deal satisfactorily with every situation that arises in practice.

The Commission ask consultees to give 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.

I agree that it is not practicable to propose mandatory forms of agreement and that it may be anti-competitive. I have experience of operators using standard agreements and rates agreed with landowning bodies in an anti-competitive manner by insisting that only their standard agreement and consideration should apply (even to landowners not members of the organisations concerned).

It might however be appropriate for a revised Code to set out certain minimum or default standards for agreements for the protection of landowners.

These should perhaps include: -

- **a fixed term for the agreement**.
  The electricity industry has 15 year terms for its Necessary Wayleaves but it would be for the tribunal to determine the term according to the circumstances. Most telecoms agreements are for a term of 10 years.

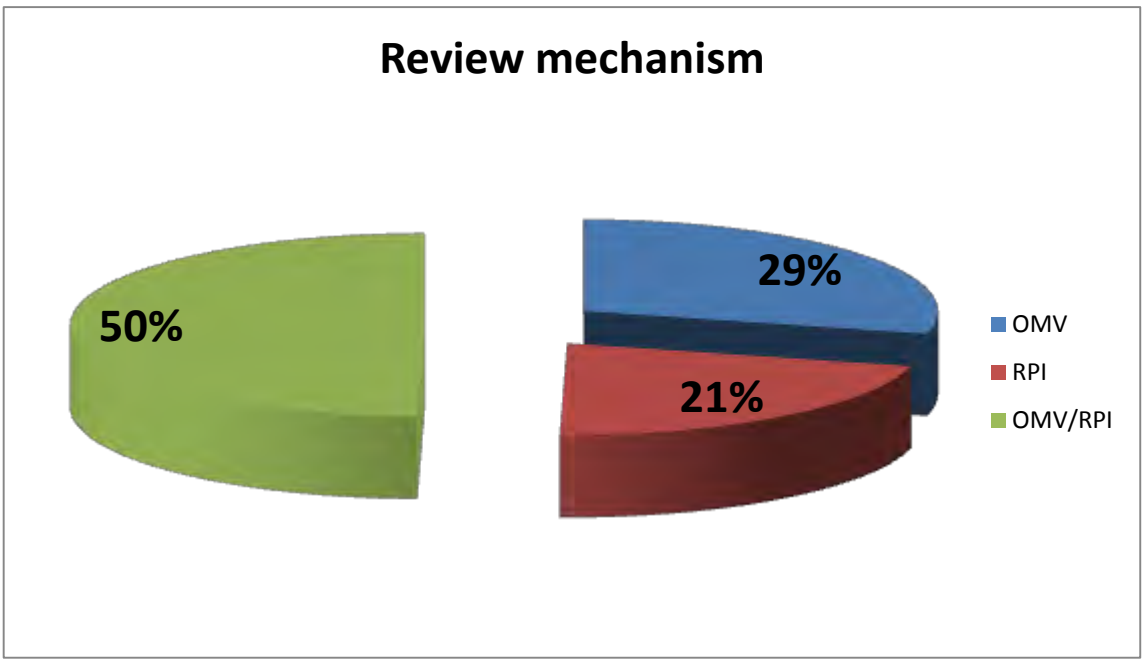
- **protection for the operator's interests in the equipment installed including access for maintenance during the term**

[redacted]

- **consideration for the agreement**; whether rent for tenancy and the payment for a wayleave or other arrangement

- **provision for review** of that consideration at regular intervals (and, in the absence of other agreement, the default presumption to be on a market value basis)

  My analysis of new lettings over the past 5 years reveals OMV / RPI reviews remain the usual mechanism for review in telecoms agreements:-



- **recourse to dispute resolution**

- a **break clause** in the operator's favour if the site becomes impossible to operate for technical reasons arising out of the site.

- **A prohibition against assignment, sub-letting and site sharing**.

- **An obligation to remove the equipment and to reinstate the property to the condition it was in prior to entry**.

- **An indemnity for the landowner**

These should be viewed as standard rather than mandatory so as to give the Court (and the parties) a measure of direction but allow the Court discretion in respect of the circumstances

before it. This would give the parties a degree of certainty as to what terms may awarded in terms of the revised Code.

TEL

7.0 INTERACTION WITH OTHER REGIMES

The Code governs the relationship between landowners, occupiers and Code Operators. It works alongside other statutory regimes; for example town and country planning. Planning issues that relate to the installation of electronic communications apparatus are not the subject matter of this project. But there are two instances where problems caused specifically by the Code's interaction with other regimes that fall within the scope of the Commissions consultation. These are: -

1. the security of tenure regime for business tenants contained in the Landlord and Tenant Act 1954; and

2. the requirement contained in the Land Registration Act 2002 to register certain estates and interests at Land Registry.

7.1 Landlord & Tenant Act 1954: Part 2

A Code Operator may acquire the right to place apparatus on a piece of land or a building by entering into a lease. Even if the agreement is labelled otherwise it is generally assumed that a communications network operator can occupy land for the purposes of its business through its apparatus[36]. The Operator in England and Wales is therefore protected by two sets of provisions: Part 2 of the 1954 Act, and paragraphs 20 and 21 of the Code

Part 2 of the 1954 Act protects the tenant against the landlord obtaining possession at the end of the lease unless one of the specified grounds for termination is shown. Otherwise, the tenancy continues and the court has the power to determine the terms of a new tenancy between the parties, in default of agreement.

If the parties are in agreement, it is straightforward for them to contract out of these provisions by the landlord serving the appropriate notice on the tenant. If they have not done so, it appears that the protections offered by the Code and by the 1954 Act apply concurrently. This gives rise to considerable and complications and uncertainty, in particular because the two regimes are not compatibly drafted.

First, there are different notice requirements. Section 25 of the 1954 Act requires that the landlord's notice is served within a specified period before the proposed termination date, and the tenant does not have to give any counter-notice in order for the tenancy to continue. Under paragraph 21 of the Code, it appears that the landlord's notice cannot be served until the term of the lease has ended; in relation to paragraph 20, there are no special provisions as to timing of the notice. The Code Operator must also serve a counter-notice in order to avoid being required to remove the apparatus.

