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Babcock Group

Telecoms Code Consultation Paper

Points of Response

Introduction

A On 28 June 2012 the Law Commission published its Consultation Paper on the Electronic Communications Code (**the Code**). The Consultation will close on 28 October 2012.

B The Code provides for Telecoms Operators who are granted rights under the Code to install and keep upon any land telecommunications apparatus.

C It is widely recognised that the Code as currently drafted provides difficulties of interpretation and practical implementation. It was drafted at a time when the state of the communications market both from a technological and competitive view point were very different. Given the importance of telecommunications systems both now and in the future to the functioning of our society, a more coherent and efficient Code that balances the interests of Landowners, Code operators and the general public would seem to be of general benefit.

D The Law Commission's Consultation Paper is a thorough examination of the workings of the Code and invites consultees to provide submissions by 28 October 2012.

E Babcock as a substantial Landowner has two principal concerns with how the Code currently operates:

a The concern that if Code operators are granted rights over Babcock's land (eg by Lease or Licence) the Code will nullify or modify the contractual rights so agreed. This can lead to a reluctance to allow Code operators voluntarily to install equipment on Babcock land, and

b Operators who already have apparatus installed on Babcock land (particularly within the context of the old VT business) will be difficult to remove once their contractual rights have expired because the operators will claim Code Rights. This may have ramifications for the clearing of sites in readiness for sale or other development.

F Babcock as a partner working with Telecoms operators also has concerns that the Code in its current form does not facilitate the ability of operators to access land easily enough.

G Although these two aspects of Babcock's business do, to an extent, approach the Code with differing imperatives, nonetheless it is in Babcock's interest as a whole for the Code to provide more certainty as to the inter relationship between Landowners and operators than it currently does.

H The points set out below are eight aspects of the Code and the Consultation Paper on which Babcock wishes to respond to the Consultation Paper.

Code Consultation Paper: Relevant issues and response

1 Definition of "electronic communications apparatus" in the Code (para 3.27)

1.1 The existing definition of electronic communications apparatus is deliberately wide and vague. The Consultation Paper points out that such is necessary for the Code to be able to cover the advances of technology and changing technologies. Under European legislation, there is a requirement for legislation to remain technologically neutral so as not to favour any particular emerging technology. This is not a view point that Babcock seeks to dispute.

1.2 The issue does arise, however, concerning ancillary equipment eg electricity generators, plinths and fencing.

1.3 The Paper suggests that the Code should not adopt any definition of ancillary apparatus. Babcock disagrees with this, as in practice it is desirable to know the extent to which equipment on the ground may or may not be caught by the Code. The rationale for keeping the principal definition vague (advances in technology etc) does not necessarily hold good with the demarcation between the primary and ancillary equipment. Without this clarity, what should be a simple operation on the ground – eg the alteration of some fencing – may take a wholly disproportionate amount of

time costs and effort to achieve merely for fear of contravening a part of the Code that may not even apply to the fencing in question.

2 Test for dispensing with Landowners' consent. (para 3.53)

2.1 If an operator is forced to use the Code to gain access to a Landowner's land against the Landowner's wishes (or indeed to stay on such land upon expiry of a particular Lease/Licence) then the ultimate test applied by the Court involves assessing a balance between prejudice to the Landowner, and consideration of all the circumstances and the principle that no person should unreasonably be denied access to an Electronic Communications network (the Access Principle).

2.2 This test, in practice, is very difficult to apply. Indeed, quite how it might be applied gives rise to considerable uncertainty which in turn practically prevents both Landowners and operators from using the Code in practice.

2.3 Babcock therefore supports the Law Commission in its suggestion that any test should be "clear and readily understood". Babcock says that the "Access Principle" is very difficult (if not impossible) to apply in practice and a replacement test balancing prejudice to the Landowner against public benefit is needed, being a test which is capable of being operated in practice The fact that it may be possible to compensate the Landowner in money should not be an overriding criterion for the grant of Code rights, but merely a factor in assessing this balance.

3 Operators' Rights to upgrade equipment and share/assign benefit of Leases etc, and consequential rent adjustments (paras 3.78, 3.83, 3.92)

3.1 Historically, Lease and Licence Agreements drafted by Landowners have not been tightly enough worded to provide an effective fetter on an operator's right to upgrade, share or assign its apparatus. This has led to operators in practice taking advantage of some Landowners by maximising the utilisation of the apparatus (eg by upgrading and/or sharing with other operators) with no commensurate increase in the consideration/rent payable to the Landowner.

3.2 Landowners increasingly have become aware of this and, typically, agreements now drafted contain far more restrictions on the activities of Code operators than was the case many years ago. These restrictions are legally binding and the Code currently does not allow them to be overridden by the operators.

3.3 Accordingly, the Consultation Paper suggests that Code operators should have the right (whatever is contained in the relevant land agreement) to upgrade/share/assign, possibly with a commensurate rental increase.

3.4 Babcock's principle concern with this is preventing another Code operator from getting access to its land such that there may be two sets of Code Rights to be dealt with. Furthermore, if the existing Lease/Licence purported to modify the existing Code operator's Code Rights (insofar as that may be legally possible) it is unclear whether such modification would apply to any third party operator who was permitted (by the Code or otherwise) to share the existing equipment.

3.5 Babcock's position is, therefore, that any contractual provisions freely agreed between the parties should not be capable of being overridden by new provisions in the Code. If, however, the Commission disagrees with this, any upgrading/sharing of equipment should be on the basis that:

3.5.1 The third party operator does not obtain any Code Rights, or

3.5.2 Such Code Rights as it obtains are subject to the same modifications as that operator who is the original party to the Lease/Licence.

3.6 Of subsidiary concern to Babcock is the consideration payable under the Lease/Licence in circumstances where upgrading/sharing has become possible or permitted. Certain Landowners have perceived an injustice where Code operators have been able to maximise utilisation of the apparatus through upgrading/sharing without payment of an adjusted consideration for such expanded rights.

3.7 Babcock's position is that if the Code is varied to allow such expanded rights even in circumstances where the relevant Lease/Licence prohibits them, then the Landowners should be compensated by an appropriate uplift in the rent/fees payable. The precise methodology of quantification of that uplift would come within the whole issue of consideration for obtaining Code Rights as appears below

Bond Pearce

3.8 However, Babcock does have considerable doubt as to whether, in practice, there will be readily available (from the operator or otherwise) sufficient information and background data about the sharing/upgrade (and the possible financial consequences of it) to make an assessment of the revised consideration payable easily ascertainable. As a consequence, Babcock sees the impracticality of assessing revised compensation as a factor against allowing operators to use the Code to override existing contractual rights in respect of sharing/assigning/upgrading.

4 Alteration and removal of equipment: Revised procedure, and security (paras 5.49 and 5.50)

4.1 Landowners generally (and Babcock is no exception to this) face considerable difficulties in removing Code operators once the relevant Lease/Licence has expired (assuming there is no extra security under the Landlord and Tenant Act 1954 – see below). The procedure for removing operators prescribed in paragraphs 20 and (particularly) 21 of the Code appears flawed in practice because:

4.1.1 Once the paragraph 21 Notice and Counter Notice procedure has been gone through, in practice the parties most often do nothing and there is a stalemate. This is notwithstanding the fact that in any paragraph 21 counternotice, an operator should set out steps it intends to take to secure relevant Code rights to stay, and thereafter should not be dilatory in taking such steps. There is no clear Court process whereby issues surrounding removal/security can be resolved.

4.1.2 This stalemate is probably brought about to a large degree because the parties are unclear as to how, precisely, any Court Application would resolve itself, and how the relevant tests would be applied by the Court in practice (see paragraph 1 above). A theoretical procedure that is not applied in practice because it is too uncertain must be an inadequate procedure.

4.2 Babcock submits that the procedure for removal of equipment needs to be more detailed, with the onus on the operator to take positive steps to resolve security positions one way or another or lose those Rights. Clarity of both procedure and criteria for resolving issues will in fact be in the interest of both Landowners and operators.

4.3 Babcock also submits that the Code needs to be clearer as to the precise basis upon which Code operators are permitted to resist the removal of their equipment and therefore stay in occupation of the relevant land. Is this interim period some form of extension of the expired arrangement on the same terms (including those as to consideration and other covenants) or is it simply a status of irremovability where no consideration is payable, but no other lease terms apply? Are there any implied terms that should bind the landowner (eg an obligation to continue to facilitate a supply of electricity) or the Code operator (eg to keep the apparatus or the site in repair)?

5 Compensation/consideration: Methodology of Assessment (paras 6.73 and 6.74)

5.1 The Consultation Paper notes that the Code currently lacks clarity as to the basis of valuation. The Consultation Paper is set firmly against an allowance for profit share , and also excludes a "market value" because of the lack of comparable evidence. Babcock does consider though that although much comparable evidence may be in the hands of operators alone, nonetheless there is sufficient comparable evidence in the market for an assessment of consideration based on comparable evidence to be practically possible. This is contrary to views apparently already expressed to the Law Commission by other valuers, as detailed at para 6.49 and 6.63 of the Paper.

5.2 The Consultation Paper therefore favours what is in effect the methodology adopted in the field of compulsory purchases under the Land Compensation Act, namely a valuation based on the value of the right and land to be affected, discounting its value to the operator within the context of the operator's network and business. This, the paper concludes, would strike a fair balance between Landowners and operators.

5.3 Such a methodology is, of course, likely to produce low figures by way of consideration. Babcock submits that this therefore produces an inappropriate result (given the likely importance to the Operator of the rights) and that consideration should be based on market value. Whilst falling shy of a profit share methodology of assessment, nonetheless such a methodology does reflect to an extent the value to the Operator of the right being imposed on the Landowner. As such, Babcock does not agree with the conclusion reached by the Law Commission(that consideration should be assessed by reference to compulsory purchase principles, where the value of the right to the grantee is not taken into account). . It is not to be overlooked that the operators' main aim is not

Bond Pearce

to provide a public service for the benefit of the public as a whole, but rather to make a profit for their shareholders in so doing. Whilst it might be appropriate for a company simply motivated by the public benefit not to have to pay consideration assessed by reference to the value to it of the rights to be conferred, for a private company motivated by profit, not paying full value for rights imposed on Landowners might be seen as the Landowners subsiding the ability of the operators to make a profit. The fact that a public benefit may be conferred by the grant of Code rights, is, as between Landowner and Operator, in reality a tangential issue , given the operators' primary concern with profitability, not delivering a public benefit, and operators should not be allowed to pray public benefit in aid of a methodology which would enable them to obtain valuable rights at a disproportionately low price in pursuit of profit.

6 Forum for resolution of disputes (7.26 and 7.27)

6.1 The Code currently provides for disputes principally to be referred to the County Court, with some issues being referred to the Lands Chamber (the old Lands Tribunal) or arbitration.

6.2 Babcock supports the Consultation Paper's conclusion that the County Court is ill equipped to deal with Code issues.

6.3 Babcock supports the Consultation Paper's proposal that the Lands Chamber should be given express jurisdiction to hear Code issues (both issues of law and valuation). The Lands Chamber will have the appropriate expertise (or be able to draw on that expertise from Judges with appropriate Real Estate experience) and should (subject to adequate resourcing) be an ideal forum for disputes to be resolved.

6.4 There should be a set procedure (ie specific rules or a practice direction) for referring issues to the Lands Chamber which would assist with determining issues relating to security as highlighted at point 4 above.

7 Interaction with Landlord and Tenant Act 1954 (para 8.22)

7.1 The Consultation Paper notes that the Code and the 1954 Act do not fit well together. Indeed, in practice, it is virtually impossible to work out how the two regimes are meant to work together, and in practice any advisor would seek to contract out of the 1954 Act thereby avoiding these problems arising at all.

7.2 Babcock unequivocally supports the Consultation Paper's position that the 1954 Act should not apply to Leases/Licences involving the siting of electronic communications apparatus (and indeed ancillary equipment).

8 Contracting out of the Code. (para 5.51)

8.1 There are currently no express provisions allowing parties to contract out of the Code. Many agreements currently purport to contract out of the Code or alternatively impose a penalty on the operator of a set sum in the event that the operator invokes Code Rights. The legal efficacy of these devices is uncertain, although it is generally felt that they would be void.

8.2 The Consultation Paper therefore proposes that parties should be free to contract out of the Code if they so wish. This would provide certainty to Landowners that they could recover possession of their land at the expiry of the relevant Lease/Licence, and might also benefit Code operators who would be able to persuade Landowners more easily to allow them to site masts on the basis that there will be certainty that no Code Rights would apply.

8.3 Babcock supports these recommendations because the ability to contract out of the Code provides certainty, which in turn facilitates land agreements taking place. Babcock would be far more comfortable granting agreements to operators (thereby facilitating the siting of apparatus more easily) were there certainty (by way of contracting out) that the apparatus would be removed once the contractual arrangement came to an end.

8.4 The efficacy of such a contracting out procedure is amply demonstrated by the working of the Landlord and Tenant Act 1954, which also seems to illustrate that fears of operators that contracting out would become a default position are ill-founded, given the number of 1954 Act leases that are granted. Further, any streamlined ability of a landowner to regain possession of sites pursuant to a revised code will mean that granting a code-protected lease need not be such a concern for landowners as it is now, such that contracting out of the Code would not become a default position.

8.5 Contracting out provisions should not be limited simply to where the landowner wishes to redevelop, but should be of general application (as with the 1954 Act). Often a landowner may wish for the apparatus to be removed for other valid reasons eg to sell with vacant possession, and limiting the efficacy of contracting out to redevelopment scenarios would curb the

Bond Pearce

effectiveness of contracting out as a method of enabling transactions to be freely and quickly completed for the siting of apparatus.

8.6 The Code would need to make it clear that if the provisions of the Code were contracted out, there could be no possibility of the operator claiming, as a long stop, 1954 Act Rights, so that any arrangement entered into by the parties would be truly unprotected and regulated solely by the agreement drawn up between the parties.

Conclusion

Babcock submits as a concluding remark that the key objective of the Code's reform should be to produce a regime that provides a workable framework within which Landowners and operators can function.

The existing Code fails in this respect for a number of reasons including:

- Its incompatibility with established property principles and legislation, particularly Landlord and Tenant Act 1954.
- Obscurities and inconsistencies of drafting.
- Difficulties of interpretation, including application of the key test, and the Access Principle.
- The fact that, in practice, the Code and its procedures are rarely used, so are clearly not of practical benefit to parties affected.

22 October 2012

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

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

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

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

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

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

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

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

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

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

Tel: 020 3334 0200 / Fax: 020 3334 0201

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

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

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

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

Your details

Name: Tony Harris LLM FRICS FCIArb

Email address:

Postal address:

Telephone number:

Are you responding on behalf of a firm, association or other organisation?
If so, please give its name (and address, if not the same as above):

No

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.

Operators should have the right to upgrade equipment and share with other operators provided the site is not materially altered. In other words if the change does not make a detrimental change in the appearance or intensity of physical use of the site the operator should not have to seek to consent or pay extra.

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.
To behave properly to land owners by not creating a nuisance, giving notice of visits etc perhaps the requirements could be set out in a code of practice which can be updated as necessary more easily than the code. Other requirements should be to maintain the site properly and insure public liability risks.	

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.
In my view the definition should be wide and perhaps should be capable of being added to if needed by OFCOM. Any list would be out of date before it is produced. The Code should protect ancillary matters reasonably necessary for the operation of the Code protected site so that there is no ability to obstruct use of the site by interfering with ancillary matters eg access electricity etc.	

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.
If Code rights are to exist on land and run with the land then superior interests to the current occupier should be given notice of the proposal and the right to make representations to any Tribunal. The alternative is that the Code rights only exist for the duration of the occupiers interest and need to be regranted on the termination of that interest which would be very cumbersome particularly where the equipment cannot be readily relocated or the occupational interest is short or approaching the reversion.	

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
2) Yes
3) the threshold should be high eg there is no other way of providing the service and the public benefit requires it to be provided in other words it should not be just because it is the easiest or cheapest way

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.

Only provided that notice has been given to the superior interest(s) and their agreement obtained or a Tribunal order has been made. It should also be listed on the appropriate land register

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.

If power is sought to fly a line then owners affected should be given notice and consulted and have the right to be heard at Tribunal

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.

1) yes
2) yes
3) yes otherwise the use of a site could be impaired by a malicious or just thoughtless owner

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 as it can be a contentious area 2) no unless there is a material change in the nature of the site. Altering and materially changing a site should trigger a review of consideration.

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. Network consolidation is a huge problem area and fertile ground for dispute 2) yes 3) yes. It resolves the question whether the code right is for the equipment, the right to receive or transmit or both which is probably the right answer. The default could be a payment of a percentage of the base rent but it is perhaps best left to the market which is already going that way

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.
If the rights discussed in the previous section are included this will not be necessary

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) yes as it interferes with corporate rearrangements or network consolidation without any change in the physical equipment
2) yes but subject to consent not to be unreasonably withheld and with an authorised guarantee agreement if one is reasonably required. Any dispute to go to the Tribunal.
3) No this is contrary to normal Landlord and Tenant principles

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

Consultation Paper, Part 3, paragraph 3.94.

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

Consultation Paper, Part 3, paragraph 3.100.

10.21	Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.
Yes. This could be useful but the application must be made as part of a single scheme and the whole scheme considered by a Tribunal if terms are not agreed	

10.22	Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.

10.23	We ask consultees: (1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers; (2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and (3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights. Consultation Paper, Part 3, paragraph 3.106.

10.24 We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator. Consultation Paper, Part 3, paragraph 3.107.
Owners should have a right to go to the Tribunal to enforce any obligations owed in case of default. Costs should follow the event to reduce any likelihood of abuse

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

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

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.11.

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

Consultation Paper, Part 4, paragraph 4.20.

10.27 We seek consultees' views on the following questions.

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

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

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

Consultation Paper, Part 4, paragraph 4.21.

10.28 We ask consultees:

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

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

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

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

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

Consultation Paper, Part 4, paragraph 4.30.

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

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.34.

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

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.40.

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

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk.

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.11.

Yes but the time for an operator to comply must reflect the time it will realistically take to relocate the equipment. The tribunal should have the power to vary the time provided an application is made promptly. Consideration needs to be given to compensation in the manner of the Landlord and Tenant Act where a lease is not renewed for redevelopment

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

Consultation Paper, Part 5, paragraph 5.12.

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

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.13.

Yes. A properly constituted tribunal should be able to deal with any problems swiftly

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 but a balance needs to be struck so as not to prevent legitimate 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 should be the competent landowner who takes steps but the threshold for consent should not be set too high and should reflect the reasonable time to relocate the equipment. Perhaps 2 years notice and in case of dispute the threshold is a reasonable possibility of carrying out the scheme such as for insertion of a break clause under the Landlord and Tenant act rather than a fixed and settled intent required to terminate a lease. Compensation should be set perhaps as a multiplier of Rateable value

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.

Rent should continue to be payable to compensate the landowner and give the operator an incentive to remove the equipment

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.

Only if the land is required for future development or some other good reason but either party at liberty to apply to the Tribunal to vary the provision after say 5 years

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 for simplicity	

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.

In looking at the question of payment it seems to me there is a difference between installation of underground cables and ducting on the one hand and aerial cable and transmitter masts on the other. The former are likely to be permanent whereas the latter may not be and are more likely to be altered and to require regular access for maintenance and upgrading. A single payment in the former case is likely to be better due to the small sums likely to be involved in most cases but a periodic payment should be possible for the latter.

The danger of making payments too low is that no one will voluntarily agree to have equipment on their land thereby creating a large number of disputes which don't happen at present.

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

Consultation Paper, Part 6, paragraph 6.36.

This problem is avoided by periodic payments which go to the person entitled to the payment at the time. If a single payment is made it should involve the superior interests and the single payment shared appropriately as in compulsory purchase

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 question implies that the possibility of a periodic rental payment has been ruled out. It is an appropriate basis for a single payment for a wayleave for example but is more arguable for a rental type payment.

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.
Yes the diminution in value is capable of being assessed.	

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 problem is avoided by having a regime of payments periodically while the installation remains with regular reviews and also triggered by such an alteration to the new appropriate figure	

TOWARDS A BETTER PROCEDURE

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

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.26.

yes

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.

My involvement in the sector is as an expert witness, arbitrator and member of the Valuation Tribunal for England.

At the consultation to Charles Russell on 1st October the need for an appropriate forum for adjudication was identified.

It was also clear that no existing Tribunal or Court was considered satisfactory due to cost, delay or lack of expertise or more than one of these.

Valuation disputes were considered appropriate for arbitration but there was unease over the granting of rights over another's property in arbitration as it is a private forum and decisions are not easily reviewable and I say this as an arbitrator of many years standing. It might also raise Human Rights issues. Arbitration is better suited to disputes with an existing set up rather than the creation of Code Rights. A Tribunal might also be better at dealing with removal of equipment.

A concern with arbitration is the perceived lack of independence by some parties of some potential appointees with appropriate sector knowledge as valuers act exclusively for either operators or landowners with no crossover with a consequent unconscious bias possibly arising.

In my view there is no existing first tier Tribunal suitable due to lack of resources and expertise. Neither the Residential Property Tribunal (LVT and Rent Assessment Committee) nor the Valuation Tribunal for England (VTE) have enough expertise and both struggle to cope with existing workloads. Neither is sufficiently responsive.

The County Court was seen as too slow, too expensive and lacking the necessary expertise in general.

Some participants doubted the Upper Tribunal Lands Chamber had sufficient resources and some doubted its expertise, surveyors were more in favour of it than lawyers perhaps as it has surveyor members in addition to legal members. Lawyers thought it could be slow. Some lawyers suggested the TCC as having appropriate expertise and better procedures. It is still expensive and does not normally deal in valuation issues.

I would suggest that before any dispute resolution mechanism is engaged there needs to be a provable attempt to negotiate a solution and DR should be regarded as a last resort. It needs to fit into any notice provisions. ADR should be encouraged first.

A new public dispute resolver should be able to draw on legal, valuation and technical expertise and therefore may fit better in the more flexible tribunal structure than in the more formal Court Structure.

A possible structure would be a new first tier tribunal sitting in the property chamber. In the first instance a small administrative staff would be needed, possibly co-located with another Tribunal with a Judicial body composed of legal, valuation and possibly engineering specialists having the flexibility to sit as a sole member or as a panel as necessary. It would need a good registrar and wide case management powers to proceed proportionately. It would be possible to set down timetables for proceedings. Judicial members may not need to be full time and if a sufficient pool is maintained it should be possible to proceed without delay. Transfer of appropriate cases direct to an appropriate Judge member of the Upper Tribunal eg TCC, Lands Chamber, Chancery Division should be possible with permission of the president.

Appeals could be to the Lands Chamber or if the point is a sufficiently important legal issue direct to a Higher Court with the permission of the Lands Chamber President.

Another possibility would be a new jurisdiction and additional members within the existing Lands Chamber.

It could be funded at least in part by charges to users eg if code powers are sought over land the operator pays or if removal of a site is needed for development the developer pays and in part by a levy on the industry.

As a new approach is needed this points to a new Tribunal with fresh thinking on process.

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

yes

10.51	We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.

The Party Wall Act process of serving notice with a time limit for acceptance or a deemed dispute arises could be useful but I doubt that 14 days is sufficient to allow the landowner to obtain advice. Perhaps the formal notice could be second stage and if an operator goes straight to it without trying to negotiate first then there could be a costs penalty or penalty payment

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

Both have their uses. The first would be more appropriate where an operator seeks opposed rights over land and the latter where a dispute arises over removal of equipment

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.
Yes as some are effectively a form of compulsory purchase and some more akin to private disputes and a flexible costs regime makes parties consider their conduct	

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 but try to use existing rules for service etc where possible for simplicity	

10.55	Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? Consultation Paper, Part 7, paragraph 7.53.

10.56 Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.
If the occupier is not the owner then the owner should be given notice and allowed to participate. Occupiers should be required to provide details of the superior interest and so on up the chain.

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.
It sounds good in theory but in practice there are not many standard sites. Model terms need to be able to be updated. It would be difficult to find representative bodies for all sides. However if what emerges is a form of permanent lease with rental payments rather than a single wayleave type agreement then some standard terms will be necessary perhaps capable of modification under the supervision of OFT

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 but it must be clear what happens at the end of a Code lease and how it is to continue or be terminated. It could just continue until terminated under the Code at a current rent reviewed say every 5 years or on a material change

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

Do consultees agree?

Consultation Paper, Part 8, paragraph 8.33.

yes

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us: (1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon; (2) what impact regulation 16 has on Code Operators and on Ofcom; (3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and (4) if the answer to (3) is yes, what form should it take? Consultation Paper, Part 9, paragraph 9.14.

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.

42

Glasgow Housing Association
www.gha.org.uk

James Linney
Law Commission
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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 GLASGOW HOUSING ASSOCIATION

Please accept this as an individual response to the above consultation on behalf of Glasgow Housing Association (GHA).

GHA is one of the largest social landlords in the UK, with more than 45,000 tenants and 26,500 factored homeowners across Glasgow. We also play a key role in the regeneration of Glasgow alongside our partners such as Glasgow City Council and the Scottish Government.

Since stock transfer from the city council in 2003, we have invested more than £1billion in modernising and improving tenants' homes across the city. We are building brand new homes across the city. Phase 2 of our new-build programme is well under way and will see 411 new homes built at nine sites across Glasgow. The first phase saw 259 homes built in the north of the city.

We are firmly focused on helping Glasgow residents lead better, happier and healthier lives.

GHA owns numerous highrise housing blocks across Glasgow. Many blocks generate substantial income from communications installed apparatus on their rooftops. These have licenses and leases to mobile phone network operators, community radio stations, taxi operators, broadcasters (including BBC and independent local radio) and other public and private sector organisations. Some of the licensees benefit from statutory powers under the Code. Some of them do not.

This important income stream partly supports the maintenance and management of the high rise blocks. As assets in their own right, the leases and licences have a value of several million pounds.

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, masts, towers 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 GHA) rely on this evidence to agree market values.

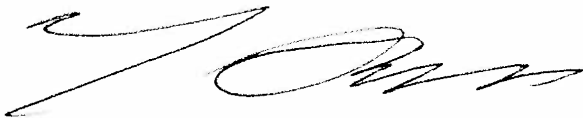
If the Commission's proposal to replace market value consideration from Code Operators' licences with compulsory purchase style compensation is allowed to go ahead, it will virtually destroy the income receivable from our infrastructure properties. This will vastly reduce their capital values as well. The change will distort the market place in favour of code operators. Smaller organisations which do not benefit from code rights will be at a disadvantage by having to pay commercial rates.

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 no doubt the existence of a commercial market for wireless communications base station lettings and licenses has assisted with the development of communications networks in Glasgow. If operators were only obliged to pay compensation based sums for installing apparatus on our land and buildings it is quite 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



Mark Sinclair BLE(Hons) MRICS
Property & Facilities Manager, Glasgow Housing Association

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Electronic Communications Code
Response to Law Commission on the Consultation

23rd October 2012

Proposed changes to the Electronic Communications Code described in the Consultation Document appear mainly designed to reduce long established income of small businesses and in particular rural ones, in order to increase the profits of the telecommunications industry. The rural economy is fragile whereas the telecommunications industry is not.

It is wrong to penalise individuals and small businesses in order to transfer power and profit to the vast telecommunications industry and to hide these dishonest actions behind the cloak of state controlled so called public benefit. Historically, reductions in outgoings of large companies are seldom passed on the consumer but turn into increased company profits. It is also inappropriate for the Government to seek to interfere in the contractual arrangements between two parties whether individuals or commercial. A free market for these services should apply and alternative prices and sites can always be sought.

This smacks of the telecommunications industry trying to fix rentals at a lower than the market rate, otherwise known as a cartel. The Law Commission must take care not allow itself to be a pawn of the telecommunications industry.

Mrs Caroline Tayler

23rd October 2012

J. Linney Esq.
Law Commission
Steel House
11, Tothill Street
London SW1H 9LJ

Dear Mr. Linney

Re;- Response to Law Commission Consultation Paper No 205 on the Electronic Communications Code

My objections to the above have been sent in to you by my agents.

I would, however, ask for consideration of the tax implications of the proposals. Currently the Exchequer will be receiving many millions of pounds annually as a result of the taxation category applied to most mast sites as Unearned Income gained by private individuals.

Whilst I understand a 'one off' payment will be offered by the Telecommunications Industry to change the current position, the amount of tax that will flow into the Exchequer in the future will virtually cease as Private Landlords lose their payments and thus will have no tax liability and the large companies use evasive tax measures to ensure low levels of Corporate Tax are paid.

At this time in history when our Nation needs all the financial support it can gain from its populace, the proposals do not appear to represent a change that would be in the public interest.

I would request detailed consideration of the above in your deliberations.

Yours sincerely,

Charles Pitcher

Bar Council response to the Electronic Communications Code consultation paper

1. The General Council of the Bar of England and Wales (the Bar Council) welcomes the opportunity to respond to The Law Commission consultation paper entitled The Electronic Communications Code.[1]

2. The Bar Council is the governing body and the Approved Regulator for all barristers in England and Wales. It represents and, through the independent Bar Standards Board (BSB), regulates over 15,000 barristers in self-employed and employed practice. Its principal objectives are to ensure access to justice on terms that are fair to the public and practitioners; to represent the Bar as a modern and forward-looking profession which seeks to maintain and improve the quality and standard of high quality specialist advocacy and advisory services to all clients, based upon the highest standards of ethics, equality and diversity; and to work for the efficient and cost-effective administration of justice.

Overview

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. We would also suggest that these rights should be clearly and explicitly set out. The current drafting is very unclear, notably in paragraph 20 where 'alteration' is allowed in order to create 'improvement', defined there to include redevelopment, notwithstanding that in paragraph 1 'alteration' is defined to include removal.

[1] [Law Commission] [(2012)] [The Electronic Communications Code]

10.4	Do consultees consider that code rights should be extended to include further rights, or that the scope of code rights should be reduced? Consultation Paper, Part 3, paragraph 3.17.
We see no need for either the extension or the reduction of code rights, though we do consider that there should be greater clarity and simplicity in relation to the termination of code rights, in order to avoid unnecessary interruption to or delay in the exercise of the rights of landowners. We say more about this in our answer to question 10.8.	

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.
Yes, where those rights are imposed. We consider that where parties agree to accept code rights, they should be equally entitled to agree the obligations to be imposed on a Code Operator. Where rights are imposed, we consider that the obligations should include some provision for: a) Positioning apparatus as unobtrusively as possible; b) Maintaining apparatus in good repair and condition; c) Restricting access to cases of emergency or where a reasonable period of notice has been given; d) Restricting assignment except to another Code Operator; e) Removal of the apparatus at the termination of the rights or agreement; f) To repair damage caused as a result of the installation, use and maintenance of the apparatus, and to indemnify the landowner against damage caused to the landowner or to third parties to whom it may become liable as a result of the same.	

10.7 We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it? Consultation Paper, Part 3, paragraph 3.27.
No. We agree that a broad definition is necessary, but are of the view that the current definition achieves its intended purpose.

10.8 We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.
We consider that it is correct for the consultation paper to suggest that, as a matter of practicality, it is necessary that Code Operators should deal with occupiers of land in order to create code rights. We do not, though, accept that third parties should be bound by those rights without having given their consent to the same. We also consider that Code Operators should be obliged to remove their apparatus at the end of the interest of the occupier who granted rights to them, unless they have acquired either the agreement of the owner of the superior interest to retain the apparatus, or have obtained a court order entitling them to retain it, bearing in mind that such an order could be obtained as an interim measure whilst court proceedings were ongoing. Contrary to the analysis in the consultation paper, our understanding is that in the ordinary case the occupier who agrees to the imposition of Code rights is not the end user of the apparatus installed, but interested only in the monies payable in return for the grant of those rights. This is particularly the case among tenants who, again contrary to the analysis in the paper, are often hardly inconvenienced at all when apparatus is installed on a roof or in an unused area. It is the freeholder whose interest is then most seriously affected when the lease is terminated and he finds that he is subject to adverse rights to which he did not consent which limit his use of the property. We consider that that is difficult to justify, and that, instead, the onus should be on the Code Operator to plan ahead where they have made agreements with parties having only a limited interest in the land affected.

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. The fact that the value of land is diminished by the installation of apparatus may be compensated by compensation, but there may be other important factors which are of concern to a landowner but cannot meaningfully be reflected in the assessment of that compensation, particularly where those factors are subjective, such as concerns relating to privacy, health, and appearance. It is appropriate to perform a balancing exercise between these factors and the public benefit.

2. It is possible to imagine circumstances where, absent such compulsion, electronic communications to particular areas could be limited. However, the paper emphasises that the 'Access Principle' is not stated to be 'overriding' and should not be labelled as such. Its phrasing also imports an element of 'reasonableness'. Whether or not a landowner should be made subject to rights where they cannot be compensated is really a question of whether this principle is of such importance that that degree of expropriation can be justified, which is a question of policy rather than drafting. We are not attracted to such a suggestion, however, absent evidence that there is a serious and fundamental problem which it would address.

3. Again, this question is really one of policy. We consider that the current drafting is acceptable, but if it is to be changed, the balance between these competing factors is a question of how important it really is to provide access to electronic communications to the public, where to do so is prejudicial to landowners. That is a policy matter on which we prefer not to comment. However, we do think it is important that those making policy should ask themselves the right question.

10.10	We ask consultees to tell us if there is a need for a revised code to provide that where an occupier agrees in writing for access to his or her land to be interfered with or obstructed, that permission should bind others with an interest in that land. Consultation Paper, Part 3, paragraph 3.59.
As per our answer to question 10.8, we do not consider that it is appropriate for third parties to be bound by rights voluntarily surrendered by an occupier of land.	

10.11	We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused. Consultation Paper, Part 3, paragraph 3.67.
We are not aware of any problems having arisen.	

10.12	Consultees are asked to tell us their views about the right to object to overhead apparatus. Consultation Paper, Part 3, paragraph 3.68.
We restrict ourselves to some related observations. We question whether the three month time limit for objection is sufficient. It is certainly conceivable – although we have no evidence to offer on this – that an affected owner or occupier might not become aware of the right to object, or of any concerns or consequences which might lead him to wish to object, either within that period or sufficiently early within that period to have a proper opportunity to consider (and/or take legal advice on) his position. The risk must be greater in relation to those who are not in occupation (e.g. a mortgagee or a landlord). This may be compounded by any failure by the operator to put up the required notice, or any failure by the owner or occupier to see that notice, within (or early enough during) that three month period. We note that there is no scope for that period to be extended. The potential effect of a failure to put up such a notice at the outset might be cured by our observation in answer to the next question; but that would not deal with our other observations, or with the position of an adjoining owner or occupier. On the other side, if the apparatus is already in place, then there is likely to be little, if any, additional prejudice to the operator from allowing an extended period for objections. The position of an affected owner or occupier (including the owner or occupier of any land within a defined distance of the apparatus) might be assisted by a procedure for prior notification. Any concerns as to its impact on an operator's network in the meantime could be catered for by enabling an operator to acquire and necessary rights, or to install apparatus for which it does not need further rights, in the meantime: see para.6 (2) of the Code, and question 10.50 and our response to it. Owners could be notified relatively easily, where the	

land is registered: notification to occupiers might have to be restricted to a right (and duty) to affix or erect a notice in a prominent position on the land itself.

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.

The obligation may be of some benefit, but it might be more useful (either instead, or in addition) to stipulate that the time for objections should run from the date on which the notice has been displayed.

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

(1) to vegetation generally;
(2) to trees or vegetation wherever that interference takes place; and/or
(3) to cases where the interference is with a wireless signal rather than with tangible apparatus?

Consultation Paper, Part 3, paragraph 3.74.

1. Yes. The distinction between trees and other vegetation is not only difficult to make in practice, but also logically not beneficial in this context.

2. Yes, save where the relevant apparatus has been installed using a power to do so without either consent or court sanction. In those cases, occupiers and owners should be entitled to object, and the objection should be considered more broadly in the context of whether it is necessary to install the apparatus in such a way that it would entail lopping of vegetation, rather than installing it more unobtrusively at ground level, as opposed to assuming that the apparatus must remain in its present position and then considering the status of the vegetation.

3. No. This could have far-ranging effects particularly where there is a possibility of improving a signal, albeit it is satisfactory without improvement, and it is also the case that landowners who are entirely unaware that they are situated in the way of a wireless signal might be affected. In *Hunter v. Canary Wharf* [1997] AC 655 the House of Lords (though in a different context) rightly recognised the difference between mere interference with radio signals (in that case TV broadcasts) and tangible interference with enjoyment of property. It would also be difficult to draft the appropriate provisions and very hard to enforce them without significant objections.

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, save that where the upgrade involves an alteration in the position or size of the apparatus, which is not covered by existing agreement, the landowner should be entitled to object, and the Code Operator should be compelled to obtain either agreement or a court order to allow it to proceed. Where there is no alteration in position or size, objections should still be allowed, but only on specified grounds, in particular those relating to health and safety concerns.

2. Yes, if the Code Operator would have been obliged to pay more to install the upgraded apparatus than the original apparatus.

10.16	We ask consultees:
	(1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice; (2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or (3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus. Consultation Paper, Part 3, paragraph 3.83.

(1) We agree with the points made in the paper about the potential for increased delay and expense.

(2)/(3) We can see the public benefit in allowing – and, indeed, encouraging – the sharing of apparatus in all its forms, subject to provisions limiting the installation of additional apparatus, as considered above, and subject to the landowner being required to deal with, and only affected by, the rights belonging to the original Code Operator. At present, landowners can find themselves having to deal with multiple rights claimed by multiple parties who share apparatus, variously claimed under statute, under licences and under subleases.

However, we are wary of how far a 'general right to share' might go. There is a practical difference between, on the one hand, allowing joint use or adding a cable within a conduit and, on the other hand, adding a new piece of apparatus (potentially a quite substantial piece to apparatus) to an existing piece of apparatus, the latter being potentially highly intrusive.

We suggest that the key question should be whether the breadth and extent of the

possibilities is such that either (1) there might be justifiable objections to some types (or extent) of sharing on the part of an affected owner or occupier, and/or (2) it is conceivable that additional consideration or compensation might be justified.
In the case of the former, an unrestricted right to share would not be justified. In the case of the latter, it should be possible to seek additional consideration or compensation.

We do not feel able to rule out either scenario (although whether additional consideration could ever be justifiable may depend in part on the basis on which consideration is to be assessed). Evidence from the industry and landowner groups might well assist.

We are neutral as to whether those possibilities should be dealt with by way of a minimum 'qualified right to alter' regime (i.e. one in which sharing cannot be prohibited, but in which the owner's or occupier's consent can be made a requirement (not to be unreasonably withheld), and which also has scope for seeking consideration/compensation), or by way of applying the general Code regime for acquiring rights to share (either generally or in specified situations, and with or without modifications).

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 consider that it is unhelpful to treat leases differently from other forms of tenure in the context of rights under the Code. We would propose that the same regime should apply to all agreements. Broadly, though, the effect of section 134 is beneficial, but it should apply universally.

10.18 We ask consultees:

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

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

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

Consultation Paper, Part 3, paragraph 3.92.

(1) We can see the logic in the proposition that it may do so, but we have not come across any examples.

(2) We are wary of this suggestion.

Currently, whilst there may be an absolute prohibition on assignment, there may also be a qualified prohibition (i.e. one that permits assignment, but only with the prior consent of the affected landowner or occupier).

The proposal would appear to sweep away the right of a landowner or occupier to insist on even a qualified prohibition, as well as an absolute prohibition. If that is not the intention, then it would instead seem odd for the Code to permit a qualified prohibition, but to render an absolute prohibition wholly void.

We do not know how often an absolute or qualified prohibition is agreed, but a landowner or occupier may have a legitimate concern about an assignment of rights from one operator to another. Unless there is evidence of such provisions being abused, or of real practical difficulties, the current system could not be said to have created any particular difficulties in practice; and if operators have been prepared to agree to such provisions (rather than to exercise their rights under the Code) then in the current market they would not appear to be objectionable. In those circumstances, there would not be a firm basis for any greater interference with the rights of owners and occupiers of land.

We do recognise that Code Operators are often merged or taken over, so that there is an alteration in effective ownership which a landowner cannot prevent, and that this may be becoming more frequent, or perhaps more likely than may have been anticipated in 1984; but are not convinced that this is sufficient to justify altering the existing regime in the absence of a strong evidential case for doing so.

If alteration were to be made, then an alternative would be to stipulate that all absolute prohibitions should be qualified in some defined way, rather than void. We suggest that this might result in a better balance between operator convenience, property rights, freedom of contract, and individual circumstances.

In addition, if there were to be any change, then we suggest that it ought not to disrupt existing agreements. We note that the consultation paper contains no suggestions as to any transitional provisions, and suggest that this is one area which would need to be dealt with by way of transitional provisions (as it is under the existing Code). Otherwise, existing rights would simply be removed, irrespective of individual consequences, and irrespective of whether assignability was taken into account in fixing the consideration for the rights in question. If it is necessary, as a result, to have two regimes (a 'new Code' regime and an 'existing Code' regime), then this might be preferable to simply tearing up existing agreements.

Whilst it might be less objectionable to alter existing absolute prohibitions to merely qualified prohibitions, this would still involve an interference with a pre-existing bargain, without reference to any impact that it might have had on the agreed consideration.

Whatever decision is made in this regard, paragraph 2 of the Code might benefit in any event from some clearer drafting.

(3) Possibly, but not necessarily. In many situations, there maybe no additional loss to the landowner, and no cause for any additional consideration; but for the reasons indicated in answer to question 10.18(2), this will not necessarily be the case.

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

Consultation Paper, Part 3, paragraph 3.94.

None other than those set out elsewhere.

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

Consultation Paper, Part 3, paragraph 3.100.

We are not aware of any such difficulties.

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.

The reasoning in the paper is compelling, if there are any such difficulties. The situation is the mirror image of that considered in our answer to 10.8, where difficulties arise from third parties finding themselves bound by agreements made by non- end user occupiers. Here, an end-user occupier who wishes to benefit from a service, which he shares the recognised public interest in accessing, can be effectively prevented from doing so by a third party owner whose only real interest is a private – and in most cases modest -- financial one. But we are not aware of any examples.

10.22 Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used?

Consultation Paper, Part 3, paragraph 3.102.

No.

10.23 We ask consultees:

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

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

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

Consultation Paper, Part 3, paragraph 3.106.

1. We are not aware of any such problems.

2. n/a, though we do not that the court has wide and effective powers which we would expect to be sufficient. The power of courts to impose injunctions is swift, effectively, and readily available.

3. We do not see any need for additional powers, and do not consider that the imposition of a criminal offence in justified in this context any more than in other cases where interferences with third party rights are involved.

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.

Not as far as we are aware.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

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

10.26	We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests. Consultation Paper, Part 4, paragraph 4.20.
We are unaware of any specific problems.	

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. We consider that a special regime is appropriate, not least because of the multitude of the other law which applies in this context, such as the Crown Estate Act 1961 and the Marine and Coastal Access Act 2009.

2. The same balancing approach should be adopted as in the general regime, but the process should take account of the fact that cables at sea are likely to be of heightened importance, and possible international, and that there may be additional important interests relating to fishing rights and navigational matters which will need to be taken into account.

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. Yes, it is necessary to have a special regime given the public interest served by the infrastructure comprised in these "obstacles". 2. We have no data on this, but imagine that it is frequently used. 3. A civil sanction would suffice. 4. We have no reason to suspect that they are not. 5. We are not aware of any need for it to do so.

10.29	We provisionally propose that a revised code should prevent the doing of anything inside a "relevant conduit" as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it. Do consultees agree? Consultation Paper, Part 4, paragraph 4.34.
Yes.	

10.30	We provisionally propose that the substance of paragraph 23 of the Code governing undertakers' works should be replicated in a revised code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.40.
Yes.	

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

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk. Do consultees agree? Consultation Paper, Part 5, paragraph 5.11.
Yes, and we consider that the proposal (below) to disapply the Landlord and Tenant Act 1954 where Code rights are enjoyed will be beneficial in this context, by making the procedure easier to use.

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, save that the limitation to just 'improvements' is not justified. Landowners should be entitled to use their land as they choose, provided that that user is not in conflict with the Access Principle. There should be no difficulty with, for instance, moving apparatus in a manner which does not cause disruption.

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.
Yes.

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.
We consider that the most serious problem with the present procedure is that notice cannot be served until the rights have already expired. Instead, as is the case in most leasehold contexts, the landowner should be able to serve notice in advance, though the period could be limited to, say, the 12-month period preceding the termination, as it is in the context of business leases. Such an approach would allow both parties to either agree to continuation on new terms, or termination, or seek an independent determination, without either side gaining or losing anything during that process. Termination, by any method, should also entail that the Code Operator is obliged to remove the apparatus and make good afterwards, failing which the landowner should be entitled to carry out such works at the expense of the Code Operator.	

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 a different procedure would avoid this problem, but if it does not or is not adopted, then the Code Operator should be required to indemnify the landowner in circumstances where there is no existing claim for damages for trespass, but the Code Operator does not remove its apparatus at the end of the term, although not allowed to remain, and the landowner suffers loss as a result. In particular, we consider that where there is a deemed right pursuant to paragraph 21(9) during a period of dispute, but no right is ultimately obtained or granted, there should be a right to compensation (and even	

consideration), as a counterbalance to the effect of that paragraph.

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.

10.41 Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code? Consultation Paper, Part 5, paragraph 5.56.
No.

FINANCIAL AWARDS UNDER THE CODE

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

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

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

10.44	We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator. Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact. Consultation Paper, Part 6, paragraph 6.73.
We are provisionally supportive of this approach, though we do not know, and cannot assist with, whether or not such an approach is in fact practicable, given the scarcity of comparables. We are aware that the Upper Tribunal (Lands Chamber) has experienced in other contexts in making valuation decisions by other methods (for example by the residual method) in cases where there is no reliable evidence of comparables; and, indeed, of carrying out valuations in artificial scenarios where there is no market evidence (which applies, for example, to some aspects of leasehold enfranchisement valuations). Whilst this is far from perfect, it may be the least undesirable option.	

10.45	Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable). Consultation Paper, Part 6, paragraph 6.74.
We can see no fundamental objection to such an approach, which would at least give a degree of certainty, although we lean more in favour of the Commission's provisional proposal, largely for the reasons given by the Commission.	

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. There is, perhaps, a partial analogy with the compensation provisions relating to the discharge or modification of restrictive covenants under section 84 of the Law of Property Act 1925.	

TOWARDS A BETTER PROCEDURE

10.48 We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes. Do consultees agree? Consultation Paper, Part 7, paragraph 7.26.
Yes. A specialist tribunal will be better equipped to deal with the kinds of disputes which arise and are likely to arise from the Code. We note, however, that the Upper Tribunal does not make orders requiring actions to be taken, and has no enforcement mechanisms at its disposal. Accordingly, if the Upper Tribunal is to be the main forum for disputes under the Code, we consider that there should be a Court-based enforcement mechanism. An analogy can be drawn with leasehold enfranchisement, where the LVT or Upper Tribunal (Lands Chamber) is the preferred route for questions of valuation or the terms of a transaction, but the Court has power in relation to enforcement and specific actions.

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.
Option 1 is the most appealing, given the acknowledged expertise of the Tribunal in both law and surveying matters. However, the parties should have the option of an ADR procedure (perhaps along the lines of the Party Wall Act) for certain kinds of dispute where it is likely to produce a result more quickly and cheaply.

10.50 We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment. Do consultees agree? Consultation Paper, Part 7, paragraph 7.31.
Yes, in theory, in circumstances where it can be dealt with properly by a tribunal as a 'preliminary issue'. This will need to be considered on a case by case basis. As part this, the tribunal will need to consider the issue raised in question 10.9(2).

10.51	We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.
We have no such suggestions.	

10.52	We seek consultees' views as to how costs should be dealt with in cases under a revised code, and in particular their views on the following options: (1) that as a general rule costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs incurred; or (2) that costs should be paid by the losing party. Consultation Paper, Part 7, paragraph 7.37
We prefer option 1. We believe that this probably covers not only unnecessarily increased costs, but costs unnecessarily caused only by the landowner's conduct, but it might be helpful to make that clear. This is in line with the position in several areas of the jurisdiction of the First-tier and Upper Tribunals, where costs are awarded only insofar as they are incurred as a result of a party's unreasonable conduct.	