[36] See cases such as *Graysim Holdings Ltd v P&O Property Holdings Ltd*[1996] AC 329 (HL); *Bracey v Read* [1963] Ch 88 ; *Pointon York Group plc v Poulton* [2006] EWCA Civ 1001, [2007] 3 EGLR 37 (CA), [2007] 1 P&CR 115 (CA) ; *Northern Electric Plc v Addison* [1997] 2 EGLR 111 (CA)

The grounds on which the landlord may recover possession of the land are also different. Under the Code, the landlord may press for removal of the apparatus either because he or she proposes to improve the land, or on the basis that the lease has ended so the landlord is entitled to require the removal of the apparatus. Under section 30 of the 1954 Act there are seven possible grounds of opposition to the grant of a new lease. Some overlap is apparent. For instance Section 30(1)(f) of the 1954 Act refers to the landlord's intention "*to demolish or reconstruct the premises*" or "*to carry out substantial work of construction*" which cannot reasonably be done without obtaining possession. Paragraph 20 of the Code is concerned with alteration (including removal) of apparatus which is necessary to enable the landlord *"to carry out a proposed improvement of the land in which he has an interest"; "improvement"* includes development and change of use.

However, the tests do not map onto each other, so a proposed re-development may fall within section 30(1)(f) and not within paragraph 20, and vice versa.

In order for the landlord to serve a notice under paragraph 21, the lease must already have ended. However, a tenancy which is protected by Part 2 of the 1954 Act may only be terminated in accordance with that Act. This can give rise to a particularly acute problem with the interaction of the provisions.

For instance the 1954 Act allows a landlord to resist the renewal of a tenancy where the property is needed for his own occupation (section 30(1)(ground (g)) or for development (ground (f)). If the tenant opposes this, then under s.64 of the 1954 Act the tenancy continues on an interim basis until three months after the final decision. That means that a landlord can only serve a paragraph 21 notice at that point. While the Courts may allow the landlord a *"reasonable time"* for ground (g), it is far from clear that the time often needed for the Code's procedures to operate. That makes it perhaps logically impossible for the landlord to mount a successful argument under the 1954 Act in that at the date of the trial of the tenant's application for a new tenancy, the landlord would be unable to demonstrate an ability to develop or go into occupation himself because of the tenant's security of tenure under the Code.

The natural answer for a landlord faced with the conflicting requirements under the 1954 Act and the Code is to move as best as he can to consolidate court action under the Code and the 1954 Act. As outlined above I have recent experience however of solicitors acting for operators resisting attempts to consolidate such an action.

It may be possible for a Court to award vacant possession and then, because a notice will still be needed under the Code, for another Court to decide that, in terms of the Code, the operator can remain!

In Scotland however the 1954 Act does not apply – in effect all such tenancies can be considered as 'contracted out' by virtue of statute. There is no evidence to suggest that this has caused any difficulty to operators.

The Commission 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 and seek views.

I consider that where a Code Operator leases land for the placement and use of electronic communications apparatus it should be protected by the provisions of the Code and the 1954 Act should not apply.

Since the practical answer to the interaction between the two regimes is for the agreement to have been contracted out from Part 2 of the 1954 Act, this further points to tenancies franked as subject to the Code being excluded from Part 2.

7.2 Land Registration Act 2002

The Land Registration Act 2002 ("LRA 2002") provides for the compulsory registration at the Land Registry of specified estates and interests in land in England and Wales.

The Northern Irish equivalent is the Land Registration Act (Northern Ireland) Act 1970.

The Scottish equivalent is currently the Land Registration (Scotland) Act 1979. There is an ability to register servitudes (easements) in Scotland. Under s 2 of the Land Registration (Scotland) Act 1979, leases are only registrable if they are for a term of over 20 years.

Paragraph 2(7) of the Code excludes rights under Paragraph 2(1) from any normal requirement for interests affecting land to be registered.

The effects of the presence of electronic communications apparatus in, on or under land given the rights afforded to operators under the Code can be a major issue for purchasers and lenders. When a right is registered, it is visible to all who search the register. Ideally any land register would include all electronic communications apparatus but I accept given the differences in interests that would not be possible.

I do not understand the logic by which such rights should not be registered and so be more reasonably evident to any purchaser or prospective tenant against whom they might be enforced. These important rights should be on the same basis as other such rights.

The Commission 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. Consultees are asked if they agree.

In my experience Code Operators often fail to register leases and as the Commission points out will not be subject to any particular sanction for failing to do so, since they are protected by the priority provisions in the Code in any event.

TEL

A revised code should make it clear that its provisions as to who is bound by code rights prevail over those in any other enactment. Subject to that, I agree that the code should have no effect on the land registration legislation; registrable leases and easements should remain registerable.

TEL

8.0 THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

The 2003 Regulations were made by the Secretary of State. They take the form of a statutory instrument; power to make them comes from section 109 of the Communications Act 2003. The factors that the Secretary of State is to take into account when exercising the power are set out in section 109, and they go some way to explaining the diverse subject matter of the 2003 Regulations:

(1) the duties imposed on Ofcom by sections 3 and 4 [of the Communications Act 2003];
(2) the need to protect the environment and, in particular, to conserve the natural beauty and amenity of the countryside;
(3) the need to ensure that highways are not damaged or obstructed, and traffic not interfered with, to any greater extent than is reasonably necessary;
(4) the need to encourage the sharing of the use of electronic communications apparatus;
(5) the need to ensure that restrictions and conditions are objectively justifiable and proportionate to what they are intended to achieve; (6) the need to secure that a person in whose case the code is applied will be able to meet liabilities arising as a consequence of: -
    a. the application of the code in his case; and
    b. any conduct of his in relation to the matters with which the code deals.

Regulation 3 of the Regulations (General conditions) provides that:-

(1) A code operator shall consult—

(a) highway authorities … to ensure that any works involving the breaking up of maintainable highways or public roads do not undermine or unduly disturb the highway authorities' or roads authorities' work;
(b) planning authorities in relation to the installation of electronic communications apparatus, including installation in a local nature reserve; and
(c) relevant undertakers with a view to avoiding the disruption of the services provided by those undertakers.

(2) A code operator shall ensure that any electronic communications apparatus installed underground is installed at such a depth that it will not interfere with the use of the land (as at the date of the installation), unless the occupier and any other person having a legal interest in that land have consented.

(3) A code operator, when installing any electronic communications apparatus, shall, so far as reasonably practicable, minimise—

(a) the impact on the visual amenity of properties, in particular buildings on the statutory list of buildings;
(b) any potential hazards posed by work carried out in installing the apparatus or by apparatus once installed; and

(c) interference with traffic.

(4) A code operator, where practicable, shall share the use of electronic communications apparatus.

(5) A code operator shall install the minimum practicable number of items of electronic communications apparatus consistent with the intended provision of electronic communications services and allowing for an estimate of growth in demand for such services.

Regulation 5 requires a Code Operator to give written notice to the planning authority. It applies where the Code Operator intends to install apparatus (other than lines) in an area where it has not previously installed apparatus; or to install a cabinet, box, pillar, pedestal or similar apparatus for which planning permission is not required. There are exceptions concerning apparatus installed inside a building (or other permanent structure), temporary networks and apparatus attached to or supported by certain electricity poles or pylons. One month's notice, specifying details of the proposed installation, must be given.