10.53	We also ask consultees whether different rules for costs are needed depending upon the type of dispute. Consultation Paper, Part 7, paragraph 7.38.
No.	

10.54	We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.
Yes.	

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

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

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.
Provided that parties are able to use their own terms, it might be beneficial, particularly to landowners, to be able to use or consult some standard terms, if only to provide them with an indication of the matters they should consider providing for in any agreement, since they will frequently have no prior experience of dealing with Code Operators. We are not best placed to suggest what those terms should include. In principle, we see no particular reason why the existing market models (as revised form time to time) could not provide a useful starting point: but, equally, we can see that it may be debatable whether anything more is needed. In order to justify a formal, regulatory intervention, there ought to be evidence of a need for it, and the intervention ought to be proportionate, and targeted at that need (e.g. perhaps aimed private landowners who are not likely to be members of the NFU or CLA). If there is insufficient justification for intervention of that nature, then we suggest that it would be preferable to look for a way of encouraging (and perhaps facilitating) market participant to agree on (and publish) model terms.	

INTERACTION WITH OTHER REGIMES

10.58	We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease. Do consultees agree? Consultation Paper, Part 8, paragraph 8.22.
Yes.	

10.59	We provisionally propose that where an agreement conferring a right on a Code Operator also creates an interest in land of a type that is ordinarily registrable under the land registration legislation, the interest created by the agreement should be registrable in accordance with the provisions of the land registration legislation, but that a revised code should make it clear that its provisions as to who is bound by the interest prevail over those of the land registration legislation. Do consultees agree? Consultation Paper, Part 8, paragraph 8.33.
Yes. It might be helpful, and increase transparency, if registers of title were to state this qualification on the effect of registration in the entry itself (as is done where certain matters are excluded from the effects of registration).	

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

<table>
<tr><td>
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.
</td></tr>
<tr><td>We are not in a position to comment on this.</td></tr>
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<tr><td>
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.
</td></tr>
<tr><td>We consider that the regulations relating to planning and public space should be more restrictive, and in particular that Regulation 5(3) gives Code Operators excessively broad powers. The making of permanent (or at any rate long term) alterations to the appearance of the streetscape, for example by installing cabinets or other apparatus, is apt to be a matter of local controversy. Attitudes to the quality of public realm have evolved considerably since the Code was first introduced. It is now widely recognised that the way public space is configured is an important factor in quality of life in the locality. As public realm, the street is used and enjoyed by large numbers of people, and there should be appropriate limits and safeguards on the rights of Code operators in a way that reflects an understanding that there is more than one public interest involved. In addition to the requirement to notify the local planning authority of intended works, there should be an obligation on the Code operator to consult by posting notice of its intention in the locality, so that representations from the public can be taken into account, before deciding whether and how to alter the appearance of the public realm. That is of particular importance given the existence of permitted development rights under the planning system which remove that aspect of control over Code operators' activities. The Code operator should be required to pay consideration to the local authority to reflect the impact of the works on the public realm. That would result in a more disciplined approach by Code operators in making decisions about the scale, siting and appearance of street apparatus.</td></tr>
</table>

Bar Council
[OCTOBER 2012]

For further information please contact
Jan Bye, Head of Professional Affairs
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ

Linney, James

From:	Philippa Railing [redacted] on behalf of Desmond Hampton
Sent:	25 October 2012 10:20
To:	LAWCOM Property and Trust
Subject:	Consultation on Electronic Communications Code
Follow Up Flag:	Follow up
Flag Status:	Orange

I act for Guy's & St. Thomas' Charity which inter alia is responsible for original endowments of Guy's and St. Thomas' Hospitals. The Charity owns rural land and estates in Cambridgeshire, Oxfordshire, Gloucestershire, Surrey and Hertfordshire. They have several telecommunications masts on their land. They will be affected by the proposals contained in your consultation document, as will all other rural land owners including many major charitable landowners.

I believe that your proposals set out in part 6 of your consultation document are put forward on a false premis as set out in paragraphs 2.3 of the document. This suggests that there is abuse of monopoly power by landowners which is unreasonably forcing up the price of installing telecommunication equipment.

My experience is that the reverse is the case. In some cases Code Operators are threatening to move their masts elsewhere unless the landowners accept a significant reduction in income. Also through frequency sharing, Code Operators are avoiding site sharing provisions which may be incorporated into existing agreements.

Most landowners welcome the installation of telecom masts on their land, as they provide an important income stream in a diversified rural estate. I do not consider that land in this country is held in sufficiently large monolithic blocks to enable landowners to adopt a monopoly position. There is always a landowner next door who would welcome the company at a market rent.

With regard to the specific points in Part 6, on which comment is invited, I comment as follows:-

6.35 Any landowner is bound to object to the removal of consideration when equipment is placed on his land, and would object strongly to the payment of compensation only.

6.73 The proposal to adopt a Land Compensation Act approach is to remove the rights from the landowners that sometimes form a significant part of their income. I do not agree that the Market Value approach is flawed as suggested in para 6.63. I do not know what valuers have given you the impression that there is a shortage of comparables. There are in my opinion ample comparables, freely negotiated between landlords and tenants.

The proposed basis of compensation would result in a major reduction in landowners income and a substantial boost to the already large profits of Code Operators. There is no justification for that shift. Although such a move would obviously be welcomed by the major telecom operators, it would disadvantage the many relatively small landowners throughout the country, who often feel that they are at a negotiating disadvantage against the might of the large telecoms companies.

It is suggested in para 6.42 that telecoms equipment should be treated as water pipes where the diminution of value principle is adopted. There is false logic here in that there is no obligation to provide a universal service as there is with water supply, as accepted by you in para 6.58.

The proposed basis of compensation is a recipe for disputes and strife between telecoms companies and

landowners. No landowner will willingly accept any telecom mast on the basis of compensation alone, without significant consideration. Code operators will be forced to use compulsory powers in all cases with a consequent increase in delay and litigation.

I therefore believe that the principle of Market Value which has worked well in practice should remain and the proposal to bring in the Land Compensation Act basis should be abandoned.

Regards

Desmond Hampton
Consultant

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CLA Country Land & Business Association

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Linney, James

From: Mike Tristram [redacted]
Sent: 25 October 2012 11:05
To: LAWCOM Property and Trust
Subject: Electronic Communication Code consultation

Dear Mr Linney

I am the Managing Trustee for an 1800 acre mixed farming Estate near Worthing in West Sussex.

Please take into account the following points regarding these proposals:

1. The rent negotiated at current market rental levels is reasonable and fair compensation for the location and service provided. As we understand them, the proposals would unjustly impact on the right of the landowner to negotiate a fair return for a mutually acceptable location.

2. The currently negotiated commercial levels of rent already form a vital income component on many farms and small estates. I am also Chairman of the South Downs Land Management Group with 230 farmer and landowner members across the South Downs and am aware from that network of the important contributions made by this income stream to the rural economy and the well-being of the countryside.
   - For example on our own land this additional rental income has enabled restoration work on traditional flint farm walls and buildings and conservation plantings on the same farm, for which funding was not available either from the farm business or from grant schemes. Under the new arrangements this kind of work which is of public benefit would not be funded.
   - In addition the economic and climatic (severe weather fluctuations) impacts on land businesses are increasingly destabilising. It is precisely this kind of rental income that is a stabilising factor in poor years. The proposals would undermine this stabilising contributor to the rural economy at a time of rapidly increasing instability.

3. The proposed changes are not necessary and do not deliver net additional public benefit: the current market approach has worked well in most cases and the roll-out of mast and landline services to most of the population has been and is being generally successful.

4. The proposed changes would reduce cooperation from land managers not increase it. At the reduced rental levels the masts would be regarded by landowners and farmers as an unwelcome intrusion into their facilities and landscape and be fiercely resisted, where at present they are (in reasonable locations and for reasonable compensation) generally welcomed as an economic contributor to our management of the countryside.

5. The economic effects of the change would be to enrich large international mobile communications operators at the expense of the well-being of the English countryside and rural economy.

I would be grateful for your confirmation that these objections have been received and will be taken into account.

Yours sincerely

Mike Tristram
Managing Trustee, Sompting Estate

www.somptingdowns.com

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Linney, James

From: Paul Innes [redacted]
Sent: 25 October 2012 12:00
To: LAWCOM Property and Trust
Subject: FW: Electronic Communications Code Consultation Paper - Response from Shere Group Ltd
Follow Up Flag: Follow up
Flag Status: Blue
Attachments: cp205_electronic_communications_code_response-form Shere group 24 Oct 12.doc

Dear Sirs

Thank you for the opportunity to comment on the proposals for reform of the Electronic Communications Code, for which we have attached our comments in the form prescribed.

Shere Group Ltd are a business engaged in the provision of radio sites to the Mobile industry in the UK and Holland. The directors of Shere Group Ltd have extensive experience both in the UK telecommunications industry. This experience extends to utilisation of the Code as representative of an operator, and being faced by the Code as a property owner.

Our general view is that for our area of experience the Code has served the industry fairly well to date, and whilst there are some conflicts between UK Landlord and Tenant law and the Code, these in themselves do not bring about the need for changes. Over the past 25 years the industry has managed to acquire and build tens of thousands of sites with little or no need to resort to the Code for gaining access to provide telecommunications. Terms have been agreed for the use of sites in an extensive range of locations from farmers field through in-building systems to extensive rooftop installations.

There have been conflicts where landlords have sought to protect their future value in the property by seeking to exclude the provisions of the Code, especially regarding the right to remain, although this has generally been successfully resisted by the industry.

Where the Code has proved a success to the continuing provision of mobile communications in the UK is by giving the operator the ability to resist notices to determine leases where the landlord was seeking to exert some ransom price for the right to remain on site at the end of the term. The counter to this has been that where the basis of compensation for the right to remain has appeared prohibitive, then the Code has encouraged the operators to remove their equipment to an alternative location to allow for redevelopment where this is commercially appropriate.

As it is currently drafted there is some uncertainty as to the value of compensation that might be payable for utilising Code Powers to dispense with the need for an agreement, but it is this uncertainty that sometimes moves parties to agreement rather than dispute. The existence of a market in these type of sites for so many years has developed such that there is a wealth of comparable property and land interests for each type of radio site, and this market could be severely distorted by a statutory basis of compensation along the lines you are discussing.

We strongly believe that whilst the Code could benefit with a number of changes, and our comments set out our position on this, there are some overriding principles which should be maintained. In maintaining these principles we can still identify a way to bring the benefits of effective deployment of sites by simplifying the process of using Code Powers to access land and property without substantially affecting the market as it exists today.

It is our belief that where there is a properly established market for the legal rights being sought by utilising the Code then the following should apply;

1 An operator should demonstrate that there is no other existing telecommunications installation that can provide the required rights before using the code.
2 An Operator should seek to reach agreement with a property owner for the rights it requires, and if the only dispute is around commercial terms, then the Code could provide for early access while an independent expert assesses the proper market rental and commercial terms.
3 Where there is an established market in the rights being considered then the basis of compensation should be existing market value of those rights or the diminution in value for granting the rights if that is greater, and not a Statutory Compensation basis.

All of the above will maintain the commercial status quo that presently exists, ensure operators are not unnecessarily delayed in deploying their networks or held to ransom over commercial terms, all of these points I believe meet many of the objectives of the review, but leave the landowner in a position where they have the ability to influence siting, and receive proper payment for the rights they are providing.

We would be pleased to meet with you to discuss the matters we have raised in detail should you require, so do hesitate to contact me if there is anything you wish to discuss.

Regards

Paul Innes

Managing Director - Shere Group Ltd

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LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

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

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

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

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

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

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

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

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

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

Tel: 020 3334 0200 / Fax: 020 3334 0201

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

Freedom of Information statement

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

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

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

Your details

Name:
Paul Innes
Email address: [redacted]
[redacted]
Postal address:
Unit 2 River Court Albert Drive Woking Surry GU21 5RP
Telephone number:
[redacted] [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):
Shere Group Ltd
If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

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

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

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

(3) to enter land to inspect any apparatus.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.16.

We agree with the broad concept of protection for essential services provided by Code System Operators. The amount and extent of the equipment installed by Operators varies extensively, and the rights currently held by the mobile operators arose from those granted to British Telecom at their privatisation, in a time before a market for these types of installations were envisaged.

There is an extensive and well documented market for these types of sites, and changes to the Code should not be undertaken simply to bypass a market that has been properly established for over 25 years.

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 extent of the rights has worked successfully for many years and there is no need to extend the rights further.

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

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

The rights already seem technology neutral in the real world, so we have no comments in this regard.

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.
Code Operators should have an obligation to reach agreement with a land owner on a proper commercial basis before proceeding to use powers to dispense with the need for an agreement. There is no shortage of market comparables, the Operators having access to extensive records' of thousands of agreements each. If the use of Code Powers is solely with respect to the value of the rights being sought then Operators should be obliged to publish all their rents and agreements in a predefined radius so that both parties have the opportunity to refer the rental matter to independent arbitration/expert armed with full information.	

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

10.8	We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.
The Code should bind all parties to the land in as much as their interest is registered, can be readily identified and that they have been subject of notice of intention to use Code powers.	

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 We believe that in all cases the Code Operator should first have attempted to reach proper commercial agreement with the land owner/occupier. The tribunal should consider the public benefit and prejudice against the owner before making any determination.
2 In circumstances where a land owner cannot be properly compensated by the sum to be paid under the revised Code the operator should have to demonstrate that the location chosen has the minimum impact on the property owner and that no other existing telecommunications site could be made available that provided substantially the same coverage.
3 The Access Principle has not proved to be unworkable or controversial so does not require changing.

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

We believe it is inappropriate for any person who has a registered or readily discoverable interest in land to be bound by the actions of an occupier. It should be encumbent on the Operator to make sufficient and appropriate attempts to discover all parties with an interest in the land and engage them in negotiations.

10.11	We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused. Consultation Paper, Part 3, paragraph 3.67.

We have no direct experience of the installation of overhead wires, and have no comments on this point.

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

Consultation Paper, Part 3, paragraph 3.68.

We believe that the right to object to overhead apparatus properly applies to situations where planning approval by way of application and public consultation has not applied. Examples of this might be the installation of telegraph poles and wires. In situations where applications to the Local Authority are required as part of the permitted development process a further right to object seems inappropriate.
The test applied when considering an objection to overhead apparatus seems to us one that should be applied when allowing an operator to utilise their Code Powers to dispense with the need for agreement.

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.

There should be an absolute requirement for Code system operators to affix notices in all cases where Code Powers are used to obtain access and/or the equipment was installed without the need for formal application to the Local Planning Authority.

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

(1) to vegetation generally;

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

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

Consultation Paper, Part 3, paragraph 3.74.

In general terms we accept the right of the Operators to require the lopping of trees or vegetation in all circumstances to maintain a reasonable service from any equipment installed by them. However, there needs to be a balance maintained such that any screening or protection provided by planting to the benefit of the wider public at large is maintained. Such lopping etc should only be as is reasonably required to restore or maintain service.

10.15 We ask consultees:

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

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

Consultation Paper, Part 3, paragraph 3.78.

1 When an Operator enters into a commercial agreement with a landowner this is done on an arms length basis. Many agreements contain provisions permitting upgrades, or deliberately restrict upgrades as part of the terms voluntarily agreed by both parties. Where access was granted by way of the Code then some right to upgrade may be required if the Code Rights given are in themselves restricted. Nothing in the Code should interfere with the existing well established site rental market.
2 There is a properly established and operating site rental market, and it is our belief that when using the Code compensation should be paid at the level of the market as a minimum. This may in itself mean that an additional payment is appropriate.

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 is a well-established market in telecommunication sites, and it clear that in practice sharing of apparatus regularly takes place without the need for dispensing with the need for agreement under the Code. It is possible that in a very limited number of sites that some difficulty may occur, but this limited issue should give rise to further prescriptive procedure.
2 Where parties have at arms length agreed restrictions in property agreements the Code should not seek to overturn those provisions. Restrictions on intensification of use are often appropriate and reflect individual circumstances. Operators might request such a provision, but this is generally for their own commercial advantage, and if such a right were considered this should be reflected properly in the compensation provisions of the Code
3 Additional rights have as a norm always given rise to additional payments to site owners. The Code should not be used to override proper commercial agreements that exist and could continue to exist for the future

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

Consultation Paper, Part 3, paragraph 3.88.

We have no experience of the use of the section set out in this part of the consultation, therefore cannot envisage a need to extend the provisions. Sharing of apparatus on a proper commercial basis is not likely to be a problem.

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 This does not cause difficulties in practice.
2 Assignments of Operator agreements is not a common practice, and in the mobile environment very few sites are accessed using Code Powers so this is of no relevance. If assignments of this sort were to be considered assignment should only be permitted to the licence holder of the service being provided, not subsidiaries or associated Companies established for other commercial reasons.
3 All actions taken using the Code should be on proper commercial terms.

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

Consultation Paper, Part 3, paragraph 3.94.

We do not believe the Code requires extending.

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.

Most sites are controlled and operated under properly constituted legal agreements, and these provide for access arrangements/rights. Simply giving rights under the Code will not add to the ability to gain access where administrative or other issues cause delays access. This simply provides another legal right that would require enforcement.

There would be no value in extending the Code in this regard, if a Code System Operator requires access through land they can already use the Code to achieve this.

10.21 Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.
We believe that generally where service can be provided on a commercial basis operators would use their current Code Powers to provide service in the most proper and economic manner. Extending the Code in this way would not add to the utility of the Code or deliver service to customers who otherwise cannot receive it.

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

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 Our experience is that generally unlawful interference is an issue of theft or vandalism. Variance to the rights of an Operator has no effect in these matters. 2 This has no effect. 3 We do not believe further provisions would serve any purpose in these circumstances.

10.24	We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator. Consultation Paper, Part 3, paragraph 3.107.
We have no comment on this point.	

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.
We agree that the streetworks provision should remain.	

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.
We have no experience in this area.	

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.
We have no comments to make in this regard.	

10.28 We ask consultees:

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

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

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

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

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

Consultation Paper, Part 4, paragraph 4.30.

We have no comments to make with regards to linear obstacles.

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

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.34.

We agree with this provision but it has no implication in our circumstances.

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

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.40.

We agree with this proposal.

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
Agreed.	

ALTERATIONS AND SECURITY

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

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 have no experience of the regime in practice but believe it represents a proper balance.	

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.
Agreed. However where parties enter into an agreement outside the Code then that agreement should be the point of reference regarding alterations. If an owner or Operator willingly agrees and documents an agreement for a period of years then they should not be able to utilise the Code to bring about an alteration to their proper commercial arrangements.	

10.35	We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code? Consultation Paper, Part 5, paragraph 5.18.

We have no experience of the operation of these provisions, but believe they strike a proper balance.

10.36	We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.

Our particular experience and reference in this operation is in the area of mobile telecommunications, where there is already a long and well established market in sites and the terms for their occupation. These agreements are usually for a relevant term of years, ranging between 10-20 years with breaks for one, both or neither parties point of view. These provisions are often agreed to reflect the commercial reality of a situation, for example where a site is clearly suitable or appropriate for redevelopment at some time in the future. When notice is served under the agreement by a landlord to facilitate such redevelopment the Operator has the ability to serve a Code Notice to remain, and reimburse the landowner for his lost development value. Depending on the basis of compensation proposed under any new Code, the existing use of a site might be limited in value at the outset, but its future value substantial. If the basis of compensation has no regard to hope/future value then using the compulsory purchase rules suggested later to determine the value of this type of site would be prejudicial. There is a balance to be struck regarding the security of the rights granted under the Code, the relevant compensation basis and the effect on value of other land affected by the scheme. The Code is attempting to address a simple wayleave situation in the same manner as complex set of antennae and equipment on the roof of a building or edge of a development site.

The revised Code should not be constructed to allow mobile operators to pay anything other than the proper market rent/value of the rights they use, and should reflect the fact that in the future the value of the site may be prejudicially affected by the Code Rights.

From first reading of this consultation it is possible a situation will be created whereby a landowners loses his enjoyment of land to a Mobile Operator, has no right to require its removal, and receives only a historic existing use value for allowing this to arise.

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

10.38	We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.
In the event that the land is occupied by rights granted directly under the Code, then the landowner should be indemnified by the Operator for the costs they incur in having to enforce against the Operator for the Operators own breach.	

10.39	We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus. Consultation Paper, Part 5, paragraph 5.50.
The landowner should be indemnified for any costs or losses incurred as a result of code Operators equipment until such time as it is removed from their land.	

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

Agreed. The Code should not be used simply as a commercial tool to gain access at other than proper value. Our belief is the Code is there to allow installations where a party is being deliberately intransigent. If the dispute over access for works is solely a matter of commercial value then the Code is not the route to reach resolution. Use of the Code to access property or remain in possession should only arise after the parties have failed to reach agreement on commercial terms and after a proper arbitration procedure has been undertaken.

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.

The Code should be applied in such a way that it is not prejudicial in any way to what was commercially agreed between the parties at any point in time.

FINANCIAL AWARDS UNDER THE CODE

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

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

Do consultees agree?

Consultation Paper, Part 6, paragraph 6.35.

We agree with the principal that compensation for loss or damage should be paid to any person bound by rights granted by the Code. We have reservations with regard to the proposals on how to determine 'compensation' as set out later in the consultation. Where there is no established market in the rights being sought by an Operator we can see a reason for some use of compulsory purchase rules. However, in the case where there is a well founded basis for establishing value for the rights granted the Code should not distort the existing commercial position by applying a prescriptive valuation basis.

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.

In response to this point it is clearly a matter of the basis of compensation that is proposed under the Code. In the case of mobile communications the existing commercial market is structured around an annual payment. This type of market assessed annual rent negates the need to deal with this matter as the all future owners or parties bound by the rights will be compensated.

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.

Your presumption that the purchase of rights can be dealt with by applying part of the rules in the Land Compensation Act is flawed. Aside from the fact that choosing to apply this valuation regime on a well established market for telecommunication site would serve to distort the current market, it does not properly reflect the availability of supply, disturbance to site owners or detriment to land and property arising from the scheme. Compulsory Purchase is a holistic approach more normally used to facilitate schemes where the assembly of land interests is complex and otherwise difficult.
Disregarding the use of a site as a telecommunications mast site where it is clearly suited for that purpose simply because the applicant is an operator makes no sense. There are a number of such site operators/owners in the UK, and therefore the fact that a site is suitable for such a use, does not mean that such a use would not occur other than as a result of the scheme. There are

already many locations where multiple operators have situated antennae in the same location.

This is a situation where there are countless property transaction comparables available to reach agreement regarding proper compensation, and many professional experts and arbitrators who can settle commercial disputes without reference to Statutory or other regulated procedures.

We would propose that where there is demonstrable market in the rights being granted the code should provide for the appointment of an independent expert to value the rights being granted, and avoid the need for statutory or regulated processes. The previous reference to the County Court was not, and continues to be inappropriate.

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

Consultation Paper, Part 6, paragraph 6.74.

As discussed briefly above we believe there are a number of areas for which utilising the Power to dispense with need for an agreement could be readily processed using existing third party professionals to deal with matters.

The area of particular interest to us is mobile communications mast sites. This is an area where there are tens of thousands of sites in the UK all governed by agreements reached after arms length negotiation between the Parties.

In this part of the telecommunications industry the wealth of market comparables lie with the Mobile Operators themselves, although there are a limited number of other organisations and professional representatives who also have access to this information.

It is our belief that if a mobile operator seeks to use the Code to gain access to a site they should be prepared to pay the appropriate market rent for the rights. The rent and commercial terms could be easily be determined by an expert given access to the Operators site rental data base, on a privileged disclosure basis, and upon receiving representations from both parties.

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.

Agreed, but our comments above similarly applied where there there are existing established markets in these rights.

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

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.
Agreed	

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 Subject to disputes over compensation being removed from this route we would agree with this as a suitable forum. 2 We agree that in disputes over value reference should be made to some kind of procedure where experts are appointed. We believe that there is a sufficient body of evidence available to appoint an expert jointly between the parties from an approved list. However we also feel that in view of the overwhelming weight of evidence of rentals lying with the Code operator there should be an obligation on the Operator to provide confidential disclosure of comparable transactions on a demand basis if required by the expert. This approach redresses the balance between the parties where it exists. 3 As previously stated we do not believe that in cases where there is a well established existing market that adjudication should not be bound by Compulsory Purchase rules, but rely on the market comparables that are available to reach a determination.	