Written notice to the planning authority is also required, under Regulation 7, for apparatus installation in proximity to certain listed buildings, unless it relates to a temporary network or emergency works (with a notification requirement). There is provision for objections by the planning authority within 56 days.

There are special requirements to give notice where the Code Operator intends to install apparatus in specific protected areas: Regulation 8. These protected areas include National Parks, areas of outstanding natural beauty, certain nature reserves and sites of special scientific interest. The notice must be given to the planning authority or other designated public body. For instance, for an installation in a national nature reserve in England notice must be given to Natural England. Notice to the National Trust or the National Trust for Scotland may be required if they own or hold any interest in the land. Again, provision is made regarding objections by the body notified within 56 days; further notices and consultations may be required.

Under Regulation 10(1) Code Operators must inspect and maintain their apparatus to ensure that it will not cause personal injury or property damage, unless it is installed underground or inside a building or other permanent structure. If a report is received that any of its apparatus is in a dangerous state, a Code Operator must investigate, and if necessary make the apparatus safe: Regulation 10(2).

Regulation 11 imposes requirements to keep and permit inspection of records of apparatus installed in or under certain highways, streets and roads in Scotland and Wales. In relation to England and Northern Ireland, similar duties are imposed by separate legislation.

Where apparatus is installed in or under certain highways, streets and roads, Regulation 13 requires Code Operators to provide trained staff to indicate its location on site, at the reasonable request of a relevant undertaker or highway or roads authority.

Regulation 17 requires a Code Operator to co-operate with planning and highway (or in Scotland, road) authorities to produce guidelines on the manner in which Code Operators should conduct the installation (including positioning) of various items of apparatus. After the guidelines have come into effect, the Code Operator is to comply with them.

The 2003 Regulations are enforced by Ofcom under sections 110 to 111B of the 2003 Act. Ofcom can take enforcement measures where it determines: *"… that there are reasonable grounds for believing that a [Code Operator] is contravening, or has contravened, a requirement imposed by virtue of any of the restrictions or conditions contained in the [2003 Regulations].*

Enforcement commences with a notification to the Code Operator setting out various matters, including the steps that Ofcom thinks should be taken to comply with the relevant regulation and remedy the consequences of the contravention. Ofcom can also propose a financial penalty and, in serious cases, suspend the application of the Code to the operator.

The Commission states that it is unaware of difficulties with the 2003 Regulations subject to one exception. Their provisional view is therefore that the 2003 Regulations should be retained alongside a revised code. That exception related to Regulation 16, which requires Code Operators to maintain a fund to meet certain specified liabilities. I am however aware of other difficulties.

8.1 Regulation 16: funds for meeting future liability

Regulation 16 of the 2003 Regulations requires a Code Operator to:

> *… ensure that sufficient funds are available to meet the specified liabilities which [arise or may arise in certain periods] from the exercise of [the right to undertake works in publicly maintained streets and roads].*

The specified liabilities are set out in regulation 16(10), which we summarise as follows: -

1. certain liabilities in respect of costs and expenses that arise under the New Roads and Street Works Act 1991 or (in Northern Ireland) the Street Works (Northern Ireland) Order 1995;
2. any costs or expenses reasonably incurred by an appropriate or responsible authority in making good any damage caused by the installation or removal of electronic communications apparatus; and
3. any costs or expenses reasonably incurred by an appropriate or responsible authority that arise after certain events have occurred in removing electronic communications apparatus from the street.

In order to confirm that it is complying with the obligation set out in paragraph 9.7 above, a Code Operator must provide an annual certificate to Ofcom. The certificate must set out certain prescribed information.

Where Ofcom is not satisfied that a Code Operator has discharged the duty set out in paragraph 9.7 above then it can direct that operator to take such steps as Ofcom considers "*appropriate for*

the purpose of securing that sufficient funds are available to meet the … liabilities"; and can publish details of any such direction.

The Commission ask consultees to tell them:

(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 22 of the Code provides that:

> *"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."*

There have been two insolvencies of radio mast operators enjoying Code Powers. Such an event leaves the landowners with a redundant structure and potential non-domestic rates demands.

Local authorities have however been given some measure of protection under Regulation 16.

Despite their heavy investment in infrastructure, there is no evidence to suggest that the main telecommunication companies have made any financial provision in their accounts for the removal of their networks despite this licence obligation. Operators resist requests for reinstatement bonds from landowners and have been successful in doing so even though such bonds are usual in wind farm agreements (and are often imposed as a planning requirement[37]).

In the light of the seeming failure of operators to set aside monies for reinstatement, far from removing such an obligation, we believe it should be extended to make it a specific statutory requirement that operators set aside sufficient funds for this liability in respect of their entire network suitable ring-fenced as for employees' pension funds. A strengthening of the Code requirements in this respect would mean that this could then be dealt with in normal accountancy and auditing of the operators for taxation etc and this may alleviate the need for Regulation 16.

[37] In this context the Commission is reminded that most radio masts in England & Wales enjoy GPDO rights and so no such planning consent can be imposed.

TEL

8.2 Other elements of the 2003 Regulations

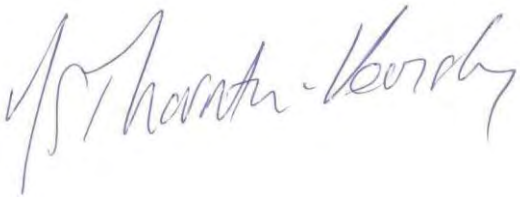
The Commission seek views on the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 and whether any amendment required?

Ofcom appear to suggest in response to a complaint that the Regulations encourages the sharing of apparatus and that Regulation 3(4) is not an absolute requirement[38]. If this is indeed the case then compliance with other aspects of Regulation 1 is not an absolute requirement. This makes a mockery of this legislation. Clarification is necessary.

I consider that the Regulations should be enacted and strengthened in any revised Code.

[38] See Appendix C

I trust this is of assistance in the Commission's deliberations in respect of a revised Code and would be happy to assist further in any aspect of this paper that requires amplification or explanation.



I S Thornton-Kemsley TD MRICS FAAV
[redacted]

8 October 2012

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

Dear Mr Linney

Water UK's response to Law Commission Consultation
"The Electronic Communications Code: A Consultation Paper"

Water UK is the industry association that represents UK statutory water supply and wastewater companies at national and European level. We are funded by our members to influence public policy and opinion to ensure a strong water industry in the interests of all stakeholders. The focus on policy means: identifying gaps or inadequacies; working with members and stakeholders to develop alternatives; and helping deliver the benefits as new approaches are implemented. Our core objective is sustainable water policy – actions and solutions that create lasting benefit by integrating economic, environmental and social objectives.