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.
Agreed, provide the reference to value is to market value and not a prescriptive valuation basis..	

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.
Where an operator is using Code Powers following notice to determine a lease from their landlord, and that notice has been served only as statutory protection, and not because the landlord actually requires possession, the matters in dispute could be resolved by either party being able to make a reference to the simple disputes procedure outlined above. Using this route would avoid wasteful Court applications under traditional property law, and negate the need for determinations under the Code and the processes that this would involve. It is our belief that more issues will be directed at the Code as a result of commercial disputes at lease renewal than the simple grant of new rights.

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 Where the Operator is relying on the Code to obtain rights it is proper that they should meet all the costs. If the parties are simply disputing rent using some kind of agreed expert procedure then it would seem appropriate that the expert award costs depending on his determination. There are many cases where this type of award of costs work, that could be adapted for these circumstances. 2 There may be cases where there is not a 'Losing Party'. However see our comments above.

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.
Yes different rules are required, see our comments above.

10.54	We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.
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.
Standardisation of forms of notice would make the Code more addressable by property owners without the need for expensive legal advice, and therefore could be of some benefit	

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 procedures to be followed by land owners should be clearly set out in the Code to enavble them tom be understood by the general public.	

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.
Unless utilisation od the Code to access land was to become the norm, the standardisation of the forms and terms of agreement would have little effect to the overall basis by which a Code Sytem operator held the rights to install its network. However, that said some standardisation of terms to be used in Code Agreements might provide guidance to both parties as to the type of terms to expect in these types of agreements. We have no strong view either 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.

This would make little practical difference, especially if the Code had a streamlined process to determine rent and commercial terms as discussed above.

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.

Agreed

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us: (1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon; (2) what impact regulation 16 has on Code Operators and on Ofcom; (3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and (4) if the answer to (3) is yes, what form should it take? Consultation Paper, Part 9, paragraph 9.14.
We have no experience of this issue, or comments to make.

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

HIGHCROSS

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Dear Mr Linney

THE LAW COMMISSION CONSULTATION ON THE ELECTRONIC COMMUNICATIONS CODE (THE CODE) – RESPONSE ON BEHALF OF HIGHCROSS STRATEGIC ADVISORS

Please accept this as an individual response to the above consultation on behalf of Highcross Strategic Advisors.

Investment funds managed by Highcross 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 Highcross Strategic Advisors) 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.

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 has 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

pp Nick Turner
Director – Asset Management

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Linney, James

From: Sarah Avens [redacted]
Sent: 25 October 2012 13:20
To: LAWCOM Property and Trust
Subject: Electronic Communications code
Follow Up Flag: Follow up
Flag Status: Orange

Dear Sir. It is understood that the Law Commission is consulting on proposals to reform the Electronic Communications Code which oversees dealings between the Mobile Communications Operators and Landowners.

This is, in my opinion, gross interference by the Government into arrangements between The Mobile Operators and host Landowners.

The current Market approach has worked very well in the majority of cases and there has been good liaison and professional dealings between the parties concerned. Why do we need Government legislation ?

The reform you are suggesting will unjustly enrich the Mobile Operators at the expense of Landowners and why should the latter bother with the administration and erection of phone masts on their land without fair compensation.

If Landowners are only to be paid cheaply for having masts on their land there is no incentive for having them
and Operators may be asked to remove them and make good the site at their expense.

It is hoped that there will be some fairness and consideration given to Landowners during your deliberations.

Yours sincerely,

W R Avens

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LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

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

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

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

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

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

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

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

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

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

Tel: 020 3334 0200 / Fax: 020 3334 0201

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

Freedom of Information statement

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

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

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

Your details

Name:
Peter Howard-Dobson
Email address:
[redacted]
Postal address:
Eva Lynn (Company Secretary) Mobile Phone Mast Development Ltd., Mott MacDonald House 8-10 Sydenham Road Croydon Surrey CR0 2EE
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):
Mobile Phone Mast Development Ltd. (MPMD)
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.

No

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.

Yes.
i. There should be a requirement, similar to that which binds code operators in other utilities, for Code Operators ("COs") to have a Code of Practice to which they must adhere when carrying out works on privately owned land.
ii. COs must be obliged to consult with occupiers/landowners about their intention to exercise their powers, which must give the occupier/owner the opportunity to respond to the proposals and request more information (eg: about the proposed location/route of/to apparatus). The obligation in the water and sewerage, energy, rail and other utility industries to consult, is aimed at avoiding complaints and minimising areas of dispute.
iii. There should be a complaints procedure similar to that provided by Ofwat in the water and sewerage industry or OFGEM in the energy industry. This should give Ofcom the power to receive and investigate complaints and to punish breaches of the Codes/any exceeding of Code powers/any unreasonable conduct by a CO, by awarding further compensation to the occupier/owner. This will ensure that Code powers are not abused. Determinations of complaints should be publicly available.

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 a definition of "accessories" to apparatus which is to be installed, which should include plant/equipment necessary for the functioning of the apparatus, including that necessary to preserve its safety and protect it from damage or interference – this will therefore include security features such as fencing or kiosks.

10.8	We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.

The creation of Code rights should be not only in relation to an occupier but also an owner of land, in order to avoid/minimise issues later arising under the security provisions.
Notice should always be served on an owner as well as an occupier, so that each may make a claim and each is bound by the notice.
The situation described in paragraph 3.38 of the paper is of no concern to MPMD.
The issues which arise from an occupier being served notice and reaching agreement with the CO or an order being made by the County Court/Lands Tribunal could be largely avoided if notice were also served on the landowner at the time of the works.
If an agreement is reached with an occupier on a voluntary agreement, the CO must give notice of it to the owner by serving notice. If no notice is served, the landowner should not be bound by the agreement and the paragraph 21 provisions should not then apply: this will ensure that COs serve notice on the landowner.

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, because there has to be some sort of test to be applied in order to decide if the CO should be permitted to exercise Code powers. (2) No. (3) The Access Principle should not carry the weight it does now, because it has become viewed and treated as an overriding principle, although that might not have been the intention of those who drafted the Code.	

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.
Others should not be bound in this way, otherwise occupiers could submit owners to unacceptable future limitations on the use of their land and its long term use and value will be adversely affected.	

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.
How can an occupier/owner object if no notice is given? Agreement or the Tribunal's authority must be obtained first. Otherwise, COs would have more rights than electricity undertakers, which is surely not the intention?	

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.

The reality is that if an objection is only made after the event, the Tribunal is more likely to allow the apparatus to remain. This puts the onus on the owner/occupier to apply, whereas the onus should be with the CO.

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.

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10.14	Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended: (1) to vegetation generally; (2) to trees or vegetation wherever that interference takes place; and/or (3) to cases where the interference is with a wireless signal rather than with tangible apparatus? Consultation Paper, Part 3, paragraph 3.74.

Yes, but the interference must be genuine and of sufficient severity and the CO must produce evidence to show this. Such works must be at CO's cost and the new Code should provide for damages, if any losses are suffered (eg loss of privacy, diminution in value etc).
Any Code of Practice must apply to such works.

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. (2) If the upgrade does not extend the Rights provided under the lease, then no. However, if the upgrade extends the operational capabilities of the equipment beyond the Rights (which were, after all, the determinants of the rent), then the upgrade should be subject to an additional payment.

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, but see 3 below. (2) Yes, but see 3 below. (3) There should be a payment of consideration at the time to reflect the financial benefit to the CO. Contractual terms should not be void or overriden.

10.17 We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate. Consultation Paper, Part 3, paragraph 3.88.
-

10.18	We ask consultees: (1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice; (2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and (3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement. Consultation Paper, Part 3, paragraph 3.92.

(1) –
(2) Yes, save that this should not be retrospective (so contractual terms would apply and not be overridden)
(3) On balance no – although the disadvantage is to create a “trade” in assignable rights from which the CO will benefit financially and the landowner/occupier will not.

10.19	We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code. Consultation Paper, Part 3, paragraph 3.94.

-

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

-

10.21	Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.

Yes, but if the CO successfully defends any such application there should be no provision allowing third parties to proceed to apply against the occupier/landowner.

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.

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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.

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10.24 We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator. Consultation Paper, Part 3, paragraph 3.107.
In the case of removal of abandoned equipment, or equipment at the end of an agreed period which the CO does not apply to retain, the onus should be on the CO to apply within a set time. If it does not make an application, then the occupier-owner may enforce its removal and the CO would have no defence. COs should not be entitled to leave apparatus and force the occupier/owner to make an application. The proposed revision to the Code provides sufficient protection for the COs because it provides that they can apply to retain the apparatus. If they choose not to make an application then they should not be protected from an application to remove it. If the CO fails to make an application to continue to retain the apparatus on the land, then it should be a simple trespass.

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.
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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 a special regime applying to land used for railways etc, but also for land owned/used by utilities companies for their operations. Operational issues must be given equal or more weight than the Access Principle, because otherwise they may be overridden. The Code should specifically provide for this.

10.29	We provisionally propose that a revised code should prevent the doing of anything inside a "relevant conduit" as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it. Do consultees agree? Consultation Paper, Part 4, paragraph 4.34.

Yes

10.30	We provisionally propose that the substance of paragraph 23 of the Code governing undertakers' works should be replicated in a revised code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.40.

Yes.

10.31	We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.43
There should be a special regime applying to utilities providers and land owned or used by them. Operational issues must be considered. The present code/Regulations provide for consultation, which is not sufficient.	

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.
Yes	

10.34	We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code. Do consultees agree? Consultation Paper, Part 5, paragraph 5.13.
No. It should be possible for private occupiers/landowners to make agreements with COs, and the Code should not seek to interfere with or override them, retrospectively or otherwise. Otherwise private agreements will be discouraged.	

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.
The provisions are appropriate and should be extended to apparatus owned by utilities undertakers.	

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.
This right should be different in the case of utilities undertakers, who have operational requirements in relation to their land. Eg water and sewerage undertakers may own catchment land around reservoirs which may be leased in rural areas to farmers. Catchment land is operationally important, and the right of a water and sewerage undertaker to make an application should not be removed or restricted. These matters should be included in a special regime applying to utilities undertakers.	

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.
Responsibility should be reversed so the onus is on the CO. Private landowners/occupiers may be unaware of their rights, but COs will know the laws that apply to them and should take responsibility for removing apparatus which is abandoned, or for applying to keep apparatus which they still use.	

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.
There should be sanctions against a CO which does not either remove apparatus or make an application: the rights of a CO to enter and carry out works on private land are onerous and should be accompanied by strict obligations. If a CO fails to apply to retain apparatus, then punitive damages should be awarded to a landowner/occupier who has to enforce its removal by making an application.	

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	

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.

The Code should not be retrospective. So agreements made before a revised Code comes into force should not be overridden by Code rights. Pre-existing agreements negotiated in a different context should not be interfered with.
If this necessitates an application by the CO at the end of the agreement term, so be it, but this should not be problematic if the revised Code clearly sets out the compensation/consideration to which the owner is entitled. If the owner would not have had the right to require removal if the operator had not become a CO, then this is a circumstance which the Tribunal should take into account.

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.

Definitely.
Those who will be affected by Code rights must be given compensation/consideration to be assessed at the time the right is granted, not only when a paragraph 21 scenario arises. If further losses are suffered as a result of any paragraph 21 extension, further compensation/consideration should be awarded at that time, because the long term presence of apparatus may lead to further losses.

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

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

Consultation Paper, Part 6, paragraph 6.73.

No. This still leaves the problem of assessing "market value". A percentage uplift would provide greater clarity and minimise disputed claims.
Where the presence of apparatus does not affect the value of the land, there should be a standard payment instead. In the water and sewerage industry this is standard practice and is known as a "recognition payment". The payment is calculated with reference to the area of land affected according to the length of any pipe/conduit, and the area occupied by any apparatus.
We wish to comment on paragraph 6.58 of the Law Commission Consultation Paper – it is not appropriate to equate COs with utilities operating under a managed surplus regime. Such operators are regulated in what they can charge customers and therefore what profits they may make. COs are not controlled in this manner and cannot therefore be equated with return-regulated utilities.

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.
A percentage uplift would be far simpler (option 4). Alternatively, the Law Commission should consider whether the standard formulae/pricing structures agreed by eg the NFU could be adapted and used (option 2). See comments above regarding "recognition payments" where there is no loss in value. Betterment should also be taken into account when compensation is considered.	

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, but there would need to be detailed provisions which set out what is to be offset against any repayment (eg the costs of the application, cost of removal) and whether interest would apply.	

TOWARDS A BETTER PROCEDURE

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

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) The most appropriate forum would be the Lands Chamber. (2) This will increase costs for private owners/occupiers, because third party adjudicators/independent surveyors will have to be privately paid for the services they provide. It will also result in a lack of case law which will assist parties in reaching consensual agreements. If you decide to include this in a revised Code, the costs should be paid by the CO, regardless of the outcome. (3) ditto comments under 2 above Options 2 and 3 should be voluntary alternatives.	

10.50	We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment. Do consultees agree? Consultation Paper, Part 7, paragraph 7.31.
Yes. The assessment of compensation/consideration should be after installation, so that issues of reinstatement can also be dealt with. There should be a provision for the CO to make an advance payment, as there is in the water and sewerage industry, and interest should be payable on the final payment.	

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
The current regime works well because it punishes landowners/occupiers who behave unreasonably. Costs orders against owners/occupiers are rare in reality. The Lands Chamber should be entitled to consider which party has "won", but this should only be one consideration.	

10.53	We also ask consultees whether different rules for costs are needed depending upon the type of dispute. Consultation Paper, Part 7, paragraph 7.38.
No. The costs regime must be designed to prevent owners/occupiers from behaving unreasonably.	

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 We suggest that the 28 day notice period is insufficient; landowners may be on holiday, many people own second homes. The short period gives owners/occupiers little time to seek legal advice. The period should be extended to a minimum of 6 weeks.	

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.
Plans must be provided with notices, indicating the size, position/route of apparatus and accessories. A leaflet must be provided explaining the procedure for applications/objections, and for complaints, with information about where standard forms can be found. A Code of Practice must also be provided.	

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 of Practice Complaints Procedure Leaflet, as above.	

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, but Ofcom should make standard terms available which it should regularly review, and attention should be drawn to this in the Notice/Leaflet/Code of Practice.

INTERACTION WITH OTHER REGIMES

10.58 We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease.

Do consultees agree?

Consultation Paper, Part 8, paragraph 8.22.

Yes

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

Do consultees agree?

Consultation Paper, Part 8, paragraph 8.33.

No.
The provision at paragraph 2(7) of the Code should not appear in the revised Code. There is no reason why rights created or granted should be exempt from the LRA 2002. It is in the public interest for the rights/obligations to be recorded on the register.

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

<table>
<tr><td>
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.
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<tr><td>
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.
</td></tr>
<tr><td>Regulation 3(1) should include an obligation to consult with relevant undertakers (including water and sewerage undertakers), with the aim of avoiding disruption.</td></tr>
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Ofcom Response to Law Commission consultation on the Electronic Communications Code

Publication date: 25th October 2012

Introduction

Ofcom welcomes the opportunity to respond to the Law Commission's consultation on the Electronic Communications Code. Ofcom is the independent regulator and competition authority for the UK communications industries. Our principal duty under section 3(1) of the Communications Act 2003 is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition. In performing these duties Ofcom must also have regard to the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom.

Under Section 106 of the Communications Act 2003 Ofcom is also responsible for applying Code powers to providers of electronic communications networks and providers of conduit systems available for use by providers of electronic communications networks.

We have not responded to every question but have instead focussed our responses on two areas which we consider most relevant to our duties.

Regulation 16

Regulation 16(1)(b) of the Electronic Communications Code requires Code Operators to provide Ofcom with a certificate on 1st April each year which needs to state, among other things, that sufficient funds have been put in place to meet any specified liabilities that arise from them exercising their right to undertake work in publicly maintained streets and roads. In effect this bond is to cover the costs incurred by local authorities for any damage caused by the installation of electronic communications apparatus or its removal, if for example a Code Operator went into administration. The certificate needs to be accompanied by copies of any insurance policy, bond, guarantee or other instrument which will provide for the funds. We can see the rationale for affected public bodies (including highway authorities and local authorities) having some ability to be compensated in the event of the failure of a communications provider, if they are to incur expense to deal with any street works or telecoms equipment that is above ground. One of Ofcom's roles in carrying out its duties is to take enforcement action when a provider has not complied with the requirement of demonstrating that is has adequate funds in place.

We are aware of one occasion when Ofcom has had to take enforcement action to ensure that funds were put in place to meet any potential liabilities when a Code Operator has failed to do so. However Ofcom is not in a position to verify the adequacy of any funds that are put in place which may put some limitations on how effective this approach is. It is also worth noting that we are not aware of any occasion when funds have been called upon.

Ofcom has also been advised by a number of communications providers that they have had difficulty securing certain types of security (e.g. insurance policies) and some providers have said that the cost of provision of certain types of security can be high.

If the Law Commission is looking to reform this area then our view is that proportionality should be a key consideration. Therefore if it is still deemed that some form of funds for liabilities are still required, then an assessment should be made on the most appropriate system based on the level of risk for public bodies. Any changes to regulation 16 should also consider the impact on smaller operators. The current system places a disproportionate requirement on smaller companies who may find it more difficult to comply with the current requirements.

Financial awards under the Code

In Ofcom's view there is definitely scope to improve the operation of the Code with respect to obtaining private wayleaves. We would agree with the Law Commission's view that a lack of certainty hinders the operation of the Code, particularly in relation to consideration. This uncertainty constrains network deployments which involve the construction of new infrastructure across private property, delays their completion and/or increases the cost of doing so considerably.

The case law arising from the Mercury Communications Ltd v London and India Dock Investments Ltd judgement and the handful of other precedents means that it can be very difficult for interested parties to come to an agreement about what would be a reasonable consideration. This difficulty is amplified as there is little public information on wayleave charges in the telecommunications industry for operators to obtain a sufficient range of appropriate comparables to assess the true going rate.

The current process of escalation of failed negotiations to the courts also adds cost and delay (particularly if subsequent appeals are factored in), and introduces a further layer of uncertainty because of the lack of specialist knowledge. The establishment of both a more explicit framework for determining the level of consideration and an arbitration process that is more predictable and draws on appropriate expertise would be a considerable step forward.

Any such reforms that bring greater clarity to the process and provide the operator and landowner with a better framework for reaching agreement would assist in saving time and money for all parties. Given the key role that new telecoms infrastructure delivering "superfast broadband" and 4G mobile services will play in delivering benefits to telecoms consumers and citizens as well as stimulating and enabling economic growth, this should result in wider public benefit to individuals and businesses across the UK.

Geo Networks Limited ("Geo")

Response to the Law Commission Consultation Paper No 205: The Electronic Communications Code ("Consultation")

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Contents page

1. Executive Summary 3

2. Our Response 3

Geo. Own Your Network

1. Executive Summary

Geo provides dedicated fibre networks for private sector customers and public sector projects. We have first hand experience of attempting to enforce rights and powers granted under the Electronic Communications Code (the "*Code*") having been involved in one of the very few cases brought under this piece of legislation – *Geo Networks Ltd v Bridgewater Canal Co Ltd*[1]

We believe reform of the Code is a critical enabler for the successful deployment of broadband infrastructure in cities and rural Britain and to realise the Government's vision to have the best broadband network in Europe by 2015.[2] An effective revised code should help speed up the deployment of broadband infrastructure, increase the levels of private and public investment and reduce costs to the benefit of businesses and consumers. An effective revised code is fundamental to the success of our digital economy.

The prevailing and most fundamental objective of a revised code should be to establish a workable system of compensation. The financial provisions under the current regime delays and deters investment, causes numerous disputes and results in unsuitable contractual arrangements. A revised code would have significant economic benefits for broadband investment in the UK.

Compensation

We strongly believe that only compensation, not consideration, should be awarded under the financial provisions of a revised code. We do not believe a concept of "consideration" is workable and cannot be defined based on a market value definition, in our view it will always equate to notions of ransom, profit share and completely arbitrary amounts. In most cases, there is no market value for these sorts of transactions. Certainly in the case of underground or overhead cables, the subterranean or aerial space occupied has, by itself, no intrinsic value and would not be offered or traded by the landlord were it not made compulsory by the Code. Licences to occupy rooftops may also be difficult to value.

Similar to other schemes for compulsory acquisition, "compensation" will adequately and generously compensate a landowner. The Consultation looks at other utilities such as electricity under the Electricity Act which only deals with "compensation" under its heads of financial award. Similarly, the Commission has proposed certain revisions to the Code akin to party wall procedures under the Party Wall etc Act 1996. We note that party wall agreements under the Act also only deal with compensatory awards rather than consideration for the rights granted.

When calculating compensation under a revised code, compulsory purchase principles should apply. This is supported by the case *Star Energy Weald Basin Limited v Bocardo*[3], as discussed at paragraph 6.52 of the Consultation. In *Bocardo,* Lord Hope held that compensation rather than consideration was applicable based on compulsory acquisition principles *"because the transaction which is in issue is the acquisition of the right….which…Bocardo had no option but to allow…"*[4] The acquisition rights under the Petroleum (Production) Act 1934 are similar to the rights under the Code and the compensation principles set out under both Acts are nearly identical. It is imperative that, by applying compulsory purchase principles to

[1] [2010] EWCA Civ 1348
[2] Jeremy Hunt, ex Cultural Secretary: http://www.culture.gov.uk/news/news_stories/7547.aspx
[3] SA [2010] UKSC 35
[4] Ibid. paragraph 38

the Code, it clearly removes any concepts of ransom, profit share and anxiety to settle. The removal of “consideration” from the Code will ensure this is achieved.

We agree with the Commission’s reasoning to base financial awards on compulsory acquisition principles based on Section 5 of the Land Compensation Act 1961. We consider that all 3 rules of Section 5 should apply to calculate “compensation” rather than “consideration” as the wording of the Act suggests.

Linear obstacles involve land that has usually been acquired by compulsory purchase principles for the purpose of running a railway, canal or tramway. Hence the ownership is different to land owned under the General Regime and the statutory undertaker should not be entitled to the same financial award provisions that are given under the General Regime. As set out in the *Geo v Bridgewater Canal Co* case, the Court held “*There is no principle of which I am aware which requires the provider of one public facility, a railway, to be paid by another, a provider of electronic communications networks or services for such a minimal intrusion as crossing the railway with a line…*”[5]The linear obstacle provision is to implement and give effect to the necessary and unavoidable crossing of telecommunications networks (at the shortest possible point) with other networks run by statutory undertakers and “rental payments” are not applicable. For linear obstacles, Code Operators should only pay compensation for carrying out the works, not for a right to keep the apparatus on the land.

Standard Terms

We strongly recommend a revised code should include a standardised agreement or terms. This would significantly reduce risks, cut down negotiation times, minimise disputes and certainly reduce the cost of exercising rights under the Code. This is common place in other industries for example, party wall agreements under the Party Wall etc Act 1996 (a system advocated by the Commission in the Consultation). We also understand that standard form contracts have been developed for leases for mast sites.

Procedure

Operators rolling out electronic communications networks are usually working to challenging delivery timescales. Taking a dispute through the County Court system is a lengthy process and there are no certainties as to when a final judgment will be reached. The delays entailed would in many cases lead to business opportunities being lost, or to contractual liabilities. Operators face the financial risk associated with losing a case (payment of court costs and other legal fees) and sometimes adverse publicity. As a result of these factors, only 2 cases have ever been brought before the County Court under paragraph 5 by operators seeking to enforce their Code powers.[6] The Mercury Case took more than a year from interlocutory order to the final judgment (with several months of negotiations preceding the court case).

Landlords know that the current timescales are prohibitive and are able to exploit the commercial pressure facing Code Operators to extract commercial terms and conditions that conflict with the Code. We believe that the appointed authority should be required to come to a decision in the first instance within no more than <u>two months</u> from the receipt of an application by the Code Operator. There should be established emergency provisions that allow fast track decisions similar to the process for obtaining an emergency injunction.

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[5] Ibid 1, paragraph 28
[6] See Cabletel Surrey & Hampshire Ltd v Brookwood Cemetery Ltd [2002] All ER (D) 136; and Mercury Communications Ltd v London and India Dock Investments Ltd (1995) 69 P. & C.R. 135

Geo. Own Your Network

We also consider that Code Operators, landowners or their appointed agents should be able to follow the process without needing to appoint solicitors or barristers to run it on their behalf. The knowledge of potential legal costs under the current process is one of the key deterrents from using the Code. We strongly believe that each party should bear their own costs during the negotiation process. With a clear and simplified process with standard terms and charges, this can be managed quickly and efficiently in house or by experienced surveyors or engineers.

Restrictions

We commonly find that landowners unreasonably restrict the rights granted under the Code, compromising the Code Operator's ability to properly and effectively run its network. These restrictions are often premised on an intention to extract additional payments from the Code Operator that are not justified under the Code. Some of the key areas that need addressing are as follows:

Contracting Out: Landowners often require Code Operators to contract out of the Code or indemnify them against using it. Whereas there are a few provisions in the Code that cannot be contracted out of, we commonly find landowners attempt to get around these provisions by requiring Code Operator's to heavily indemnify them for all losses incurred if the Code Operator tries to use those rights. We strongly consider that a revised code should have strict and express "voiding provision" for conditions in agreements incompatible with the Code, including indemnities to the same effect (subject to provisions where contracting out is expressly allowed). Section 100 of the New Roads & Street Works Act contains such a provision: *"An agreement which purports to make provision regulating the execution of street works is of no effect to the extent that it is inconsistent with the provisions of this Part."*

Infrastructure Sharing: Many landowners prohibit open access conditions or infrastructure sharing on a Code Operator's network. This is contrary to both the Government's policy of promoting infrastructure sharing and the European State Aid Guidelines, which require any network built using public funds be an open access network. It is also contrary to the express conditions of the Code. We believe the wording in the Code in relation to Regulation 3(4) should be stronger, expressly prohibiting landowners from imposing such restrictions and voiding any attempt to contract out.

Upgrades: Code Operators need rights under the Code to upgrade apparatus. In many cases, an upgrade itself should not warrant an additional payment. For example, when a Code Operator blows additional fibre through ducts already in situ on land, there is no intrusion, no detriment to the landowner and no increase in the physical presence of the apparatus. Multi-tenanted buildings are another example where landlords often grant rights solely in respect of one tenant and one floor of the building. We believe a revised code should include express rights for Code Operators to upgrade their apparatus without having to make additional payments unless there are clear grounds for compensation as a result of the upgrade.

Transferring Rights: Landowners often restrict Code Operators from transferring the rights granted under the Code. We believe that rights should be included in a revised code to allow the seamless transfer of rights between Code Operators without delay. This is particularly relevant under the Government's vision for Next Generation Access networks in Britain and consistent with the approach taken by the European Commission. In procurements, it is common for a procuring authority to take ownership or control of a network either immediately or after a period of time. The authority might then appoint another Code Operator to run the network. We suggest a standard form notice for Code Operators to issue to landowners that includes a requirement to demonstrate the transferee Code Operator:

1) is registered with Ofcom, holding Code Powers; and

2) is sufficiently creditworthy to take on the obligations being transferred.

Emergencies: We are often obstructed from accessing our network in service emergencies and the current Code does not provide Code Operators with any rights or options for emergency access. For example, landowners often restrict access in emergency situations where there is a serious threat or service outage. We consider that a revised code should afford Code Operators access rights in emergency situations.

Geo. Own Your Network

2. Our Response

PART 3: THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

3.16 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?

We agree with this.

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

We do not consider that the scope of rights should be reduced.

We suggest the rights should be expanded as follows:

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

3.18 We provisionally propose that code rights should be technology neutral. Do consultees agree?

We agree with this.

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

In our experience, landowners usually impose disproportionate liability and indemnity provisions on Code Operators, going far beyond the rights and obligations applicable under common law and that which is envisioned by the Code. We can see a benefit to including standard liability provisions for loss and damage caused, then invalidating contractual provisions that are inconsistent. Such provisions would also be effective alongside a set of industry standard contract terms (discussed in more detail later in our response).

3.27 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?

We have not encountered problems with this definition.

3.40 We ask consultees to tell us their view 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.

We consider that code rights should bind all parties with an interest in the land including successors in title. We acknowledge the issue the Commission raises about tenants being able to bind landlords in relation to the Code. However we believe that landlords need to ensure their leases afford them sufficient protection against a tenant's actions and include suitable rights and remedies (e.g. requiring tenants to obtain consent for installations).

3.53 We ask consultees for their views on the appropriate test for dispensing with the need for a landowner's or occupier's agreement for 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?

We believe that the landowner can always be adequately compensated for an agreement to grant code rights.

(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?

Yes, because we believe that the landowner can always be adequately compensated for an agreement to grant code rights.

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

We believe the Access Principle is outdated and does not take into account the benefits of competition in the market and consumer choice. We believe the Access Principle should be abandoned and replaced with a simple test to establish:

(1) the Code Operator is entitled under the Code having Code Powers; and

(2) the Code Operator has an established need/purpose to build the network.

Network installation is costly and no commercial Code Operator would recklessly build new network. There will always be established customers or a clear service requirement to justify the installation.

3.59 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.

We agree that an occupier's agreement should bind others with an interest in that land.

3.67 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.

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

3.69 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.

3.74 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?

3.78 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.

We agree that Code Operators need rights under the Code to upgrade apparatus. We consider that additional compensation should be payable *only* if the upgrade causes damage to the land or is a greater intrusion on the land than it was before the upgrade, further diminishing the landowner's use or enjoyment of the land.

In many cases, an upgrade itself should not warrant an additional payment. For example, when a Code Operator blows additional fibre through ducts already in situ on land, there is no intrusion, no detriment to the landowner and no increase in the physical presence of the apparatus. Multi-tenanted buildings are another example where landlords often grant rights solely in respect of one tenant and one floor of the building. These practices would never be accepted in similar industries like electricity and water (in particular an electricity company would not have to pay to provide services to additional occupants in a multi-tenanted building). The Code should include express rights for operators to upgrade their apparatus without having to make additional payments unless there are clear grounds for compensation as a result of the upgrade.

3.83 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.

Many landowners prohibit open access conditions or infrastructure sharing on a Code Operator's network. This is contrary to both the Government's policy of promoting infrastructure sharing and the European State Aid Guidelines, which require any network built using public funds be an open access network. It is also contrary to the express conditions of the Code (for example paragraph 29).

One amendment to the Code introduced as part of the Communications Act 2003 was the introduction of paragraph 29, which encourages the sharing of apparatus. Another amendment was the broadening of the definition of "apparatus" to include "conduit".

The policy of encouraging infrastructure sharing has continued in the current Coalition Government and reference is made to Government support for opening up access to BT's ducts and poles in the 2011 National Infrastructure Plan.

Last year BT launched its product for duct and pole access, known as Physical Infrastructure Access, or "PIA". Operators using this product who lay their own fibre in BT's ducts should not be required to acquire their own wayleaves where BT already has permission to install apparatus. It would be helpful if an updated version of paragraph 29 of the Code could make clear that if a Code Operator obtains a right to install and keep its apparatus, which apparatus comprises both duct and cable, then any other Code Operator which installs its cable (copper, coax or fibre) within the existing duct, should not be required to seek a new right of way, but merely submit an intention to install notice. This is crucial in order to make infrastructure sharing, as promoted by the European Commission, Ofcom and the Government, viable in practice.

3.83 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 payments should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement.

We agree with the proposals under points 1 and 2 above. We disagree with the 3rd point.

We believe that rights should be included in a revised code to allow the seamless transfer of rights between Code Operators without delay. We suggest a standard form notice for Code Operators to issue to landowners that includes a requirement to demonstrate the transferee Code Operator:

3) is registered with Ofcom, holding Code Powers; and

4) is sufficiently creditworthy to take on the obligations being transferred.

This is particularly relevant under the Government's vision for Next Generation Access networks in Britain and consistent with the approach taken by the European Commission. In procurements, it is common for a procuring authority to take ownership or control of a network either immediately or after a period of time. The authority might then appoint another Code Operator to run the network. Provided a Code Operator

meets the basic criteria above, a landowner should not be entitled to withhold consent to the transfer. In all cases, the transfer rights must be quick and efficient and most importantly not disrupt the continuity of service for customers.

We see no basis for an additional payment to landowners for these rights.

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

We are often obstructed from accessing our network in service emergencies and the current Code does not provide Code Operators with any rights or options for emergency access. Landowners usually refuse to grant emergency access rights under access agreements often creating situations where there is a serious threat or service outage and a Code Operator cannot access its network to repair it. We consider that a revised code should afford Code Operators access rights in emergency situations.

3.100 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 multi-dwelling units or others.

We do not experience difficulties in gaining access per se. However we do encounter difficulties with landowners imposing restrictive terms on access rights. Such restrictions include limiting access rights to a specific tenant only and limiting upgrade and alteration rights.

We believe that standard form terms and conditions would be extremely effective and ensure Code Operators have the rights they need to properly operate their networks.

3.101 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?

We do not see how this provision would be useful.

The building of new networks is usually premised on a payment for that network either privately or through public funds. Code Operators will always be willing to build new networks provided there is a business case for investment. We believe that, any Code Operator would agree to use its powers to gain code rights in the right situation.

3.102 Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used?

We are not aware of any circumstances.

3.106 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 Operator's 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.

A common problem Code Operator's face is having to contract out of many rights under the Code or offer indemnities to landowner's should the Code Operator seek to enforce its code rights.

Whereas there are a few provisions in the Code that cannot be contracted out of, we commonly find landowners attempt to get around these provisions by requiring Code Operator's to heavily indemnify them for all losses incurred if the Code Operator tries to use its rights under those provisions.

We strongly consider that a revised code should have strict and express "voiding provision" for conditions in agreements incompatible with the Code, including indemnities to the same effect.

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

As we discuss in Part 7 below, we consider that if an effective judiciary body is appointed to administer a revised code, alongside improved redrafting of the key provisions, landowners or occupiers should not need any additional provisions or rights to enforce obligations owed to them by a Code Operator.

PART 4: THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

4.11 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?

We agree with this.

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

We consider the current regime for tidal waters and lands to be adequate. However we do not consider it adequate in relation to Crown interests.

There is no process, timescales, judicial or dispute resolution processes for lands held by the Crown, making it extremely difficult to plan or secure access rights.

The rights afforded to Code Operators in paragraph 11 of the Code cannot be exercised unless a separate agreement has been given by the Crown. The Code gives no indication of the form in which this agreement must take or more importantly the judicial/dispute resolution process that must be followed if this agreement is not forthcoming. We do not see why the Crown should be treated any differently to any other landowner in this respect. We would recommend that the Code Operator is given the opportunity to bring this matter before the courts (in a similar manner to exercising its paragraph 5 rights) should the Crown's agreement not be forthcoming within a set timeframe. We would also query the basis on which the Crown can charge licence fees at the current rate under the Code. The lack of definitive process in paragraph 11 increases the risk of a ransom strip being created in respect of tidal waters and lands held by the Crown.

4.21 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?

We agree there should be a special regime for tidal waters and lands.

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

Except for Crown land, we consider the current regime is adequate and suitable.

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

We consider that lands held by the Crown should be treated in the same way as other tidal waters and lands.

4.30 We ask consultees:

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

We believe strongly that a special regime for linear obstacles is necessary.

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

Before the recent *Geo Networks Ltd v Bridgewater Canal Co* case[7], no one understood how the linear obstacle regime worked. Since the interpretation of paragraph 12 by the Court of Appeal, Code Operators have been using the regime and, in our case, find it extremely effective and appropriate to secure access rights across linear obstacles.

(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?

We consider that malicious or wilful misuse of this provision causing damage to another party should be treated as a criminal offence; otherwise any damage caused should be a civil matter.

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

We agree with this.

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

The linear obstacle regime is important because it deals with competing rights of two statutory undertakers. It is highly important that it is treated as a special regime. By their nature linear obstacles constitute ransom strips and a Code Operator may have to cross them a number of times when rolling out a new network with no alternative route. Paragraph 12 rightly focusses on the operational technicalities of these two competing interests.

We do not consider that the regime needs to grant any additional rights. However we do believe the drafting needs to be improved so that the Code Operator's rights, in relation to linear obstacles, and indeed under the General Regime, are clear and unequivocal.

4.34 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?

We agree with this provision provided that any provision for use of the conduit states that the conduit must be fit for purpose and the authority grants adequate rights for the use of the conduit (consistent with the Code) including but not limited to future access rights to the conduit.

Any provision for a Code Operator to use a conduit should not detract from a Code Operator's general rights to install its own apparatus rather than use the conduit should the arrangement be unsuitable. For example, a Code Operator must be able to retain and exercise its right to install apparatus under the General and Special Regimes rather than use a specified conduit if the local authority is imposing unbalanced terms or demands unreasonable payments.

[7] Ibid 1

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4.40 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?

We agree with this.

4.40 We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code.

Do consultees agree?

We believe that the linear obstacle regime should be expanded to include waterways (e.g. rivers) with non-riparian ownership. Certain agencies have rights over bodies of water granted by statutory entitlement. We have difficulty in dealing with these agencies and often encounter ransom scenarios when seeking to agree rights across their waterways. It is appropriate that these types of waterways be treated in a similar manner to the other linear obstacles because it involves the competing interests of two statutory undertakers, (1) the Code Operator; and (2) the agency afforded ownership rights to run and maintain that waterway. We strongly recommend the linear obstacle regime be expanded to include this category of land.

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PART 5: ALTERATIONS AND SECURITY

5.11 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 Operator's network at risk.

Do consultees agree?

We consider that, only a landowner or occupier (those who can grant the right under paragraph 2) should be able to require alteration under paragraph 20.

We believe a balanced noticing procedure should apply where the noticing party must establish its alteration requirements and the Code Operator can respond in a counter notice with its proposal.

We agree that a landowner should not be prohibited from re-developing its land should it need to. In our view, it will always be possible for a Code Operator to move its apparatus to a suitable alternative location in the event of re-development. An effective lift and shift provision will ensure landowners are not restricted from developing their land.

5.12 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?

Whereas we do not object to the notice period under paragraph 20 (28 days to counter notice), we consider a revised code should mandate a minimum notice period for the actual works to take place. We have encountered problems with landowners giving notice under paragraph 20 but giving unreasonably short notice for the alteration to take place (e.g. 2 months). An unreasonably short notice period is impractical and can put the Code Operator's network and customers at risk. We suggest that a notice under paragraph 20 must give the Code Operator no less than 6 months notice to effect the alteration once an agreement has been reached.

We agree with the current provision in paragraph 20 that the party giving the alteration notice must pay for the relocation of the apparatus.

5.13 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?

We agree with this.

A revised code should prescribe a minimum notice period for the alteration to take place following agreement by the parties (e.g. 6 months) but allow the parties to agree to a longer notice period should it be appropriate.

5.18 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?

We agree with this.

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

Do consultees agree?

We agree with this.

5.49 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?

We do not agree with this.

We consider that, only if planning rules were expressly applicable to an installation and a Code Operator installed apparatus unlawfully and in contravention of those planning laws, the planning authority should have the right to require the Code Operator to correct the installation so that it is compliant. These rights must be balanced and proportional.

We strongly caution against a blanket right to require removal in the event of any unlawfulness because this could in many cases be disproportionate and lead to removal notices based on minor or insignificant contraventions.

5.49 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?

We suggest a balanced procedure. Landowners wishing to remove apparatus should serve notice on a Code Operator stipulating clear reasons for why the removal is necessary. Code Operators should be required to respond setting out clear reasons why the apparatus must remain. Should they fail to agree between themselves, we consider the onus to invoke the dispute resolution procedure should remain with the landowner. If the judicial processes are improved under a revised code as is currently proposed, this should not be onerous or cumbersome for landowners.

As set out below, we strongly believe that an independent judiciary body should be established to make swift judgments for installation rights, relocation and removal.

5.50 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.

We agree that, had there been compensation payments due and payable were it not for the expiry of the code rights (e.g. annual payments pursuant to a lease), then a pro-rata amount should be payable for the period between the expiry of the code rights and the removal of apparatus. We do not agree that financial penalties should be imposed where a Code Operator is making bona fide use of this provision.

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5.51 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?

We do not agree with this proposal. Our reasoning is that, Code Operators are always in a weaker position when agreeing access rights under the Code. Landowners always hold leverage with the rights granted, timescales and their influence over tenants (often the Code Operator's customers). Even with a perfect dispute resolution process, landowners will always find other pressure points to force Code Operators to contract out of paragraph 21. Paragraph 21 is critical for Code Operators to protect the valuable service their customers are receiving and prevent the catastrophic impact to potentially thousands should the network be wrongfully removed whilst still in operation. Allowing parties to contract out of paragraph 21 would be highly detrimental.

More importantly, the ability to contract out of paragraph 21 would be most detrimental to the Code Operator's customers and the proposal to allow it goes against the spirit of the Code. If a Code Operator agreed to contract out of paragraph 21 on a particular parcel of land, and at the end of its term its customer wished to carry on receiving services, it would not be able to provide them. The customer would have no choice but to request services from an alternate supplier which might not be suitable or to the standard it was previously receiving from its preferred supplier. Finally, it might also mean there is a period of time the customer is without service at all while it tries to secure an alternative service.

With no proposed time limits on the contracting out provisions, parcels of land might become complete no go zones for Code Operators if they have contracted out. If an area of land is redeveloped (e.g. built up into a central communications hub), a Code Operator that has contracted out of its rights when the land was undeveloped, might be unable to provide key services to numerous customers and businesses in that area.

5.56 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 over apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator has the benefit of a revised code?

We do not agree that provisions of a revised code should apply to apparatus installed before a revised code comes into effect. Existing agreements for access rights to install apparatus were considered and agreed under the specific terms of the existing Code.

We do think that there should be retrospective effect in certain cases, for example:

- The ability to invalidate contractual terms that go against the provisions of the intention of the Code;
- The ability to prevent infrastructure sharing in circumstances where the terms of an existing individual right appear to preclude the same.

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PART 6: FINANCIAL AWARDS UNDER THE CODE

6.35 We provisionally propose that a single entitlement to compensation for loss or damage sustained by the exercise of the 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?

We agree with this but only where the affected person can prove loss caused under the prescribed rules for compensation under the revised code.

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

We do not agree with this.

If a land right is transferred to new party, the compensation paid should be factored into the land transaction. For example, due diligence would identify the existence of the apparatus on the land and as part of the sale and purchase or lease agreement, an element of that compensation should be included for the apparatus (if applicable). There is no principle that a Code Operator should make a compensation payment to each successor of title or interest in the land, each time it is transferred.

6.73 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' view on the practicability of this approach, and on its practical and economic impact.

Compensation vs Consideration

We note the Commission's distinction between compensation and consideration within the Consultation, however, we suggest that having two separate and express heads of financial award, has and will continue to cause problems. We do not believe a concept of "consideration" is workable and cannot be defined based on a market value definition, in our view it will always equate to notions of ransom, profit share and completely arbitrary amounts.

As noted by the Commission, although consideration is not payable for rights created under most legislation used by gas, electricity and water companies to acquire "statutory easements" over private land, in some cases something akin to consideration is payable[8]. Whereas we do not object to this in principle, we strongly believe that a revised code should only include the term "compensation".

Similar to other schemes for compulsory acquisition, "compensation" will adequately and generously compensate a landowner. The Consultation looks at other utilities such as electricity under the Electricity

[8] A payment "*in respect of the grant*" under section 7(1) of the Electricity Act 1989

Act which only deals with "compensation" under its heads of financial award. Similarly, the Commission has proposed certain revisions to the Code akin to party wall procedures under the Party Wall etc Act 1996, which we endorse for the reasons set out later in our response. We note that party wall agreements under the Act also only deal with compensatory awards rather than consideration for the rights granted.

We note the arguments made by the CLA (set out in paragraph 6.58 of the Consultation), i.e. "*consideration should be substantial because Code Operators are commercial entities who run their business on a competitive basis to generate profits for their shareholders*" therefore are somehow different to other traditional utilities. We wholly reject this argument. The traditional utilities such as water, electricity and gas have been largely privatised and, even though they may be regulated, are still profit-making organisations. In reality, the other utilities are more likely to make profits than non-incumbent telecommunications companies. Since multi-operator competition was introduced in the 1990s, the telecoms industry has been characterised by negative balance sheets and bankruptcies. All statutory undertakers should be treated equally, whether they are private or publicly owned, whether corporate or government bodies.

We have set out our views on the negative economic impact of compensation and consideration payable under the current regime, in the Confidential Annex 1.

Nature of the Rights – Compulsory Purchase

We believe that compulsory purchase principles should apply to the rights under the Code.

This is supported by the case *Star Energy Weald Basin Limited v Bocardo*[9], as discussed at paragraph 6.52 of the Consultation. In *Bocardo,* Lord Hope held that compensation rather than consideration was applicable based on compulsory acquisition principles *"because the transaction which is in issue is the acquisition of the right….which…Bocardo had no option but to allow…"*[10] The acquisition rights under the Petroleum (Production) Act 1934 are similar to the rights under the Code and the compensation principles set out under both Acts are nearly identical. It is also worth referencing Lord Walker's view that the history of compulsory purchase rights began with infrastructure projects:

"*The whole law of compulsory purchase began and developed with infrastructure projects (first canals, then railways) undertaken by companies in the private sector.*"[11]

It is imperative that, by applying compulsory purchase principles to the Code, it clearly removes any concepts of ransom, profit share and anxiety to settle. The removal of "consideration" from the Code will ensure this is achieved.

Basis of Valuation

We do not agree with the Commission's proposal that consideration for rights conferred should be included under a revised code. We do accept the Commission's proposal to reject a scheme to base valuation on: (1) market value; and (2) of value assessed in accordance with the *Mercury*[12] case. We also agree with the Commission's reasoning to base financial awards on compulsory acquisition principles

[9] SA [2010] UKSC 35
[10] Ibid. paragraph 38
[11] Ibid paragraph 48
[12] Mercury Communications Limited v London and India Dock Investments Ltd (1995) 69 P&CR 135

based on Section 5 of the Land Compensation Act 1961. However we believe this section should only be applied to a concept of "compensation" rather than "consideration".

The Consultation identifies the difficulty in assessing an "open market" for these transactions. We suggest this is the central problem with the proposal to offer consideration and for this reason it will always lead to lengthy "horse-trade" negotiations, ransom situations and disputes.

In most cases, there is no market value for these sorts of transactions. Certainly in the case of underground or overhead cables, the subterranean or aerial space occupied has, by itself, no intrinsic value and would not be offered or traded by the landlord were it not made compulsory by the Code. Licences to occupy rooftops may also be difficult to value. This situation occurred in the *Bocardo* case where it was noted Bocardo's use and enjoyment of its land was not actually affected "one iota" by the underground pipes. In that case the initial award of £621,180 was reduced to £1,000, which Lord Brown in the Supreme Court regarded as being "*positively generous*" assessing the compensation due as "*no more than **£82.50** including a 10% uplift*".

We note the Commission's suggestion to calculate "consideration" on the second rule of Section 5 of the Land Compensation Act. Alternatively, we consider that all 3 rules of Section 5 of the Land Compensation Act should be applied to calculate "compensation" rather than "consideration" as the wording of the Act suggests.

"5. Rules for assessing compensation.

Compensation in respect of any compulsory acquisition shall be assessed in accordance with the following rules:

(1) No allowance shall be made on account of the acquisition being compulsory.

(2) The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise.

(3) *The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is market apart from the requirements of any authority possessing compulsory purchase powers…."*

Finally it is worth commenting on our earlier points on relocation rights under paragraph 20 of the Code. We have said that a fair and balanced process is required for alteration and relocation of apparatus under paragraph 20. With these rights available to landowners, there will be no diminution in the land value when a landowner wishes to redevelop the land. Effective lift and shift provisions will ensure there is no negative impact on the land value and the landowner's redevelopment rights.

6.74 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).