We are responding to the consultations specifically under the section on the "Use of Specified Conduits" (paragraphs 4.31 to 4.34). We agree that no activity should be undertaken in any of the assets operated by Water UK's members without obtaining formal, written agreement. However we would like to take opportunity of this consultation to explore this in more detail by differentiating between the potable water network and sewer network.

Continued...

2

Use of potable water network

Under Section 174 of the WIA 1991 installers of these systems need to obtain formal consent from the water provider to access the potable water network, even for operations solely on pipes under customer ownership[1].

There are potential risks to public health associated with the introduction of any material into the potable water distribution system. These include:

- the risks of contamination of drinking water;
- hampering of repairs to address leakage or damage;
- reduction in service due to introduction of restrictions in small diameter pipes;
- the ability of materials used for cabling to withstand rigorous mains cleaning processes;
- disruption to sediments within older pipes that may cause localised discolouration and;
- the general public acceptability of such systems which involve the introduction of “foreign materials” into the network.

Whilst the use of live potable water pipes as routes for telecommunications devices or cables is not generally acceptable there may be limited options to utilise abandoned, redundant or non-potable water mains within the network. It should be acknowledged however that these mains may be limited in their location or connectivity.

Use of sewer network

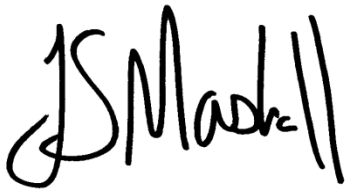
We agree that for public sewers agreement should be sought from the sewerage undertaker before using sewers as a conduit for cable routing. In some circumstances we recognise that the sewer networks could offer an opportunity for cable routing but caution that industry experience is that there is a size threshold below which insertion of cables will result in operational problems that would be unacceptable.

[1] http://www.water.org.uk/home/policy/positions/broadband-routing?s1=broadband

In addition in our response to the BIS consultation in September 2010[2] we noted that this is a concern more likely to be encountered in rural situations and as a

result it would be unlikely that the sewer network along would provide a suitable conduit in rural and semi rural areas. As a result the use of the network should be considered as apart of a wider strategy. Installers would need to be aware of hygiene implications of working with the sewer network.

Yours sincerely



Dr Jim Marshall
Policy and Business Adviser

[redacted]
www.water.org.uk

[2] http://www.water.org.uk/home/news/press-releases/broadband-consultation-response?s1=broadband

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

Westfield Shoppingtowns Limited
6th Floor MidCity Place
71 High Holborn
London WC1V 6EA
United Kingdom
[redacted]

Friday 12 October 2012

Dear Sir

RE: Law Commission Consultation Paper No205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Yours Faithfully

Kevin Nicholson
Head of Finance Operations

Capital&
Regional

Our Ref:

20 September 2012

Capital & Regional
Property Management Ltd
52 Grosvenor Gardens
London SW1W 0AU
[redacted]
www.capreg.com

Derek Blatt Esq.,
TPCL
Avon House
82 Wellington Street
Thame
Oxon
OX9 3BN

Dear Derek

The Electronic Communications Code – Law Commission Consultation

Many thanks for your note in respect of the above.

Please accept this letter as confirmation that C&R are fully in agreement with your proposed response and I look forward to hearing the outcome of the consultation in due course.

Thanks again for spending time on this matter.

Yours sincerely

PHILIP EVANS
National Property Manager

The Queen Elizabeth II Conference Centre

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

10 October 2012

Dear Sir

RE: Law Commission Consultation Paper No205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Yours Faithfully

John French

John French
Finance Director

[redacted] [redacted] [redacted]

The Queen Elizabeth II Conference Centre, Broad Sanctuary, London SW1P 3EE

Imperial College Healthcare NHS
NHS Trust

Estates and Facilities
Entrance D, Ground Floor Mint Wing
South Wharf Road
Paddington, W2 1NY

[redacted]
Website: www.imperial.nhs.uk

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

5th October 2012

Dear Sir

RE: Law Commission Consultation Paper No205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Yours Faithfully

Jill Blowers
Property Manager

Heatherwood and Wexham Park Hospitals NHS
NHS Foundation Trust

Wexham Park Hospital
Wexham Street
Slough
Berkshire
SL2 4HL
[redacted]

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

Dear Sir,

RE: Law Commission Consultation Paper No205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Yours faithfully,

Paul Rowley
Director of Facilities & Non Clinical Support Services

Our Ref
Your Ref
Direct Tel
Direct Fax
E-Mail
Date [redacted]
10th October, 2012

Legal & General
INVESTMENT MANAGEMENT

Legal & General Property
One Coleman Street
London
EC2R 5AA
[redacted]

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

Dear Sirs

RE: Law Commission Consultation Paper No205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Yours faithfully

Paul Edwards
Director, Asset Management

UBS Global Asset Management (UK) Ltd
21 Lombard Street
London EC3V 9AH

Sam Sananes
[redacted]
[redacted]
www.ubs.com

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

5th October 2012

Dear Sir

RE: Law Commission Consultation Paper No205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL .

Yours sincerely

Sam Sananes
Executive Director
UBS Global Asset Management (UK) Ltd

THE BRITISH LIBRARY

96 Euston Road
London
NW1 2DB

[redacted]
www.bl.uk

THE WORLD'S KNOWLEDGE

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

9 October 2012

Dear Sir

RE: Law Commission Consultation Paper No205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Yours faithfully

David Read
Head of Facilities & Property

David Read
Head of Facilities & Property
[redacted]

MANAWEY DEVELOPMENTS LTD.
DIRECTORS L M FROGGATT M L FROGGATT A FROGGATT

HALEWORTH HOUSE
TITE HILL
EGHAM
SURREY
TW20 0LR

[redacted]

Reg No. 3620[illegible]7 England
VAT No. 2[illegible]

11 October 2012

LMF/SH/MD/L2024

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

Dear Sir

RE: Law Commission Consultation Paper No205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Yours Faithfully

pp LIONEL M FROGGATT
MANAGING DIRECTOR

ITCHEN SIXTH FORM COLLEGE

Principal: Barry Hicks
Middle Road, Bitterne
Southampton SO19 7TB
[redacted]
www.itchen.ac.uk

10 October 2012

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

Dear Sir

RE: Law Commission Consultation Paper No.205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Yours faithfully

Jeffrey Roberts
Director of Finance & Resources

JOIN THE LEARNING & SKILLS REVOLUTION

NEWHAM COLLEGE LONDON

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

9th October 2012

Dear Sir,

RE: Law Commission Consultation Paper No205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Yours Faithfully,

Martin O'Regan
Director of Estates & Facilities Management

DONINGTON INVESTMENTS LIMITED

ORIEL BUILDINGS, 10 MARGARET STREET
LONDON W1W 8RL
[redacted]

SIM/CY

4th October 2012

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

Dear Sirs,

RE: Law Commission Consultation Paper No205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Yours faithfully

SELWYN I. MIDGEN
DIRECTOR
DONINGTON INVESTMENTS LIMITED

Enc

DEARDS LTD

TRAFALGAR HOUSE
GRENVILLE PLACE
MILL HILL
LONDON
NW7 3SA
[redacted]

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

Dear Sir

RE: Law Commission Consultation Paper No205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Yours Faithfully

P Steyne

Peter Steyne
Managing Director

THE BENEFICE OF

ST JAMES GARLICKHYTHE

WITH

ST MICHAEL QUEENHITHE AND HOLY TRINITY-THE-LESS

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

4th October 2012

Dear Sir,

Subject: Law Commission Consultation Paper No. 205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Your faithfully

Malcolm Brown ACA
Treasurer

LSE Estates Division

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

Houghton Street
London WC2A 2AE

04 October 2012

Dear Sir

RE: Law Commission Consultation Paper No205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Yours faithfully

Keith Clarkson MRICS
Head of Property and Space Management
London School of Economics & Political Science
[redacted]

HARVEY WHITE PROPERTIES

4 KIMBOLTON ROW, FULHAM ROAD, LONDON SW3 6RL
[redacted]

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

4th October, 2012

Dear Sir

RE: Law Commission Consultation Paper No205
The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Yours faithfully

C.H. DELEVINGNE
CHAIRMAN

encl

UK&EUROPEAN
INVESTMENTS

CHELSEA HOUSE, WEST GATE, LONDON. W5 1DR
[redacted]
WWW.UKANDEUROPEAN.COM

12 October 2012

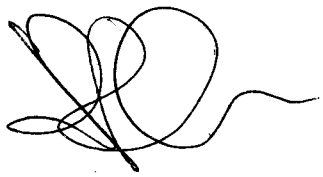
James Linney
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

Dear Mr Linney

RE: Law Commission Consultation Paper No205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Your Faithfully
On behalf of London and Overseas Property and Investment Co. Limited (LOPIC)
& Lewis (Ayr) Limited/Cavendish Square



Joanna Spear

[redacted]

RAINHAM STEEL INVESTMENTS

Kathryn House, Manor Way, Rainham, Essex, RM13 8RE

[redacted]

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

12th October 2012

Dear Sir,

RE: Law Commission Consultation Paper No205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

Your Faithfully

Luke Marshall
Director
RAINHAM STEEL INVESTMENTS LTD

Digital World Centre

1 LOWRY PLAZA
SALFORD QUAYS
MANCHESTER
M50 3UB
[redacted]
www.digitalworldcentre.com

16th October 2012
DWC/EB/TPCL001

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

Dear Sir

RE: Law Commission Consultation Paper No205 – The Electronic Communications Code

I hereby endorse the enclosed response to the above mentioned paper, submitted on our behalf by TPCL.

For, and on behalf of, Digital World Centre Limited

Eliot Baker
Director of Planning & Development
DCS

[redacted]

[redacted]

15/10/2012

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

Dear Mr Linney,

Please find enclosed our response which because we put incorrect E. Mail address has bounced back and were unable to correct, hence post.

Yours sincerely,

Patricia J Lugsden

Consultation response 34 of 130

Peter Kingston

From: "Patricia Kingston" [redacted]
To: <propertyandtrust@lawcommission.gsi.gov.uk>
Sent: 16 October 2012 20:30
Subject: ELECTRONIC COMMUNICATION CODE RESPONSE.

Dear Mr.Linney,

Having read through the Response Form would make the point that due to the different locations within the country,there that there cannot be a one size fits all approach,and therefore all Leases and Renewals should be a matter for individual negotiation between two equal partners.For example if two or more operators decide they would like to merge on one site then the increased earning capacity of that site should be shared by negotiation with the landowner in the form of a rent increase.

In view of the current Telecommunicationns Act,where operators cannot be removed,which makes a nonsense of negotiation as the operator can,at the end of a current Lease,can efffectively rewrite a new Lease to suit their own interests.A solution to this might be,bearing in mind the cost of the initial installation by the operator,that after twenty years the landowner should be able to give notice to quit if he so wished.

Two points from the Form:
At 10.3 With our site access is off a pedestrian walkway through a locked gate,and any major work entailing vehicles coming into the farms by arrangement as access is otherwise locked at all times.This works well,but if the site was in an area where stock or crops were involved that would then be a different problem.
10.49 Probably Planning or Development Surveyor being member of R.I.C.S..
Many of proposals in Response Form probably best left to legal advice.

Our experience with an operator is as follows;
Initial Lease from [redacted].No problems.At expiry agents begin renegotiations which were protracted mainly due to to consistent lack of response.However,in [redacted] operators solicitors sent Draft Lease which of course included agreed rent.We then heard that the operator now refused to pay the increase.Start again-----operator changes agents----we settled after still more delays [redacted]---concluded [redacted] when rent arrears finally paid.
Because of all this hassle they stretched the new Lease to 12 years.

Yours sincerely

Peter Kingston

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:
Lesley Hughes
Email address:
[redacted]
Postal address:
7 Park Square East Leeds LS1 2LW
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):
DAC Beachcroft 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.	
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.	
Consideration should be given to a right to update mast site equipment without consent.	

10.5 We provisionally propose that code rights should be technology neutral. Do consultees agree? Consultation Paper, Part 3, paragraph 3.18.	
Yes	

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.
It is our experience that the current definition works.

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.
In practice, much difficulty comes from third parties exercising control over access routes to mast sites. General rights of access should be protected by the Code and particularly third parties with control over access should be bound.

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) Yes.
(2) No, this appears to be a step too far.

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) Yes, it is a site that is demised and for which the original bargain was struck, and not the right to particular equipment.
(2) No, as there is no additional burden on the landowner or diminution in value of the 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) Yes
(2) Yes
(3) No, once again there is no additional burden on the landowner or diminution in value of the land.

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 presume that the reference to apparatus here includes site sharing. In our experience this section is not used as there is frequently a provision in leases for consent to be given this is almost always on the basis that consent should not be unreasonably withheld.

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.

It has always been our understanding that Code rights attach to Operators rather than the land. It is only landlord and tenant rights that require assignment.

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.

Yes. We have encountered significant difficulties in relation to agricultural land with third party or public access rights and with roof top site with inadequate rights to pass through the building.

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. In our experience Operators would be unwilling to risk the time/expense/adverse publicity.