We have recognised above that, there may be an element of a compensation award that is "consideration" in nature. We also recognise that a 10% uplift was applied to the de minimus award given in Bocardo. We consider that a simple and blanket rule for a small statutory uplift on compensation could be effective

(although we would suggest a lower percentage), it would only be suitable if it were a simple and straight forward rule applied to all transactions under the Code. If the Commission were to try and adjust the percentage for different transactions, different types of land in different parts of the country, the result would become difficult and arbitrary and, without being based on real valuation principles, potentially lead to distorted figures and comparables.

6.78 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?

Linear obstacles involve short land crossings where the competing interests of 2 statutory undertakers are under contention (e.g. a railway undertaker and a Code Operator) and neither party has any long term ownership rights or claims to the land. There is little to no land value in these crossings, therefore the provision focusses on the important technical challenges where 2 networks cross under different statutory regimes.

The land in question is by its nature very different to the land under the General Regime, the linear obstacle land having already been acquired by compulsory purchase principles for the purpose of running the railway, canal or tramway. Hence the ownership is different to land owned under the General Regime and the statutory undertaker should not be entitled to the same financial award provisions that are given under the General Regime. As set out in the *Geo v Bridgewater Canal Company* case, the Court held "*There is no principle of which I am aware which requires the provider of one public facility, a railway, to be paid by another, a provider of electronic communications networks or services for such a minimal intrusion as crossing the railway with a line…*"[13]

The linear obstacle provision is to implement and give effect to the necessary and unavoidable crossing of telecommunications networks with other network run by statutory undertakers. The provision needs to focus on the technical and operational requirements and the current section stipulates the telecoms network cannot deviate from the shortest crossing point of the other network by more than 400 metres. We are dealing with network crossings, at the shortest point possible. It is for this reason that "rental payments" or the right to "keep the line on the land" are not applicable. Alternatively, if a Code Operator were to lay its cable along the length of a canal, railway or tramway, then (despite this being a technical nightmare to implement), the Code Operator is not simply crossing the obstacle and the General Regime should apply. One might go further to say that the Code does not afford a Code Operator a right to run its network alongside a linear obstacle, it is only allowed to cross it at the shortest point. If a Code Operator wanted to run its network alongside a railway, it would either need to obtain the consent of the railway company under a private deal or it would need to exercise its rights under the General Regime in relation to the land that is not linear obstacle land, i.e. the adjacent private land.

Finally, it is also worth noting that the differences in the security provisions also highlight the need for different payment terms. Telecoms networks across linear obstacles have less security and certainty of tenure than those under the General Regime (see paragraph 23).

6.83 We provisionally propose that, where an order is made requiring alteration of a Code Operators' apparatus, the appropriate body should be entitled to consider whether any portion of

[13] Ibid 1, paragraph 28

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?

Yes we agree.

PART 7: TOWARDS A BETTER PROCEDURE

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

Do consultees agree?

Yes we agree.

Operators rolling out electronic communications networks are usually working to challenging delivery timescales. Taking a dispute through the County Court system is a lengthy process and there are no certainties as to when a final judgment will be reached. The delays entailed would in many cases lead to business opportunities being lost, or to contractual liabilities. Operators face the financial risk associated with losing a case (payment of court costs and other legal fees) and sometimes adverse publicity. As a result, of these factors, only 2 cases have ever been brought before the County Court under paragraph 5 by operators seeking to enforce their Code powers.[14] The *Mercury* Case took more than a year from interlocutory order to the final judgment (with several months of negotiations preceding the court case).

Landlords know that the current timescales are prohibitive and are able to exploit the commercial pressure facing Code Operators to extract commercial terms and conditions that conflict with the Code. We believe that the appointed authority should be required to come to a decision in the first instance within no more than two months from the receipt of an application by the Code Operator. There should be established emergency provisions that allow fast track decisions similar to the process for obtaining an injunction.

We also consider that Code Operators, landowners or their appointed agents should be able to follow the process without needing to appoint solicitors or barristers to run the process on their behalf. The knowledge of potential legal costs under the current process is one of the key deterrents from using the Code.

7.27 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.

To some extent the effectiveness of the Lands Chamber or any other appointed judiciary body will depend on the effectiveness and clarity of a redrafted code, particularly around the procedures relating to calculation of compensation and access terms.

Whereas we have not had direct dealings with the Lands Chamber in order to comment on its suitability, we are encouraged by the merits of using the Lands Chamber put forward by the Commission. We also suggest that input from a more specialist body such as the Technology and Construction Court could be effective.

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[14] See Cabletel Surrey & Hampshire Ltd v Brookwood Cemetery Ltd [2002] All ER (D) 136; and Mercury Communications Ltd v London and India Dock Investments Ltd (1995) 69 P. & C.R. 135

We agree that a similar procedure to the procedure for party wall agreements under the Party Wall etc Act 1996 would be suitable. The elements of the party wall procedure we endorse are:

- party wall surveyors have standard terms and conditions, making the contractual process quick and efficient;
- party wall agreements are agreed using surveyors, and an independent third party appointed in the event of a dispute. Solicitors and barristers are not required thus significantly reducing the costs and minimising delays;
- Party wall agreements are calculated on clear and established compensation principles, leaving little room for dispute and eliminating the risks of inflated costs.

7.31 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?

We agree with this as it will remove ransom scenarios where a landowner might seek better terms or a better price.

We believe the process for early access rights should be simple and straight forward, similar to an emergency injunction, whereby parties can seek a decision within 24-48 hours.

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

We believe that each party should bear its own costs in relation to wayleave negotiations.

Landowners are frequently instructing large expensive law firms to negotiate wayleaves on their behalf on the basis that the Code Operator must pay their legal costs. It is very rare that a wayleave will be agreed and finalised between surveyors, engineers or internal parties. As a result, these lawyers often drag out negotiations and take longer than necessary to complete matters with the knowledge that the Code Operator (or its customer) will have to pay the fees. We have seen invoices for legal fees for a land owner's solicitor in excess of £25,000. It is also worth noting that we have had law firms advising their landowner client not to grant access until their legal bill is paid, making it very difficult to raise a dispute over those fees.

It is critical that the process for agreeing access rights moves away from lawyers and towards registered surveyors and engineers. We have suggested standard terms or template agreements along with clear pricing principles to allow surveyors and engineers to manage the process without lawyers. Each party should bear their own costs except where the matter goes to dispute resolution in which case the adjudicatory body may award costs (see below).

7.32 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 cost incurred; or

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

Costs should be borne by the losing party. It may be difficult to quantify the extent the landowner has increased the cost (option 1 above) and this exercise alone may be time consuming and delay matters.

As mentioned above, we also think that the matter of costs needs to be considered when parties negotiate wayleaves prior to any dispute action. We have already stated that we regularly find landowners instructing top tier law firms to work on wayleaves, believing they will get a better deal if they use the best law firm but in any event, knowing the Code Operator or its customer will have to pay the law firm's fees. This also incentivises the lawyers to go "over the top" on these agreements and delay matters by lengthy negotiations over the legal terms.

As set out above, we strongly believe that each party should bear their own costs during the negotiation process. With a clear and simplified process with standard terms and charges, this can be managed quickly and efficiently in house or by experienced surveyors or engineers, significantly reducing costs.

7.52 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?

We agree.

7.53 Do consultees consider that the forms of notice available to Code Operators could be improved? If so, how?

We have already stated we consider that both parties should be required to provide more detail in standard form notices to assist in the negotiation process for any installation, alteration or removal.

The standard form notices themselves are not easy to find on Ofcom's website and some of the links go to the wrong documents. We suggest that these forms should be clearly published, easy to find, with guidance notes and links to the relevant sections of the Code.

7.54 Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided?

Whilst we understand the Commission's view that it is unrealistic for landowners to use a standard form of notice, we do believe this could be implemented without a significant burden. Currently there is no prescribed form for landowners to notice a Code Operator to alter or remove its network. This increases the risk that a Code Operator might not be aware a notice has been served. A notice might be buried in the text of a letter or email dealing with a number of different topics or issues, or the notice might be written badly or addressed to the wrong person in the company (someone who does not recognise it). In a few cases we have found landowners deliberately noticing in a confusing or vague/indirect manner so as to increase the likelihood of the 28 day counter-notice period. We suggest that both the landowner and the Code Operator must notice and counter-notice (respectively) using prescribed forms under the Code.

Because of this uncertainty, we have no choice but to take a very conservative view on communications received from landowners and respond with a counter notice to any form of communication which might constitute a notice. For example, receipt of emails discussing potential future developments, often

providing a number of options. A response with a prescribed form counter-notice might appear hostile to a landowner and sour a potentially amicable relationship.

We believe that, at a bare minimum, notices must be addressed to a suitable individual within the Code Operator's business such as the General Counsel. We also think that notices must be stand alone and not combined with any text or communication so they can be clearly identified.

We do not see why prescribing standard form notices for landowners would cause undue complication or burden. Standard forms could be available on a common website such as Direct Gov or an equivalent. The forms can be simple enough for a landowner to complete without the need for legal or specialist assistance but would ensure such notices are easily identified when received by the Code Operator.

7.60 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.

We believe it would be most helpful if the legislation could provide for a standard form template or wayleave agreement. We understand that such a standard form contract has been developed for leases for mast sites. The template might allow for options to be selected where the inputs are variables or have blank spaces to insert pricing and plans. To the greatest extent possible the terms should include standard boiler plates that the parties are encouraged to accept as industry standard.

Using the Commission's earlier example of party wall agreements, in this case, surveyors use a standard party wall agreement that rarely requires extensive negotiation or amendment. Equally, if best practice encouraged surveyors and engineers rather than lawyers to negotiate these documents, it should significantly cut down the time wasted and costs incurred when lawyers are involved.

We would also like to see an express "voiding provision" for conditions in agreements incompatible with the Code, including indemnities to the same effect. Section 100 of the New Roads & Street Works Act contains such a provision: *"An agreement which purports to make provision regulating the execution of street works is of no effect to the extent that it is inconsistent with the provisions of this Part."*

PART 8: INTERACTION WITH OTHER REGIMES

8.22 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?

We agree with this.

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.

We agree with this.

PART 9: THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

9.14 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;

We are not aware of any 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

We do believe that a regime is required to cover potential liabilities arising from a Code Operator's street works.

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

In our view requiring Code Operators to ring fence these funds (referred to as Funds for Liability) is not effective and does cause unnecessary administration costs and inefficiencies. We suggest that an alternative insurance obligation on Code Operators might achieve the same result without needing to physically allocate funds. However, we are not aware of any suitable insurance products that are available for this. We suggest Ofcom be tasked to assist in procuring a suitable insurance product.

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

We believe the issue with landowners frequently trying to control and restrict Code Operators from sharing electronic communications apparatus conflicts with Regulation 3(4). It is also in conflict with the Government's views on broadband networks where it encourages sharing to increase efficiencies, reduce costs and minimise the unnecessary duplication of networks.

We believe the wording in the Code in relation to Regulation 3(4) should be stronger, expressly prohibiting landowners from imposing such restrictions and voiding any attempt to contract out.

THE PORTMAN ESTATE

25 October 2012

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

Dear Sir

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

Chris Dunlop
Asset Manager

Enc.

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NEWRIVER RETAIL

11 October 2012

NewRiver Retail (UK) Ltd
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London W1S 2PP

www.nrr.co.uk

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

Dear Sir,

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.

Kind regards

Yours faithfully

Stuart Mitchell
Senior Asset Manager
NewRiver Retail (UK) Limited

Law commission consultation on reform of the Telecommunications Act

A response from RH & RW Clutton LLP on behalf of the Balcombe Estate and approximately 100 other clients who between them provide sites for telecoms masts and host telecom wayleaves on more than 25,000 acres in England.

Background

For many years RH & RW Clutton has negotiated terms for clients who host telecommunications apparatus on their land. This is against the backdrop of the Telecommunications Act (as amended), which sets out the legislative framework for the industry.

A key part of this is the open market rent provision – it is this that ensures a telecoms mast pays 35 times the rent that an electricity pylon attracts.

But the Law Commission (the expert body that advises Government on statute law) has released a consultation document which argues that this should change: in future rents should be paid on the basis used for compulsory purchase legislation.

This is the basis used by the electricity industry, and if the Law Commission proposals are adopted, would lead to major falls in telecom rents.

RH & RW Clutton is pleased to respond to the consultation. In brief we argue that the current system works reasonably well (UK operators are able to provide good service to 90% or more of the country) and there is no need to fundamentally change it (though the termination provisions could be better drafted).

The consultation document is available at
http://lawcommission.justice.gov.uk/consultations/1863.htm

For more information, or if there are any answers that may require explanation, please contact

Oliver Harwood
Partner
RH & RW Clutton LLP
92 High Street,
East Grinstead,
West Sussex
RH19 3DF

The detailed consultation questions are précised below with our draft responses in italics:

PART 3: THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS

3.16 Should Code Operators have rights to enter land for and in connection with installation, maintenance alteration inspection adjustment etc, and keep their apparatus there?

Yes, providing they pay an open market value for the rights, freely negotiated so that private interests can be respected.

3.17 Should these rights be extended or reduced?

No, provided that they are freely negotiated (and in the absence of agreement a low cost dispute resolution is available)

3.18 Should the rights be technology neutral?

Yes, provided the landowners can take account of the different impacts of different technologies in negotiation of terms.

3.19 Should the Code impose obligations on operators?

Yes, if the other proposals made in the consultation deny any effective right of negotiation to the affected owners, the Code should be accompanied by a comprehensive Code of Practice, with enforcement mechanisms to ensure it is not abused. The CLA and other organisations have expressly called for an enforceable Code of Practice to underpin fairness in Compulsory Purchase cases, where overpowering rights are often abused by acquirers.

3.40 The consultation asks how the Code works to bind parties in practice, particularly as it currently ends up binding landowners when tenants give permission for installations and then depart.

The Code should not by accident of drafting result in those with lesser interests in land binding the hands of the freeholder. This has arisen as the right to secure removal of unwanted apparatus is in practice unworkable. A better option would be for security of tenure under the Code to last only as long as the tenure of the person who grants it – according with established land law.

In practice this would force operators to secure the consent of the party who has the biggest interest in the land, which is only right.

3.53 The consultation asks how the Court should decide on whether to grant compulsory rights when there is no agreement. It asks 3 separate questions:

1. would reduced compensation (if the Court thought it adequate) be reason enough to secure compulsory rights, or should the operator also have to show a public benefit to his scheme? *We respond that nowhere in land law is any body granted compulsory rights without some form of testing of the public benefit of the proposal, and we are shocked that the Law Commission should hold private property rights so low in its estimation.*

2. Should it be possible to compulsorily acquire land without paying adequate compensation? *We respond no.*

3. How should a revised code balance the interests? *The current drafting of the Code may be resolved by simply making the two part test into one. That is to say, that provided the public interest is overwhelming* ***and*** *the owner is getting fair payment for his trouble, the order should be granted.*

   However, if as is proposed later in the consultation, the owner is to receive only compensation for his loss, there is a strong case to state that a prior hearing on whether the operator's scheme should be approved should be introduced.

3.59 Should adjoining owners be bound by wayleaves if granted by their tenants?

No, as argued above, neither the superior landlords of the site for the apparatus nor their neighbours should be bound by the actions of those who may only be on the land for a temporary period.

3.74 Should operators have wider rights to require owners to cut back trees and vegetation that may interfere with apparatus?

No, quite the reverse: Operators who wish to enter private land to undertake work to trees that are privately owned (or other vegetation) should only be permitted to do so after having obtained the written consent of the tree owner. In no cases should such rights be extended to wireless signals, which are already being used to interfere with the private rights of landowners to develop their land.

3.78 Two questions are asked

1. Should operators have the right to upgrade apparatus ? *Yes if they pay appropriately.*

2. Should they make additional payments for upgrades? *Yes.*

3.83 Three questions

1. Whether the current situation where agreement may be required before operators share equipment causes difficulty in practice? *We point the Law Commission to the evidence of mobile phone coverage: clearly there is no widespread problem over sharing apparatus. The following words are a direct quotation from Everything Everywhere's website, and hardly describe a situation where the current Telecoms Code is causing difficulty in practice…" At the end of 2011 we introduced 3G signal sharing which enabled customers to get fast internet in more places, and we also enabled seamless in call handover between the two 2G networks allowing customers to 'keep talking in more places'.Every update delivers great benefits to our customers; not least we have increased 3G mobile coverage to 98.29% of the population, allowing more people to do more with their mobiles.The network is the backbone of our company. That's why we're investing £1.4 million a day in improving and upgrading it between now and the end of 2013."*

2. Should Code operators have a general right to sublet and share possession without the landlord's consent? *No.*

3. Should an additional payment be made to a landowner if the operator sublets or shares possession? *Yes, and this should be a negotiated agreement as is standard practice across the industry.*

3.92 The consultation asks whether the law should be changed further to enable sharing by operators without landlord's consent. *No, there is no proven public interest argument in denying landowners the right to negotiate suitable terms for site sharing. The fact that they do so in the current market, and that market has delivered an improved service to 98.29% (industry figures) of the population suggests an old adage – if it is not broken, don't fix it.*

3.100 Are there problems in accessing third party land to secure telecoms services? *Clearly not.*

3.106 Three questions:

1. Do operators face problems from interference with their apparatus? *Clearly not a significant amount as they evidently deliver reliable services on the whole.*

2. Are these problems exacerbated by disagreements that have been to Court? *We do not know, but again it does not seem to stop them offering good service.*

3. Should operators have criminal sanctions to protect their apparatus? *No, certainly not. There is no evidence to justify such a profound change in the law.*

3.107 Do landowners need additional protection from operators? *No, simply a genuine opportunity to be able to bring a lease or wayleave to an end if the operator is consistently in breach of the terms.*

PART 4 LINEAR OBSTACLES ETC

We have no particular expertise in the questions raised in part 4 (Street works, tidal waters, linear obstacles, existing conduits and undertaker's works)

PART 5: ALTERATIONS AND SECURITY

5.11 Should the Code allow landowners to require the alteration or removal of apparatus where it impedes development or use of their land? *Yes the present balance is fair.*

5.12 *Yes the current balance is fair*

5.13 *Yes there should be no ability to contract out of a procedure to enable alterations. This is in the best interest of the wider economy.*

5.47 We provisionally propose that a revised Code shoul restrict the rights of landowners to remove apparatus installed by Code operators. *No we profoundly disagree with this starting point. There are clear contracting out provisions in the Landlord and Tenant Act, and they should be reproduced in the Code.*

5.48 We provisionally propose Local Planning Authorities should have the power to enforce removal: *Agreed*

5.49 Should the onus remain on landowners to secure removal through the Court? *Yes, where the lease or agreement is not contracted out. Removal of apparatus is from time to time absolutely necessary to enable development – a key property issue of wide importance.*

5.50 What financial penalties should apply after the end of an agreement? *We would prefer freedom of contract, but if legislators take a different view, then mesne profits on the Landlord and Tenant Act basis provide an answer.*

5.51 We provisionally propose Code Operators should be free to agree that Code security should not apply. *Yes we agree there should be freedom of contract for both parties in this important area.*

5.56 Retrospective allocation of rights to Operators if they become Code System Operators: *No, this is simply bad law. The fact that a business voluntarily adopts Code Operator status should not*

affect agreements made with landowners on a wholly different basis. The apparatus was either installed under Code powers or it was not.

PART 6 FINANCIAL AWARDS UNDER THE CODE

Introduction: this is the area of the consultation where the Law Commission has unfortunately got it completely wrong. There is no general problem over the valuation of telecoms apparatus. The current market based approach has led to a highly successful roll out of a wide range of telecoms services including mobile, cable and satellite based operations, and many hundreds of thousands of individual agreements have been made with willing landowners across the UK.

Abandoning this highly successful approach in favour of the Compensation Code – a matter which is some concern as the Government has not yet fully implemented the recommendations of the Law Commission on reform of compensation law and procedure – amounts in our view to throwing the baby out with the bathwater.

Parliament has not authorised a complete reversal of the market based approach, which was clearly at the heart of the drafting for "consideration".

The implications of the proposed change are immense.

It will unjustly enrich mobile telecommunications operators, who currently willingly pay between five and ten thousand pounds per annum for a 10 x 10 metre mast site, but who in a no scheme compensation world would pay the same as the National Grid for a pylon – currently between £87.61 and £147.93 per annum.

It will unjustly enrich fixed line operators, who currently pay between 10p/metre per annum and 29.5p/metre per annum, but who would be entitled to argue that compensation should be limited to the amount that electricity companies generally offer for underground line of 2.3p/metre per annum.

As we have said, and repeat here, the market approach has worked for the vast majority of cases, and the drafting of the Code, whilst lamentable, has not stopped the roll out of both mobile and land line telecommunications to the vast majority of the population.

The problem with the final mile, and the upgrading of broadband services to international standards of speed, will not be solved by the proposed change from consideration to compensation. The problem is that the industry cannot deliver shareholder returns from laying cable or providing signals where there are too few subscribers to make the investment pay. This can only be solved by the proposed public private partnerships, with public funding.

In fact, the market approach will ensure that only the appropriate amount of rent is paid for services that are not cost effective without public subsidy. The sums that BT pay for phone lines are already calibrated to take account of the number of customers served, and this principle will be adopted and agreements made in the market by landowners and companies who are engaged in rural broadband delivery.

6.35 Should the consideration payments be replaced by a single entitlement to payments for loss or damage? *We respond NO.*

6.36 Should landowners who cannot remove apparatus that was consented to by their tenants be compensated? *We respond YES.*

6.73 Should the special value to the purchaser or any other operator be ignored when assessing the payment to the landowner?

We refer the Law Commission to the case of Kettering Borough Council v Anglian Water (Kettering Borough Council v Anglian Water Services Plc, Court of Appeal - Lands Tribunal, January 16, 2001, [2001] EWLands LCA_121_2000) which considered this question in the context of the Water Industry Act 1991 Sched 12 para2(1) and compensation for depreciation in value of land by virtue of exercise of pipe-laying powers. In the no scheme world the landowner got only existing land value compensation for his loss.

The practical and economic impact of the suggested change is likely to include:

Over time[1]*, the transfer of what may be up to £30,000,000 per annum (based on an estimated 10,000 mobile phone sites -including microsites- paying an average £3000pa rent) from private individuals to telecoms companies will enrich the companies, and reduce rural incomes which are lower than the national average – truly a reverse Robin Hood, taking from the poor and giving to the rich.*

The replacement of the consensual market based approach by agreement with a compensation culture is likely to incentivise landowners into a more antagonistic and confrontational attitude. If there is no incentive to host apparatus (and having your loss repaid is not an incentive) it is likely to reduce co-operation and may well increase active hostility to the project.

*In this context, we refer the Law Commission to famous battles over electricity pylons that are legion across the UK, from "Revolt" (*http://www.revolt.co.uk/*) which campaigns against pylons to the current campaigns arising in parts of England and Wales.*

In practice, we argue that the replacement of consideration with compensation will slow down the roll out of services, lead to additional costs and delay, and unjustly enrich telecommunications companies.

6.74 Alternative approaches to payment of consideration: *We argue that the approach taken in the Mercury case is the correct one. The alternative 10% uplift on compensation payments will have little or no effect on the outcome were the Law Commission so disastrously to abandon consideration based on the market as it is operated today.*

6.80 *We note that the Law Commission* ***is*** *prepared to consider compensation if a private company orders the owner of a tree on his own land to cut it down. We see no justification for a general right to be granted to Code Systems Operators to impose their requirements on landowners without the landowners previous consent in writing.*

[1] The unjustness is multiplied when a willing landowner has agreed a lease at a certain rent for a certain period: under the Commission's proposals, at the end of the lease the tenant will be able to stay in possession but the rent will be assessed under compensation. As the tenant is already in possession, no further loss can be said to have arisen, and companies will be able to argue a nil or nominal rent.