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) This is not uncommon. It may be used as a negotiating tactic to extract enhanced payments. (2) Court enforcement is part of the reason, also Operators are unwilling to be seen to do this. (3) We doubt that a threat of criminal action will have much effect given the general reluctance of the Police to become involved in what they see a private matters. The imposition of a fine as well as/as an alternative may assist.

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.
No.

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.

Any views?

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.
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.
We believe that the balance is correct but that amore detailed process needs to be laid down.

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.	

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	

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.
Yes.

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 consider that some heat would be taken out of this situation if the SP was free to continue to accept rent without the risk of creating a new leasehold interest.

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 are concerned that contracting out may become the default position. We would be less concerned if contracting out was only on redevelopment grounds with similar requirements to prove redevelopment as in opposed lease renewals under the L&T Act 1954.

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	

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.
We are of the view that this very much depends on how payment is made. A lump sum on creation of the interest will lead to double payments. However, if payments are by way of rent, this should not be a problem.

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 valuation method might work but only if the payment is rentalised rather than a lump sum. We have found that in circumstances were (effectively) a premium is paid at the beginning of a long lease and the landowner becomes insolvent, the insolvency practitioners liquidate the company, disclaim the interest and ask for a second payment for a replacement interest. We have some concerns about the valuation method being difficult and quite cumbersome in the beginning.

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.
This should not be necessary if payment is made by way of rent rather than premium. Otherwise, we agree. However, what if the payment was made by a predecessor in title to the person requiring the alteration?

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.

No. We have found the County Court to be a good as we would expect the alternatives to be.

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.

(1) Our experience of the LCUT is that it would not have the capacity to deal with claims any more efficiently than the CC.
(2) We wonder how this solution would allow disputes other than as to payments to be resolved. We find that payment is often one of the less contentious terms.

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.

Our understand is that an Operator has these rights anyway and they do not need to be conferred in this way. However, a split trial to determine the position on rights first and then quantum later is a good idea.

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
No, shared, with ability to apply in unusual cases.

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.
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.
Much will depend on how the Code is amended/redrawn.

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

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 do not believe that this is practical. Even just on mast sites with which we deal there is such a huge variety of sites that a standard form would not be appropriate. A micro cell is completely different to a 40 metre green field mast site.

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. The L&T Act is an established and well understood regime which has within it much that could assist in framing the Code to operate more efficiently. It allows for proper negotiations between the parties on a basis that all understand.

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.

UK LAND ESTATES

19th October 2012

UK Land Estates
2nd Floor, Building 7,
Queens Park, Queensway,
Team Valley, Gateshead,
NE11 0QD

[redacted]

[redacted]

Website
www.uk-land-estates.co.uk

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

By post and email
E-mail: propertyandtrust@lawcommission.gsi.gov.uk

Dear Mr Linney

THE LAW COMMISSION CONSULTATION ON THE ELECTRONIC COMMUNICATIONS CODE (THE CODE) – RESPONSE ON BEHALF OF UK LAND ESTATES

Please accept this as an individual response to the above consultation on behalf of UK Land Estates.

UK Land Estates own numerous properties which are licensed / leased on commercial terms to operators of electronic communications infrastructure.

Substantial income is generated from licenses and leases to mobile phone network operators, broadcasters, wireless broadband operators and other private sector organisations. The value of these licenses and lettings makes their retention and operation worthwhile. The property assets have a value of several million pounds. The majority of the licensees benefit from statutory powers under the Code.

The proposals for the review of the remuneration methods in section 6 of the consultation cause us considerable concern. Income from licences to install communications apparatus on our land and buildings has been developed from unfettered negotiations between ourselves as willing site providers (licensees) and the operator occupiers as willing licensors. There is a very well established commercial market for at least 70,000 wireless base station leases or licences throughout the UK. Details of the transactions behind them are widely available. As parties to a licence, operators (both code operators and non-code operators) and site providers (which includes UK Land Estates) rely on this evidence to agree market values.

If the Commission's proposal to replace market value consideration with compulsory purchase style compensation is allowed to go ahead, it will virtually destroy the income receivable from our properties. This, in turn, will vastly reduce their capital values.

UK LAND ESTATES

Our preference is to maintain the current regime for lettings and licences to install communications infrastructure based on market value consideration. To do anything other would destabilise an established, respected and freely operating market place.

There is also no doubt the existence of a commercial market for wireless communications base station lettings and licenses have assisted with the development of communications networks. If operators were only obliged to pay compensation based sums for installing apparatus on our land and buildings it is likely they would not have been progressed in many locations, to the detriment of the wider public interest.

We fully endorse the response to the consultation made by our agents, Cell:cm Chartered Surveyors.

Yours sincerely

David Finnigan
Senior Surveyor

4 College Hill
London EC4R 2RB
[redacted]
www.citysolicitors.org.uk

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

22 October 2012

By post and email: propertyandtrust@lawcommission.gsi.gov.uk

Dear Sirs

Re: Law Commission's consultation paper number 205 on The Electronic Communications Code ("Paper")

I am writing as Chair to the Land Law committee of the City of London Law Society. The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS Land Law committee has considered the Paper and would like to congratulate and express its thanks to the Law Commission for an excellent, erudite and thorough analysis of this crucial area of law, which can have a significant impact on transactions affecting our member firms and their clients.

We do not propose to respond to all of the questions raised by the Law Commission as some of them are technical and specific to particular types of property such as railway lines and canals. We do, however, comment below on several significant issues and in places more than one perspective is provided where there were different opinions among committee members.

The key issues in the sphere of the Code which we come across most regularly are the interaction of The Electronic Communications Code ("Code") with Part II of the Landlord and Tenant Act 1954 ("1954 Act"); alterations to and removal of electronic communications apparatus; the ability to contract out of the Code; compensation and consideration under the Code; and alienation by Code operators. The Paper touches upon all of those issues, on which we

comment. When "owner" is referred to below, this may include "occupier". When "operator" is referred to, this usually means "Code operator".

General

The Law Commission considers that there must continue to be legislation under which the requirement for a landowner's consent for an operator to place apparatus on the owner's property may be overridden. The Law Commission comments that electronic communications services are considered so important to society that such compulsion is justified. The owner is entitled to financial recompense. The Law Commission considers that is compatible with the European Convention on Human Rights.

The Law Commission questions whether the Code should contain general obligations alongside Code rights such as the operator insuring against damage to land arising from the presence of apparatus. There is a possible concern about whether this may unwittingly lead to potential double insurance problems (with the owner's insurance). Public liability insurance rather than buildings insurance should be addressed in the Code as that is the most likely risk to occur and public liability insurance is unlikely to give rise to any real double insurance issues.