PART 7 TOWARDS A BETTER PROCEDURE

7.26 Should the County Court no longer be the arbiter of disputes under the Code? *No. the same problems of lack of property expertise and delay were met in the question of lease renewals under the Landlord and Tenant Act, and have been satisfactorily resolved in the Commercial Courts, and by use of Professional Arbitration under Court Terms (PACT), and by making the process of contracting out simpler.*

7.27 Comments on the alternatives:

1. Lands Chamber of the Upper Tribunal: *While the Lands Chamber is expert in property we are concerned that in valuation it is entirely concerned with compensation issues, and a change in mind set would be required to understand the telecoms market.*

2. Independent valuers appointed from a list: *Independent expert arbiters might well be useful where only the question of payment is at issue, but we argue that if land is to be taken against the landowner's will, he is entitled to have a hearing before a Court.*

3. Other adjucations: *We suggest independent arbiters (as are used under the Party Wall Act) drawn from specialist telecoms surveyors, with a right of appeal to the County Court.*

7.31 Provisional approach to enable operators to take possession of land without agreeing the price: *No, while this sounds innocuous, it goes to the heart of the relationship between the parties. Inevitably, organisations that have a right of access in this way approach the issue differently and cause significant problems to landowners. Water companies are regularly denounced as the worst offenders in this way.*

7.32 Other mechanisms for minimising delay. *We are not aware that there are any particular problems in delay. What it the evidence base that demonstrates that a change is required?*

7.38 Should costs follow the event? *Yes.*

PART 8 INTERACTION WITH OTHER REGIMES

8.22 Should the Landlord and Tenant Act 1954 not apply to land held under the Code? *No, we suggest a better option is for the two regimes to be mutually exclusive: at the start of the tenancy, by agreement (or imposed by the Court) the tenure is either under the Code or the 1954 Act, and the parties remain bound to that statute and its procedures. The problem is the deeming that any property occupied by a Code Operator automatically is subject to the Code: it is this which is in our view wrong in principle, as it unilaterally changes agreements freely made between parties with no recourse.*

RH & RW Clutton LLP
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LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

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

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

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

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

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

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

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

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

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

Tel: 020 3334 0200 / Fax: 020 3334 0201

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

Freedom of Information statement

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

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

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

Your details

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

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

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

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

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

(3) to enter land to inspect any apparatus.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.16.

We agree.

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

Consultation Paper, Part 3, paragraph 3.17.

We consider that the code rights should definitely not be extended. We believe that there is a good argument that they should be curtailed.

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

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

We agree although we note that there is considerable differential between a BT wayleave for a telephone line and a lease of premises for the installation of antennae etc.

10.6	Do consultees consider that code rights should generate obligations upon Code Operators and, if so, what? Consultation Paper, Part 3, paragraph 3.19.
We consider that operators should have an obligation to point out the provisions of the Code; in particular the implications of paragraph 21.	

10.7	We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it? Consultation Paper, Part 3, paragraph 3.27.
We do not believe that the definition should be extended.	

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 the parties to any agreement 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.

It must be open to the Court to refuse the rights sought.

The Access Principle should remain related to an electronic communications network and not be widened to the Operator's network.

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 should only bind those party to the Agreement

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.

N/A

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.
N/A	

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.
N/A	

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.
N/A	

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.

There are difficulties in determining what amounts to an upgrade.

We consider that operators should be bound to the rights granted in any agreement.

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.

In our experience, the right to share is extremely valuable however the current demands from operators to share are unreasonable and any revisal of the Code should not allow this by the back door.

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.

N/A

10.18 We ask consultees:
(1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice; (2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and (3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement. Consultation Paper, Part 3, paragraph 3.92.
We believe the Code should relate to one individual operator and not be widened. In our experience, operators are entering into joint ventures and any right to assign in a revised Code would affect existing agreements.

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.
There is no requirement for ancillary rights.

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

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

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

10.23 We ask consultees:

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

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

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

Consultation Paper, Part 3, paragraph 3.106.

N/A

10.24 We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator. Consultation Paper, Part 3, paragraph 3.107.
We understand that Ofcom have no statutory powers to intervene in agreements between a landowner and a Code Operator even to enforce the conditions of the Cost or the Operator's licence. A Code Operator enjoys the protection of the Code even in breach of it. The only recourse for a landowner is the Courts and this is expensive. In effect, we are unfairly affected by the grant of such compulsory rights to an operator without any balancing mechanism. In revising the Code we consider that adequate checks and balances should be introduced.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

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

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.11.

N/A

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

Consultation Paper, Part 4, paragraph 4.20.

N/A

10.27 We seek consultees' views on the following questions.

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

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

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

Consultation Paper, Part 4, paragraph 4.21.

N/A

10.28	We ask consultees: (1) Is it necessary to have a special regime for linear obstacles or would the General Regime suffice? (2) To what extent is the linear obstacle regime currently used? (3) Should the carrying out of works not in accordance with the linear obstacle regime continue to be a criminal offence,or should it alternatively be subject to a civil sanction? (4) Are the rights that can be acquired under the linear obstacle regime sufficient (in particular, is limiting the crossing of the linear obstacle with a line and ancillary apparatus appropriate)? (5) Should the linear obstacle regime grant any additional rights or impose any other obligations (excluding financial obligations)? Consultation Paper, Part 4, paragraph 4.30.
N/A	

10.29	We provisionally propose that a revised code should prevent the doing of anything inside a "relevant conduit" as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it. Do consultees agree? Consultation Paper, Part 4, paragraph 4.34.
N/A	

10.30	We provisionally propose that the substance of paragraph 23 of the Code governing undertakers' works should be replicated in a revised code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.40.
N/A	

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

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.

Operators enjoy income in the order of £150,000 p.a. from sites on our property. The rental income is a fraction of this. There must be a balance. We should not be prevented from legitimately improvising or protecting our property interests purely to protect the commercial interests of an individual Operator.

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.
This is because a landowner has to pay for the cost of removal etc.

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

No.
It is unreasonable to prevent the landowner from protecting or improving his property. It is wholly unreasonable for Code rights to override contractual provisions in a lease which seeks to protect the landowner's interest and to make that landowner responsible for any costs of the operator.

10.35	We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code? Consultation Paper, Part 5, paragraph 5.18.
N/A	

10.36	We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.
We have concerns about the balance inherent in the current Code provisions, particularly given the fact that operators having served a paragraph 21 notice protecting their interests tend to do nothing to obtain a new agreement.	

10.37	We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully. Do consultees agree? Consultation Paper, Part 5, paragraph 5.48.
Yes. We further consider that where a legitimate Notice to Quit has been served because an operator has breached the terms of any agreement, the Code Powers to remain on site should not apply. It is unreasonable for an operator in breach of an agreement to have the ability to 'trump' a Court Order to remove as seems to be the case in the current Code.	

10.38 We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.
The onus should be on the operator to take action to obtain any written agreement required within a reasonable period of time. If this is not achieved within such a period the landlord should be able to aply for a determination of the terms of for removal.

10.39 We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus. Consultation Paper, Part 5, paragraph 5.50.
If the Operator fails to obtain any necessary written agreement the Code should emphasise the Operator's liability for damages for the unlawful occupation.

10.40 We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development. Do consultees agree? Consultation Paper, Part 5, paragraph 5.51.
We agree. The current provisions of Paragraph 21 are of such concern that in certain cases we will not enter into agreements with telecoms operators in that any agreement with an operator fetters our ability to deal freely with our property. We have consensus regarding the definition of 'development' in that this must be wide enough to enable us to sell the property with vacant possession or to demolish, repair etc.

10.41	Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code? Consultation Paper, Part 5, paragraph 5.56.
No. In the circumstances that would have an unreasonable impact on our property rights. .	

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.

Absolutely not.
That income is in relation to an ongoing relationship between us and operators. A single one-off payment would not reflect that relationship. Secondly The Church has a property portfolio with an annual income of circa £380,000 per annum. This is a valuable income used to offset the maintenance costs of our portfolio. There is little alternative value and the consequence of the proposed change to compensation would mean the General Trustees would have little or no income for the grant of such valuable rights.

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.

Consideration <u>and</u> compensation should be payable in such circumstances.

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.

For the reasons outline at 10.42 above, we are seriously concerned about the impact of such a proposal. If such a proposal were enacted, I seriously question whether the Trustees would be willing to grant such rights. Furthermore, the Trustees are likely to resist any attempt by an operator to impose an agreement upon Congregations

The impact of such a change is not only on our rental but on rates. Based on current rateable value this is worth about £225,000 p.a. in rates.

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.

This is a valuation question best addressed to experts in this field.

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

N/A

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

We have concerns about the wording of this proposal. If there is any increase in value that should surely also be entertained.

TOWARDS A BETTER PROCEDURE

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

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 Lands Tribunal is the obvious forum for a question of law and valuation. Arbitration should be the dispute forum regarding any agreement in place.

10.50 We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment. Do consultees agree? Consultation Paper, Part 7, paragraph 7.31.
This would be inappropriate where the landowner was disputing the right to install equipment or the terms.

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.
In our experience, most delays arise from the actions of the Operator.

10.52 We seek consultees' views as to how costs should be dealt with in cases under a revised code, and in particular their views on the following options: (1) that as a general rule costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs incurred; or (2) that costs should be paid by the losing party. Consultation Paper, Part 7, paragraph 7.37
We have always recouped our reasonable professional costs when entering into any agreement. Where an agreement is imposed it is entirely reasonable that the operator pay costs (as any acquiring authority is under CPO legislation).

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.
Operators should be required to explain the consequences of entering into a telecoms agreement from the outset.	

10.56	Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.
We require information in order to comply with our Health & Safety obligations. There should be an obligation on operators to assist affected landowners in this respect.	

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 consider it would be difficult to standardise terms given the widely differing nature of the rights granted.	

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.

N/A

We observe however that the 1954 Act does not apply in Scotland and that this appears to have had little detriment to the market.

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.

Most of our agreements fall outwith the 20 year term required for registration.

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us:

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

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

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

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

Consultation Paper, Part 9, paragraph 9.14.

We have concerns regarding the failure of operators to make contingent liability for removal of redundant equipment.

This has caused problems in one case following the insolvency of Atlantic Telecom.

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.

N/A

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

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

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

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

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

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

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

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

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

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

Tel: 020 3334 0200 / Fax: 020 3334 0201

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

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

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

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

Your details

Name:
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Email address:
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Postal address:
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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):
Hogan Lovells International LLP
If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

10.3 We provisionally propose that code rights should include rights for Code Operators: (1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus; (2) to keep electronic communications apparatus installed on, under or over that land; and (3) to enter land to inspect any apparatus. Do consultees agree? Consultation Paper, Part 3, paragraph 3.16.
We agree. In light of the pace of technological changes, the definition of code rights needs to be wide enough to allow Code Operators to do everything that they need to in relation to the apparatus during the course of its life. However, on the other hand, having general and wide-ranging code rights may not meet the particular needs for every property in every case (and may go beyond what is required) – therefore such rights should only apply to the extent that they are not inconsistent with any contractual terms agreed between the parties.

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, see above.

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.

We consider that the Code should impose a bare minimum level of obligations on Code Operators in exchange for their rights. These obligations can be expanded upon in any written agreement between the parties but as a bare minimum we consider that Code Operators should be obliged:

1) to cause as little damage and disruption as possible to the land and surrounding area when exercising their rights;
2) to make good any damage caused at their own cost to the reasonable satisfaction of the landowner;
3) to maintain the apparatus and keep it in a safe working state; and
4) to comply with such reasonable security and safety measures as are required by the landowner (save in an emergency).

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

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.

<table>
<tr><td>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?
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Consultation Paper, Part 3, paragraph 3.59.</td></tr>
<tr><td>We think that agreements should only be binding on inferior interests (i.e. binding on tenants if granted by the landlord). However, they should not bind upon superior interests unless that person has been notified of the agreement and given their consent in writing to be bound by it. In any event, this issue is closely bound with security of tenure as currently, even if a person is not bound by the agreement, they are unable to secure the removal of the apparatus without going through the complex statutory processes. If a person is not bound by the agreement, we do not think that security of tenure should be enforceable against that person. This would ensure that Code Operators get the consent of all relevant persons before installing apparatus on the land, which would avoid disputes and disgruntled landowners further down the line.

For code rights over land acquired by compulsory acquisition, the court should consider the effect upon all land owners and determine those that should be bound by the code rights (and order compensation accordingly).</td></tr>
</table>

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.
We consider it appropriate that Code Operators have the right to upgrade their apparatus as long as this does not alter the space required for the apparatus. If the trend towards smaller technology continues, we do not think that this will be a problem. In the event that the new apparatus causes interference with a landowners use and enjoyment of the property or systems therein (for example by adversely affecting other electronic equipment) the landowner should have a right to require the apparatus to be moved to another location on the land (reasonably as useful to the Code Operator).	

10.16	We ask consultees: (1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice; (2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or (3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus. Consultation Paper, Part 3, paragraph 3.83.
We think it preferable to give effect to the contractual intentions of the parties in this regard. An agreed contractual clause preventing sharing should not be overridden by the Code and in the absence of an express agreement, sharing should not be allowed. This will encourage Code Operators to negotiate and record the agreement that suits its requirements, reducing future disputes. Although we are not opposed to a general right to share apparatus in theory, this can raise problems in practice. Landowners can often find it very difficult to ascertain which Code Operators are in occupation of their land. When it comes to removal of apparatus, a landowner	

may find there are a number of Code Operators with security of tenure over the land. As such, a landowner would not be able to ascertain out the outset to what extent it is encumbering its land. We therefore think a blanket code right to share the apparatus is unsuitable.

In addition to keeping the entitlement a contractual one (if so agreed between the parties) we suggest that there should be an obligation on Code Operators to inform the landowner on the commencement and termination of sharing the site to mitigate some of the problems above.

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

Consultation Paper, Part 3, paragraph 3.88.

10.18 We ask consultees:

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

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

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

Consultation Paper, Part 3, paragraph 3.92.

Please see our reply at 10.16 above. Assignment should be dealt with by virtue of contractual rights as per traditional landlord and tenant relationships. However, in the absence of an express agreement, assignment should not be allowed. This will encourage Code Operators to negotiate and record the agreement that suits its requirements.

For rights acquired over land by compulsory acquisition, the level of compensation should vary depending on whether the Code Operator requires the flexibility of having freely assignable rights.

10.19	We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code. Consultation Paper, Part 3, paragraph 3.94.

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

10.21	Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.

10.22	Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.

10.23	We ask consultees: (1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers; (2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and (3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights. Consultation Paper, Part 3, paragraph 3.106.

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

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

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

10.26	We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests. Consultation Paper, Part 4, paragraph 4.20.

10.27	We seek consultees' views on the following questions. (1) Should there be a special regime for tidal waters and lands or should tidal waters and lands be subject to the General Regime? (2) If there is to be a special regime for tidal waters and lands, what rights and protections should it provide, and why? (3) Should tidal waters and lands held by Crown interests be treated differently from other tidal waters and lands? Consultation Paper, Part 4, paragraph 4.21.

10.28	We ask consultees: (1) Is it necessary to have a special regime for linear obstacles or would the General Regime suffice? (2) To what extent is the linear obstacle regime currently used? (3) Should the carrying out of works not in accordance with the linear obstacle regime continue to be a criminal offence, or should it alternatively be subject to a civil sanction? (4) Are the rights that can be acquired under the linear obstacle regime sufficient (in particular, is limiting the crossing of the linear obstacle with a line and ancillary apparatus appropriate)? (5) Should the linear obstacle regime grant any additional rights or impose any other obligations (excluding financial obligations)? Consultation Paper, Part 4, paragraph 4.30.

10.29	We provisionally propose that a revised code should prevent the doing of anything inside a “relevant conduit” as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it. Do consultees agree? Consultation Paper, Part 4, paragraph 4.34.

10.30	We provisionally propose that the substance of paragraph 23 of the Code governing undertakers’ works should be replicated in a revised code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.40.

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

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk. Do consultees agree? Consultation Paper, Part 5, paragraph 5.11.
We agree. The Code should seek to avoid a situation where land is sterilised from certain uses or redevelopment as a result of the existence of telecommunications apparatus on the land. We understand that Code Operators have a great number of sites throughout the country. We think that the timescales to respond to notices from the landowners' requesting alteration and/or removal can be set at such a length to strike the correct balance between the competing interests of landowners and Code Operators.

10.33 Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the Code; does it strike the right balance between landowners and Code Operators? Consultation Paper, Part 5, paragraph 5.12.
The potential for delay and high costs that result from following the procedure in paragraph 20 often discourages landowners from pursuing this (particularly due to the undesirable overlap with the 1954 Act). Please see further comments below. Further, the alterations regime should be restricted to alterations (as opposed to removal) for clarity and to ensure that Code Operators obtain the term certain that has been granted to them in order to justify their capital expenditure and setting up costs.

10.34 We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code. Do consultees agree? Consultation Paper, Part 5, paragraph 5.13.
We agree that there needs to be a mechanism whereby the landowner can require the alteration of apparatus. However, where the parties provide for a different mechanism in any documents, we think that their contractual intentions should take precedence and parties should be entitled to contract out.

10.35	We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code? Consultation Paper, Part 5, paragraph 5.18.

10.36	We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.

We think that a regime akin to security of tenure is appropriate; however we are of the opinion that the parties should be able to contract out of this. Landowners can be reluctant to seek a telecommunications user of vacant space on the roof or elsewhere in buildings because of the uncertainty of being able to remove Code Operators and the ability of this to restrict the use of that part of the property (and possibly frustrate a potential redevelopment) for years after the termination of the term of the initial agreement.

We believe that landowners will be more willing to offer licences and tenancies to Code Operators, and therefore more sites will become available, if they are given the certainty of being able to contract out of the security of tenure type provisions of the Code in a similar way that a landlord and tenant can agree to exclude the provisions of sections 24 to 28 (inclusive) of the Landlord and Tenant Act 1954 in relation to a business tenancy. We are aware of the argument that such an option will result in telecommunications agreements being contracted out in every case. We do not think that this is correct. Just as landlords are willing to grant leases with the benefit of protection under sections 24 to 28 (inclusive) of the Landlord and Tenant Act 1954 we believe that landowners will be willing to grant a lease to a telecommunications operator with the benefit Code security of tenure rights where this is appropriate.

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

We agree.

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.

Landowners are put off pursuing Code Operators under paragraph 21 of the Code due to the delay, cost and the uncertainty of being able to actually remove the Code Operator from occupation. A major obstacle is of course the interaction with the 1954 Act (see below).

We do not think the onus should fall on landowners to instigate proceedings for removal. However, we suggest a regime akin to the Landlord and Tenant 1954 Act Part II be implemented whereby the landowner specifies a date for removal in their notice and the onus is on the Code Operator to issue proceedings by this date in order to oppose renewal.

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.

Whilst we have not experienced any problems in this regard, we suggest that any contractual terms be applied to the period between expiry of code rights and removal to ensure that the landowner remains protected during this period. This does not result in hardship for the Code Operator as if it wishes to avoid the agreement being continued, it simply needs to take pro-active steps to remove the apparatus by the expiry date.

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

We agree. Please see our comments above at paragraph 10.36.

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

FINANCIAL AWARDS UNDER THE CODE

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

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

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

10.44	We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator. Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact. Consultation Paper, Part 6, paragraph 6.73.

10.45	Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable). Consultation Paper, Part 6, paragraph 6.74.

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

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

TOWARDS A BETTER PROCEDURE

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

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.26.

Yes, as cases through the county courts are generally slow moving and the county court judges have limited expertise in dealing with the Code.

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

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

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

(3) any other form of adjudication.

Consultation Paper, Part 7, paragraph 7.27.

We agree that the Lands Chamber should be the forum for disputes over granting code rights/ removing apparatus but where the dispute is financial only (i.e. over the level of compensation to be paid), a Party Walls types procedure would be best to avoid overloading the Lands Chamber with matters that can be decided by a surveyor presented with valuation evidence from both parties.

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

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.31.

10.51	We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.

10.52	We seek consultees' views as to how costs should be dealt with in cases under a revised code, and in particular their views on the following options: (1) that as a general rule costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs incurred; or (2) that costs should be paid by the losing party. Consultation Paper, Part 7, paragraph 7.37
Costs should be paid by the Code Operator upon a compulsory purchase unless the landowner has acted in such a way to unnecessarily increase those costs. However, in relation to disputes over removal/ alteration of apparatus, the costs should follow the general rule and the losing party should be required to pay them. This would stop landowners threatening to "have a go" at removing the apparatus at the expense of the Code Operators to improve their bargaining position with them.	

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.
Yes, see above.	

10.54	We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.
Yes, this has worked well in the context of the 1954 Act.	

10.55	Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? Consultation Paper, Part 7, paragraph 7.53.

10.56	Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.

10.57	We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.

INTERACTION WITH OTHER REGIMES

10.58	We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease. Do consultees agree? Consultation Paper, Part 8, paragraph 8.22.

We strongly agree.

Having two different regimes offering Code Operators the possibility of rights akin to security of tenure is unnecessary. The current interplay between the 1954 Act and the Code is a frequent source of criticism of the Code and has had unintended consequences when it comes to the ability of landowners to remove apparatus.

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

Yes

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us: (1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon; (2) what impact regulation 16 has on Code Operators and on Ofcom; (3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and (4) if the answer to (3) is yes, what form should it take? Consultation Paper, Part 9, paragraph 9.14.

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.

powis hughes
chartered surveyors

Our ref: RS32112MB

26 October 2012

BY EMAIL

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

Dear Mr Linney

LAW COMMISSION CONSULTATION PAPER NO 205
RESPONSE TO CONSULTATION

I am a Chartered Surveyor in private practice. I act on behalf of several major corporate and private landowners. I have been instructed to respond and am responding on my own behalf and on behalf of my clients, Funeven Ltd, and East India Dock Ltd, both owners of substantial commercial Data Centre Business Parks in Docklands, London.

Our comments on the consultation are confined to the impact on wayleaves and I assume comments will be made by other parties such as the CLA and CAAV as regards to mobile phone masts, antennae and other installations.

I have extensive experience of dealing with telecommunications matters over a period of 20 years and would limit our comments in relation to those points with which we have significant issues.

Comparable Evidence

We are of the opinion that there is significant comparable evidence for wayleave rentals both on existing properties and by reference to the previous County Court cases. The fact that there have been very few cases that have gone through the whole Telecoms Code process is an indication that, in a period of 20 years, the parties (Landowner and Code Operator)have been able to resolve these matters by discussion amicably.

Difficulties of Network Access

In our opinion the majority of apparatus is installed within public roads and relatively few new agreements are required with individual landowners. All but three cases have been satisfactorily agreed without reference to the Courts. In general, there is an extensive duct network across the UK predominantly operated by BT Openreach. This network has been opened to other Code Operators to use under Third Party Access arrangements. We understand that [redacted] this has been unsuccessful and has seen very little uptake. This resource could obviate the need for many Code Operators to expensively extend their networks (underground duct is circa £100-120 per metre to build).

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powis hughes
chartered surveyors

Valuation Methodology

Our principal concern relates to the proposed Valuation Methodology. It is entirely appropriate that the wayleave rentals be assessed by reference to market negotiations between a willing lessor and a willing lessee; it is not appropriate that rentals discount the value of the Code Operators' Scheme as this is inherently distorting the market and will result in annual payments which are nominal once the disruption of installation has taken place.

At these nominal rentals there will scarcely be any point in a landowner allowing a Code Operator on their property to install apparatus and the rent would be barely worthwhile collecting. Code Operators are excessively protected by both the Electronic Communications Act and also the Landlord and Tenant Act and are virtually impossible to move or negotiate with as they can scarcely ever be removed and, hence, will rely on their protected position in any negotiation. In our own experience, Code Operators are already raising the Law Commission Consultation response as a reason for preventing progress as they have an expectation that they will be able to obtain the wayleaves for significantly less than they pay currently.

Our Position and Our Experience of Telecoms Wayleaves

My clients, Funeven Ltd and East India Dock Ltd, operate a large commercial estate in East London. This estate includes [redacted] some of the largest colocation data centres in the UK and are fundamental in terms of the UK's internet capacity and to international traffic. The majority of these buildings can be access directly from the public highway; however the majority of operators choose to go through our estate and all pay rentals which are consistent with each other. These rentals are based on rates per metre of duct per annum. We have installed an extensive network of apparatus within our estate, in addition, and higher rates are paid for the use of our apparatus. The estate has been operated for more than 14 years and it is only recently (in the light of the Law Commission Review and Code Operators' responses) that we have even thought to have recourse to the provisions of the Telecoms Code.