Access Principle

A fundamental principle of the Code is that no person should unreasonably be denied access to an electronic communications network or to electronic communications services, which the Law Commission terms the "Access Principle". The Law Commission considers this principle unclear and, potentially, out-of-date and asks whether, at a time when many areas do have access to electronic communications services, the Access Principle should also focus on the need for those systems to be fast, high quality, robust and modern.

This raises the question that, although it may be justifiable to override private property rights to ensure access to electronic communications services, is it justifiable to override rights (merely) to allow for the latest technology to be installed?

Upgrading, sharing and assignment

The Law Commission questions whether ancillary rights of upgrading, sharing and assignment should be expressly included in the Code. This is commented on below.

Upgrading

Should the owner be entitled to a sum if the operator exercises a new Code right to upgrade? It is debateable whether an owner should be compelled to accept such an upgrade right (absent provision in an existing agreement). Clearly, if it is obliged to accept upgrade works, it is logical that there should be some appropriate financial recompense for the owner.

Sharing

In relation to sharing, should any Code right to share be subject to the provisions of any operator/owner agreement? That is the current position. The Law Commission questions whether section 134 of the Communications Act 2003 (which turns an absolute prohibition on sharing into one that requires the landlord's consent, not to be unreasonably withheld) could be extended beyond a landlord and tenant situation. If the Code is to incorporate a sharing right, this should be subject to the provisions of any operator/owner agreement.

We are not entirely convinced that section 134 should be extended to an operator/owner situation. It would be valuable to understand the background to the section's introduction and whether the motivations were related to the landlord and tenant relationship- if so, this may be a disincentive to an extension of the section. If a provision in an agreement that an operator is prohibited to share is converted into a provision that any sharing by the operator is subject to the owner's prior consent, not to be unreasonably withheld, this may simply lead to a clash between the owner and operator's respective commercial interests in determining what is reasonable.

What is crucial here is the basis on which the owner receives compensation for the grant of the original right to the operator. If it is based on the diminution in the value of the owner's land rather than the market value of the right, then there is a much stronger argument that the operator should be entitled to share. The net effect is that the same infrastructure is then used by a number of operators, which is unlikely to further diminish the value of the owner's land.

If, however, the compensation for the original grant is based on the market value of the right, then sharing will result in greater income to the operator, which means the right is worth more and the owner should receive additional compensation. This point is also linked to the right to assign mentioned below.

Assignment

The Law Commission questions whether operators should benefit from a general right to assign Code rights to other Code operators, regardless of what any owner/operator agreement provides. There is some objection to such a provision- the owner may only have agreed to the agreement and application of Code rights, because it was a particular operator and another operator should not be forced on the owner. There was, however, an alternative view that the operator should be able to assign to (or share with) another Code operator, but subject to the owner's prior written consent, such consent not to be unreasonably withheld. Such a view raises the concern highlighted above under ***Sharing*** of a clash between the respective commercial interests of the owner and operator.

Paragraph 20 of the Code

The Law Commission considers that the alteration regime in paragraph 20 of the Code is essentially fit for purpose. One possible concern with the current paragraph 20 is the extent to which it can be amended by agreement. Paragraph 20 is not specifically mentioned in paragraph 27(2) (which specifies the Code provisions that cannot be excluded by agreement), although paragraph 20(1) does provide that the right to give the notice requiring alterations under

paragraph 20 applies, notwithstanding the terms of any agreement binding the person requiring the alterations. So it would appear that that right cannot be "contracted out", although some of the detail of paragraph 20 may be amended by contract through for example a "lift and shift" provision. Can the parties contract out of the operator's right to serve a counter-notice under paragraph 20 and, ultimately, take the matter to court? The position is unclear and should be clarified.

The Law Commission proposes that it should not be possible for operators and landowners to contract out of the alterations regime in a revised Code. This proposal would deal with the uncertainty point mentioned above, but is it correct that the operator and owner should not be able to agree to disapply whole or part of the Code's regime on alterations for their own transaction or situation? We refer below to the Law Commission's proposal to allow the owner and operator to "contract out" of paragraph 21. If countenanced for that paragraph, why not for paragraph 20? Should the parties have, potentially, to go to Court for an alteration to go ahead? Could a third party (such as a subscriber) require them to go to Court, even if the owner and operator do not wish to? Another view was that there should be no contracting out of the Code, other than in relation to paragraph 21.

Paragraph 21 and interaction with paragraph 20

Paragraph 27(2) in effect provides that paragraph 21 is not without prejudice (i.e. it is with prejudice) to rights or liabilities arising under any agreement to which the operator is a party. That in effect gives operators "security of tenure" in relation to the apparatus, which they have installed at the owner's property.

There is a potentially interesting point on the interaction between paragraphs 20 and 21. As stated previously, there is an argument (on which there is as yet no definitive position) that, in the case of an improvement, paragraph 20 can be used to remove apparatus without needing to go to court. The argument is based on an assumption (which may be incorrect) that the parties can by agreement contract out of the operator's right to serve a counter-notice under paragraph 20 and, ultimately, take the matter to court to try to stop the alteration of the apparatus.

Since "alteration" is defined in paragraph 1(2) to include "removal", it would appear that the Code permits the parties to remove the apparatus pursuant to paragraph 20 without having to go to court (where there is an improvement). However, this undermines paragraph 21, which the Code clearly states cannot be contracted out.

The position is ambiguous, resulting from the existing Code being poorly drafted. Common sense suggests that paragraph 20 applies to a relocation situation and paragraph 21 to a permanent removal, but this is not definitive. Operators may use paragraph 21(12) to argue that an owner is not under paragraph 21 entitled to remove on the ground only that he is entitled to give a notice under paragraph 20. There is some weight in this argument, but paragraph 21(12) could be interpreted to mean simply that an owner cannot use a paragraph 20 ground in a paragraph 21 application, leaving open the possibility of removing the apparatus by a paragraph 20 application as described above (in the case of an improvement). This ambiguity should be resolved in the revised Code. Even if there is provision for contracting out of paragraph 21 of the revised Code

(see paragraph below), this ambiguity should be clarified for where paragraph 21 is not contracted out.

Contracting out of paragraph 21

The Law Commission proposes that the operator and owner can, by agreement, contract out of the "security" provisions of paragraph 21, either absolutely, or on the basis, for example, that there will be no security if the land is required for development. As the Law Commission suggests, if the parties can contract out of paragraph 21, owners may be more willing to have apparatus installed at their properties. We are not convinced about the need to refer to development which over-complicates- would the owner need to prove the land was required for development and, if so, how? The owner may not want there to be security, even if there is no development. Also the owner and operator may well want to know up front whether the agreement is contracted out of paragraph 21, giving them greater certainty. We would prefer absolute contracting out of paragraph 21, akin to that for Part II of the Landlord and Tenant Act 1954. If the operator does not wish to contract out absolutely, then it has the option to use paragraph 5 of the Code.

Compensation under the Code

On the subject of compensation, paragraph 27(3) of the Code provides as follows:

"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."

This indicates that:

- where the operator lawfully exercises its Code rights, the only liability that the operator will have in respect of compensation or loss and damage will be pursuant to the Code, and any provision in a wayleave agreement or other document imposing further liability on the operator in those circumstances will be in breach of the Code;

- where the operator unlawfully exercises its Code rights, the operator is liable not only pursuant to the Code, but also subject to any further contractual liability contained in the agreement.

This Code provision could be useful for operators in warding off aggressive attempts by landlords to impose liabilities in wayleaves going beyond the Code. There is, however a tension between paragraph 27(3) and 27(2) referred to above. The failure to refer to paragraph 27(3) in paragraph 27(2) would suggest that the parties can contractually override the effect of paragraph 27(3). However, in the absence of case authority, the position is not definitive. The revised Code should clarify this issue.

On a different point, the suggestion in paragraph 6.83 of the Paper about re-visiting previous financial awards made under the Code may be perceived as undesirable because of the consequential uncertainty it may create.

As to appropriate compensation methodology, when utilities were non-profit making bodies, the compulsory purchase legislation was arguably an adequate methodology for calculating compensation. However, particularly in relation to electronic communications, the right to install equipment in a particular location may result in considerable profit to the Code operator and further revenue if the right can be shared with or assigned to other operators. The return, which the operator will earn as a result of the new asset, should be factored into the equation.

Forum for adjudication

The suggestions for alternative dispute resolution procedures for valuation issues are to be welcomed as a way of reducing delays and expense.

Standard terms for operator/owner agreement

While the revised Code can facilitate standardisation of agreements between owners and operators and may be beneficial, any use of standard terms should, as the Law Commission suggests, be voluntary for the reasons it highlights.

Interaction with Part II of the Landlord and Tenant Act 1954

The Law Commission rightly highlights the problems relating to the interaction between paragraphs 20 and 21 of the Code on the one hand and Part II of the Landlord and Tenant Act 1954 on the other. Currently, owners will often seek to contract the lease out of sections 24-28 of the 1954 Act to avoid the problems. We, therefore, support the Law Commission's suggestion that, where an operator leases land for the placement and use of electronic communications apparatus, which is protected by the security provisions of the Code, Part II of the 1954 Act should not apply to the lease.

There may be practical difficulties in ascertaining whether the Code applies. It may be, therefore, clearer to provide that Part II of the 1954 Act does not apply to the lease, if the Code applies or there is a statement in the relevant document that the owner and operator consider the Code applies.

Conclusion

In summary, we have found the Paper to be thought-provoking and it makes many sensible suggestions, which should improve the relationships between the property industry and electronic communication operators, and the way landlord and tenant legislation and the Code interact.

Please do let us know if you would like to discuss further any of the points made in this response.

Yours faithfully

Jackie Newstead

Chair, Land Law Committee

THE CITY OF LONDON LAW SOCIETY
LAND LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

Jackie Newstead (Hogan Lovells International LLP) (Chairman)

J. Barnes (Herbert Smith Freehills LLP)

W. Boss (SJ Berwin LLP)

N. Brent (Druces LLP & Clegg Manuel LLP)

J.Brooks (Eversheds LLP)

J. Chapman (Ashurst LLP)

J. Crookes (Pinsent Masons LLP)

M. Edwards (Clifford Chance LLP)

Ms J. Elkins (Field Fisher Waterhouse LLP)

M.J.H. Elliott (Linklaters LLP)

Alderman Alison Gowman (DLA Piper UK LLP)

L. Heller (Berwin Leighton Paisner LLP)

C. Horsfield (Macfarlanes LLP)

N.D.E. Jones (Simmons & Simmons LLP)

A. Judge (Travers Smith LLP)

P. Karia (CMS Cameron McKenna LLP)

Ms E. Kendall (Freshfields Bruckhaus Deringer LLP)

D. McKimm (Allen & Overy LLP)

J.Nevin (Slaughter and May)

J.R. Pike (Reed Smith LLP)

Ms J.A. Shellard (Addleshaw Goddard LLP)

P. Taylor (Norton Rose LLP)

N. Vergette (Nabarro LLP)

W. Gordon (Olswang LLP) (Secretary)

Consultation response 38 of 130

E-mail Message

From:	sue marriott [redacted]
To:	LAWCOM Property and Trust [redacted]
Cc:	
Sent:	22/10/2012 at 14:05
Received:	22/10/2012 at 14:05
Subject:	Electrical Communications Code

Dear Sir

We believe it unacceptable to offer landowners the barest of compensation for placing mast sites on their land. Often masts are situated in places which make cultivation difficult and swathes of land becomes agriculturally useless.

There is no reason to change the present arrangement which encourages landowners to welcome masts on their land. Derisory payments would negate this welcome and compulsory purchases are time consuming and breed ill feeling.

It is our belief that the mobile telecommunications firms are well able to pay a proper price for the right to enter and use private land to further their businesses.

Yours faithfully

Susan Marriott
[redacted]

Consultation response 39 of 130

E-mail Message

From:	Henry Aubrey-Fletcher [redacted]
To:	LAWCOM Property and Trust [redacted]
Cc:	
Sent:	22/10/2012 at 14:14
Received:	22/10/2012 at 14:14
Subject:	Electronic Communication Code Consultation - Attn:- James Linney

Dear Mr Linney

I am wring briefly in response to the above.

I am a director of Chilton Home Farms Ltd, Chilton House Ltd and Chilton Business Centre Ltd in Buckinghamshire. We are very dependent on mobile communications both for ourselves and our tenants. We currently host three mobile telephone masts on our land holdings. We have had no insurmountable issues when negotiating with site operators.

The questions you ask are fairly technical in nature so my response is generalised.

There is considerable potential for damage contained in the general proposal to tighten up codes relating to telecoms equipment being installed in rural areas. Rents have already reduced due to pressure on consumer pricing, any code changes that led to further reduction in rents to site owners or increase in costs, especially professional fees, would make some of us decide not to accommodate masts and other equipment on our land.

Whilst landowners value the services that these masts provide, there is a limit to the inconvenience acceptable that inevitably results from their installation and maintenance without adequate compensation.

In our view open market competition should continue to be the norm for negotiating sites with as little regulation as possible. Codes should stick to definitions, H&S and technical standards; we see no reason for further constraints to be placed on either party.

Kind regards.

Henry Aubrey-Fletcher

[redacted]

Director

PS. I would welcome acknowledgment and evidence of consideration of this consultation response.