It is only appropriate that a commercial operator taking rights to occupy land from a commercial landowner should pay a commercial rate. If the legislation distorts this by artificially inferring discounts for a Code Operator by ignoring their Scheme, then the operators are clearly receiving a material benefit to the detriment of the landowner.

We are confident that nearly all of the apparatus on our estate directly forms part of the fibre backbone (rather than an individual retail consumer broadband customer) and all bar one building is accessible directly from the public highway without any recourse to our estate. In no way can it be argued that we are preventing access to broadband telephony services for any individual consumer by requiring proper wayleaves and adequate rentals. Routing is inevitably the choice of telecommunications companies and if they wish to come onto our estate they recognise that our standard published payments apply. We have circa 20 recent wayleave agreements all on comparable figures.

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chartered surveyors

Assignments and Sharing

We believe that the normal Landlord and Tenant rules should apply to assignment and to alteration. When it comes to underground apparatus covered by wayleaves, there is little material impact on the estate above ground unless further elements of construction are incurred or if there is disruption to the estate involving road closures for access to chambers.

Conflict Resolution

Our view is that the County Court is not the appropriate forum for resolving these. The Lands Chamber (Upper Tribunal) incorporating the Property Tribunal will be a more cost-effective option. We would, however, firmly support mediation or PACT as other options. In our view, specialist valuation knowledge is required and this would be best provided by the Lands Chamber Property Tribunal.

Lift and Shift

In our opinion this should be left for negotiation between the parties and is perfectly satisfactorily dealt with at present.

Early Access

Providing the costs of professional Court or ADR costs incurred by the landlord are paid by the operator then early access would be satisfactory.

Upgrade Assignments & Sharing Rights

This would result in an unacceptable loss of control by a landowner. This is particularly important in relation to mobile phone masts but these rights should not automatically extend to the installation of further ducts within an estate.

Rights to Alter Apparatus

Rights to alter apparatus should not extend to installation of further ducts under existing agreements. Within our estate, the space beneath our roads and pavements is now extremely congested and limited. One operator installing multiple ducts at a single time could effectively sterilise routes for future operators. We are aware of circumstances on our estate where this is already happening.

powis hughes
chartered surveyors

Mr James Linney, Law Commission
26 October 2012
RE: Law Commission Consultation Paper No 205, Response to Consultation

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Loss of Rateable Value

I understand that there are in the region of 38,000 mobile phone installations in England and Wales, these are all individually assessed for business rates. Clearly, only parts of the installation (including the masts) are rateable. Fundamentally, the Rateable Values are based on the rental paid. Assuming an average of £7,500 Rateable Value (which is probably modest, given that rooftop installations could easily be higher) this translates to an aggregate Rateable Value of circa £285 million RV plus Rateable Values on Cable TV and on Fibre Networks (say £175 million). If this RV was lost on the basis of this the HM Treasury currently would forfeit in the region of £200 million per annum.

I would recommend that the Valuation Office Agency be asked to comment on this matter.

In summary, our comments are as follows:

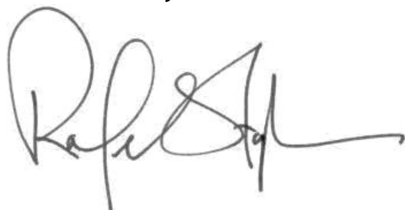
1. The rental or financial return should be determined by the Market on the basis of a willing landlord and a willing tenant, reflecting the value to the grantee (ie not disregarding the Scheme).

2. The telecoms installation should be exempt from Part II of the Landlord & Tenant Act 1954.

3. Early access could be provided providing that if an operator does so then they agree to meet all professional Court and ADR costs incurred by a landlord.

4. Lift and Shift, no changes are necessary to these rights.

Yours sincerely



Rafe Staples
Director, Powis Hughes Ltd

Regulated by RICS

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

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

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

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

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

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

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

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

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

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

Tel: 020 3334 0200 / Fax: 020 3334 0201

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

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

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

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

Your details

Name:
Tom Packham MSc MRICS Estates Business Manager
Email address:
[redacted]
Postal address:
Dŵr Cymru Cyfyngedig, Pentwyn Road, Nelson, Treharris, CF46 6LY
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):
Dŵr Cymru Cyfyngedig (also known as Dŵr Cymru Welsh Water or DCWW)
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.
No	

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.
Yes. i. There should be a requirement, similar to that which binds water and sewerage undertakers, for Code Operators ("COs") to have a Code of Practice to which they must adhere when carrying out works on privately owned land. The Code of Practice would include matters such as: information about what the landowner/occupier can expect; an obligation for the CO to consult the landowner/occupier on the position/route of apparatus; an obligation on the CO to make and provide a schedule of condition; how the future use of the land might/will be restricted; how the landowner/occupier can expect compensation and the process by which compensation will be negotiated/adjudicated upon; the landowner/occupier's right to engage a valuer to advise them and negotiate their claim, the costs of which will form part of the claim; a complaints procedure to be followed if the CO breaches the Code of Practice or exceeds its powers. ii. COs must be obliged to consult with occupiers/landowners about their intention to exercise their powers, which must give the occupier/owner the opportunity to respond to the proposals and request more information (eg about the proposed location/route of apparatus). The obligation in the water and sewerage industry to consult is aimed at avoiding complaints and minimising areas of dispute. Where onerous rights are granted, it is important that they are accompanied by strict, clear obligations to exercise those rights in a particular way and consultation is an extremely important part of this. iii. There should be a complaints procedure similar to that provided by Ofwat in the water and sewerage industry. This should give Ofcom the power to receive and investigate complaints and to punish breaches of the Codes/any exceeding of Code powers/any unreasonable conduct by a CO, by awarding further compensation to the occupier/owner. This will ensure that Code powers are not abused. Determinations of complaints should be publicly available.

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 a definition of "accessories" to apparatus which is to be installed, which should include plant/equipment necessary for the functioning of the apparatus, including that necessary to preserve its safety and protect it from damage or interference – this will therefore include security features such as fencing or kiosks.

10.8	We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.

The creation of Code rights should be not only in relation to an occupier but also an owner of land, in order to avoid/minimise issues later arising under the security provisions.
In the water and sewerage industry, notice is always served on an owner as well as an occupier, each may make a claim and each is bound by the notice.
The situation described in paragraph 3.38 of the paper is of no concern to DCWW.
The issues which arise from an occupier being served notice and reaching agreement with the CO or an order being made by the County Court/Lands Tribunal could be largely avoided if notice were also served on the landowner at the time of the works.
If an agreement is reached with an occupier on a voluntary agreement, the CO must give notice of it to the owner by serving notice. If no notice is served, the landowner should not be bound by the agreement and the paragraph 21 provisions should not then apply: this will ensure that COs serve notice on the landowner.

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, because there has to be some sort of test to be applied in order to decide if the CO should be permitted to exercise Code powers.
(2) No.
(3) The Access Principle should not carry the weight it does now, because it has become viewed and treated as an overriding principle, although that not might have been the intention of those who drafted the Code. The drafting of a revised Code must make it clear what weight is to be attached to the Access Principle in relation to the other parts of the "test".

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.

Others should not be bound in this way, otherwise occupiers could submit owners to unacceptable future limitations on the use of their land and its long term use and value will be adversely affected.

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.

How can an occupier/owner object if no notice is given?
Agreement or the Tribunal's authority must be obtained first. Otherwise, COs would have more rights than electricity undertakers, which is surely not the intention?

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.

The reality is that if an objection is only made after the event, the Tribunal is more likely to allow the apparatus to remain. This puts the onus on the owner/occupier to apply, whereas the onus should be with the CO. Where onerous rights are granted, they should be accompanied by strict obligations to serve notice on owners and occupiers before the event.

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.
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10.14	Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended: (1) to vegetation generally; (2) to trees or vegetation wherever that interference takes place; and/or (3) to cases where the interference is with a wireless signal rather than with tangible apparatus? Consultation Paper, Part 3, paragraph 3.74.
Yes, but the interference must be genuine and of sufficient severity and the CO must produce evidence to show this. Such works must be at CO's cost and the new Code should provide for damages, if any losses are suffered (eg loss of privacy, diminution in value etc). Any Code of Practice must apply to such works. When apparatus is installed/laid, COs should tell landowners about their rights in respect of trees/vegetation (they should be contained in a Code of Practice) and guidance should be given to landowners/occupiers in advance about what sorts of trees/plants they should avoid (eg. fast/tall growing/deep rooted), and whether all planting should be avoided within a certain distance of apparatus. It is, for example, standard in the water and sewerage industry for there to be a "protected width" around apparatus, over which a landowner should not plant deep rooting plants/trees or construct buildings or other structures. Information is provided to occupiers/landowners so that they know in advance what they should or should not do within the protected width.	

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. (2) If apparatus is installed by agreement: yes, if the agreement did not contemplate this and grant the right. If it is installed by order: the compensation/consideration should include an element for future upgrading.

10.16 We ask consultees: (1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice; (2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or (3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus. Consultation Paper, Part 3, paragraph 3.83.
(1) No, but see 3 below. (2) Yes, but see 3 below. (3) There should be a payment of consideration at the time to reflect the financial benefit to the CO. Contractual terms should not be void or overriden.

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.
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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) – (2) Yes, save that this should not be retrospective (so contractual terms would apply and not be overridden) (3) On balance no – although the disadvantage is to create a “trade” in assignable rights from which the CO will benefit financially and the landowner/occupier will not and we ask the Law Commission to consider how this might be dealt with.

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.
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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.
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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, but if the CO successfully defends any such application there should be no provision allowing third parties to proceed to apply against the occupier/landowner.

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.

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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.

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10.24	We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator. Consultation Paper, Part 3, paragraph 3.107.
In the case of removal of abandoned equipment, or equipment at the end of an agreed period which the CO does not apply to retain, the onus should be on the CO to apply within a set time. If it does not make an application, then the occupier-owner may enforce its removal and the CO would have no defence. COs should not be entitled to leave apparatus and force the occupier/owner to make an application. The proposed revision to the Code provides sufficient protection for the COs because it provides that they can apply to retain the apparatus. If they choose not to make an application then they should not be protected from an application to remove it. If the CO fails to make an application to continue to retain the apparatus on the land, then it should be a simple trespass.	

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.
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10.26	We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests. Consultation Paper, Part 4, paragraph 4.20.
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10.27	We seek consultees' views on the following questions. (1) Should there be a special regime for tidal waters and lands or should tidal waters and lands be subject to the General Regime? (2) If there is to be a special regime for tidal waters and lands, what rights and protections should it provide, and why? (3) Should tidal waters and lands held by Crown interests be treated differently from other tidal waters and lands? Consultation Paper, Part 4, paragraph 4.21.
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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 a special regime applying to land used for railways etc, but also for land owned/used by utilities companies for their operations. Operational issues must be given equal or more weight than the Access Principle, because otherwise they may be overridden. The Code should specifically provide for this.

In the case of water and sewerage undertakers, there is a strict statutory and regulatory regime which controls their ability to dispose of land. First of all, undertakers may only dispose of land which is not required for their regulated activities for the foreseeable future (in other words, it is non-operational and is surplus to requirements). Secondly, they must dispose of land for the “best value”. These matters are set out in the Water Industry Act 1991 and its statutory predecessor, the Secretary of State’s General Authorisations permitting undertakers to sell land and Condition K of the Operating Licence. In cases of land with a certain value, undertakers have to obtain Ofwat’s approval before a sale can proceed. The Code as it is currently drafted, and the proposed revisions to it, do not take this into account and would require undertakers to breach the terms of their operating licences and their obligations pursuant to the Water Industry Act 1991 and its predecessor. Whilst a statutory requirement to dispose of land without satisfying the various requirements may override those requirements, we ask you to consider whether it is appropriate to grant COs rights which override those requirements. A special regime would take these matters into account and would specify that the undertaker’s statutory requirements must be balanced against the Access Principle and the other parts of the test: we ask the Law Commission to consider whether an undertaker’s operational requirements should be given greater weight than the Access Principle.

I ask that you consult Ofwat on this issue.

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. It should continue to apply to statutory water and sewerage undertakers.

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

There should be a special regime applying to utilities providers and land owned or used by them. Operational issues must be considered. The present code/Regulations provide for consultation, which is entirely different and is not sufficient. I ask you to consider the comments at 10.28 above.

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.
Yes

10.34 We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code. Do consultees agree? Consultation Paper, Part 5, paragraph 5.13.
No. It should be possible for private occupiers/landowners to make agreements with COs, and the Code should not seek to interfere with or override them, retrospectively or otherwise. Otherwise private agreements will be discouraged.

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.

The provisions are appropriate and should be extended to apparatus owned by utilities undertakers.

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.

This right should be different in the case of utilities undertakers, who have operational requirements in relation to their land. Eg water and sewerage undertakers may own catchment land around reservoirs which may be leased in rural areas to farmers. Catchment land is operationally important, and the right of a water and sewerage undertaker to make an application should not be removed or restricted. Another example is land which is required for future operational use, and which is in the meantime leased to a third party in order to generate income. An undertaker's future rights over its should not be restricted.

These matters should be included in a special regime applying to utilities undertakers.

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.
Responsibility should be reversed so the onus is on the CO. Private landowners/occupiers may be unaware of their rights, but COs will know the laws that apply to them and should take responsibility for removing apparatus which is abandoned, or for applying to keep apparatus which they still use.	

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.
There should be sanctions against a CO which does not either remove apparatus or make an application: the rights of a CO to enter and carry out works on private land are onerous and should be accompanied by strict obligations. If a CO fails to apply to retain apparatus, then punitive damages should be awarded to a landowner/occupier who has to enforce its removal by making an application.	

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	

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.

The Code should not be retrospective. So agreements made before a revised Code comes into force should not be overridden by Code rights. Pre-existing agreements negotiated in a different context should not be interfered with.
If this necessitates an application by the CO at the end of the agreement term, so be it, but this should not be problematic if the revised Code clearly sets out the compensation/consideration to which the owner is entitled. If the owner would not have had the right to require removal if the operator had not become a CO, then this is a circumstance which the Tribunal should take into account.

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.

Definitely.
Those who will be affected by Code rights must be given compensation/consideration to be assessed at the time the right is granted, not only when a paragraph 21 scenario arises. If further losses are suffered as a result of any paragraph 21 extension, further compensation/consideration should be awarded at that time, because the long term presence of apparatus may lead to further losses.

10.44	We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator. Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact. Consultation Paper, Part 6, paragraph 6.73.

No. This still leaves the problem of assessing "market value". A percentage uplift would provide greater clarity and minimise disputed claims.
Where the presence of apparatus does not affect the value of the land, there should be a standard payment instead. In the water and sewerage industry this is standard practice and is known as a "recognition payment". The payment is calculated with reference to the area of land affected according to the length of any pipe/conduit, and the area occupied by any apparatus.

Water and sewerage undertakers are subject to a strict statutory and regulatory regime which governs how it may "dispose" of its interests in land. Granting of Code rights would be such a disposal. One of the matters which the regime lays out is that a water and sewerage company must dispose of interests in land at best value: this has to be the value not just of the land, but the value to the purchaser: so for example if land has development potential for the purchaser, that must be taken into account, even if the land itself in the hands of the undertaker has minimal value. The provisions of the revised Code which you propose in relation to payment of consideration and how this is to be calculated without reference of the value of the land to the Code Operator would put water and sewerage undertakers in breach of condition K of their operating licences. This is a serious issue and Ofwat should be consulted about this before a revised Code is drafted. We can provide you with a full explanation of the regulatory/statutory regime if you would like.

We wish to comment on paragraph 6.58 of the Law Commission Consultation Paper – it is not appropriate to equate COs with water and sewerage undertakers, because they are not profit making entities in the same way that COs are. DCWW is a not for profit company (which means that its profits are reinvested in the company in order to improve customer service and environmental performance, or used to reduce customer charges). Other water and sewerage undertakers are profit making entities, however all water and sewerage undertakers are subject to strict statutory controls by Ofwat in what they can charge customers and therefore what profits they may make. COs are not controlled in this manner and cannot therefore be equated with water and sewerage undertakers.

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.

A percentage uplift would be far simpler (option 4).
Alternatively, the Law Commission should consider whether the standard formulae/pricing structures agreed by eg the NFU could be adapted and used (option 2).
See comments above regarding "recognition payments" where there is no loss in value.
Betterment should also be taken into account when compensation is considered.

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, but there would need to be detailed provisions which set out what is to be offset against any repayment (eg the costs of the application, cost of removal) and whether interest would apply.

TOWARDS A BETTER PROCEDURE

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

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) The most appropriate forum would be the Lands Chamber. (2) This will increase costs for private owners/occupiers, because third party adjudicators/independent surveyors will have to be privately paid for the services they provide. It will also result in a lack of case law which will assist parties in reaching consensual agreements. If you decide to include this in a revised Code, the adjudicator/independent surveyor's costs should be paid by the CO, regardless of the outcome. (3) ditto comments under 2 above Options 2 and 3 should be voluntary alternatives.

10.50 We provisionally propose that it should be possible for code rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment. Do consultees agree? Consultation Paper, Part 7, paragraph 7.31.
Yes. The assessment of compensation/consideration should be after installation, so that issues of reinstatement can also be dealt with. There should be a provision for the CO to make an advance payment, as there is in the water and sewerage industry, and interest should be payable on the final payment.

10.51	We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.
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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
The current regime works well because it punishes landowners/occupiers who behave unreasonably. Costs orders against owners/occupiers are rare in reality. The Lands Chamber should be entitled to consider which party has "won", but this should only be one consideration.	

10.53	We also ask consultees whether different rules for costs are needed depending upon the type of dispute. Consultation Paper, Part 7, paragraph 7.38.
No. The costs regime must be designed to prevent owners/occupiers from behaving unreasonably.	

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 We suggest that the 28 day notice period is insufficient; landowners may be on holiday, many people own second homes. The short period gives owners/occupiers little time to seek legal advice. The period should be extended to a minimum of 6 weeks.	

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.
Plans must be provided with notices, indicating the size, position/route of apparatus and accessories. A leaflet must be provided explaining the procedure for applications/objections, and for complaints, with information about where standard forms can be found. A Code of Practice must also be provided.	

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 of Practice Complaints Procedure Leaflet, as above.	

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, but Ofcom should make standard terms available which it should regularly review, and attention should be drawn to this in the Notice/Leaflet/Code of Practice.

INTERACTION WITH OTHER REGIMES

10.58	We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease. Do consultees agree? Consultation Paper, Part 8, paragraph 8.22.
Yes	

10.59	We provisionally propose that where an agreement conferring a right on a Code Operator also creates an interest in land of a type that is ordinarily registrable under the land registration legislation, the interest created by the agreement should be registrable in accordance with the provisions of the land registration legislation, but that a revised code should make it clear that its provisions as to who is bound by the interest prevail over those of the land registration legislation. Do consultees agree? Consultation Paper, Part 8, paragraph 8.33.
No. The provision at paragraph 2(7) of the Code should not appear in the revised Code. There is no reason why rights created or granted should be exempt from the LRA 2002. It is in the public interest for the rights/obligations to be recorded on the register.	

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

<table>
<tr><td>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.</td></tr>
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</table>

<table>
<tr><td>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.</td></tr>
<tr><td>Regulation 3(1) should include an obligation to consult with relevant undertakers (including water and sewerage undertakers), with the aim of avoiding disruption.</td></tr>
</table>

I ask that you include Dŵr Cymru Cyfyngedig in any future stakeholder discussions/meetings to ensure that our concerns are considered during the remaining consultation period. I note from the list of attendees at the stakeholder seminar/meeting on 29 March 2012 that it was not attended by any representatives of water and sewerage undertakers, or other utilities providers. There seems to be a distinct lack of awareness in the water and sewerage industry of the proposed revisions to the Code. This is a matter of great concern because the interests of a whole class of landowners, who should be subject to a special regime because of the operational issues, appear to have been ignored. I am concerned that the issue of a special regime to apply to such undertakers has not been given adequate or any consideration. There is no indication in the paper, or the minutes of the stakeholder meeting, that indicate it has been considered. Undertakers are clearly in a different category than private landlords because they have public duties to fulfil and they must be subject to a special regime because of the operational use of land and, in the case of water and sewerage undertakers, they are subject to statutory controls over the disposals of interests in land and have a duty to preserve and enhance their undertakings.

FLEXIBLE AFFORDABLE BUSINESS SPACE

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BIZSPACE

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

25 October 2012

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 BIZSPACE LIMITED

Please accept this as an individual response to the above consultation on behalf of Bizspace Limited.

Bizspace owns 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 (licensor) and the operator occupiers as willing licensees. 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 Bizspace) 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.

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 has 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

Lisa-Jane Risk
Property Director

BIZSPACE Limited. Registered in England. Registered Office: Sovereign House, 1 Albert Place, Finchley, London, N3 1QB. Registration Number: 5988148 Part of Highcross Group. MEMBER bca

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

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

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

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

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

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

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

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

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

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

Tel: 020 3334 0200 / Fax: 020 3334 0201

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

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

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

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

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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):
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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.

(1) Agreed.

(2) Agreed.

(3) Agreed.

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

Consultation Paper, Part 3, paragraph 3.17.

The Scope of rights within 10.3 should be sufficient.

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

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

Yes as technology moving fast and The Code should not be seen as a barrier to progressive technology.

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

Yes to run and maintain their networks and to pay a fair and appropriate consideration to the landowner upon which they have their network installed.

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 range of apparatus covered is a broad one and has worked well for approx 30 years and should remain as it is.

Some Operators have had issues with getting electricity supplies connected to sites. However, it is not felt appropriate to include provisions within the Telecoms Code to include electricity cables when there are other powers to acquire such rights, eg the Electricity Act 1989.

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.

Landowners should be bound by the Code and this includes freeholders and leaseholders.

Where compulsory acquisition of land, or rights over land are contemplated they need to be of public benefit. The benefits of telecommunication systems for the public benefit should be balanced against interests of private landowners. It is important in our view that where land / rights over land is acquired by a Telecoms Operator that the landowner is provided a consideration rather than compensation, thus the value of the land taken should be the value to the grantee (Telecoms Operator) rather than the grantor (Landowner).   This is as the current arrangements which have worked well for nearly 30 years.

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

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

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

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

Consultation Paper, Part 3, paragraph 3.53.

(1) The landowner should be provided a consideration rather than compensation, thus the value of the land taken should be the value to the grantee (Telecoms Operator) rather than the grantor (Landowner). This should take account of the public benefit that the landowners land provides.

(2) Yes but where the landowner's agreement is not forthcoming and land or rights over land are compulsory acquired the landowner should receive a fair and appropriate consideration, rather than a compensation to reflect loss of land.

(3) A balance needs to be stuck between landowner and Operator and the principles of the existing Code and those that were arrived at in the case of Mercury Communications Ltd –v- London & India Dock Investments Ltd should be enshrined in any new Code.

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 should be up to the Operators to agree with all parties that have an interest in the land and where this is not obtained to use Code powers as necessary.

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 direct experience, however, if the land that the line flying is over is in different ownerships then separate agreements should be obtained from respective landowners.

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.

There should be consultation and the right to object.

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.

Notices should be fixed, however, a fixed fine (or penalty payment) may be a better remedy than a criminal offence for non compliance.

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

(1) to vegetation generally;

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

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

Consultation Paper, Part 3, paragraph 3.74.

(1) No, there needs to be proven interference.

(2) Yes.

(3) No as interference should be to tangible apparatus.

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) Upgrades should be permitted but they should be restricted so that the size and quantity does not increase beyond a certain percentage (this should be small and be in the order of 10%) of the original installation without further agreement.

(2) Extra payment should be made when increases made beyond a certain limit, see comment as above as the extra payment could be triggered when the maximum expansion above the pre defined limit had been reached.

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 due to the merger of what was T Mobile and Orange and assignments it is difficult to control; use of sites as was originally intended. Use of the site should be limited to a single legal entity, unless by an agreement permitting greater use of a site.

(2) It should be the landowner who has the ability to control use of their land.

(3) When increased use is made of a site by sharing the consideration payable to the landowner should be increased to reflect the increased use 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.

There should be provisions to allow landowners to control who is using the land and prevent sharers using the site unless by prior agreement.

10.18 We ask consultees:

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

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

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

Consultation Paper, Part 3, paragraph 3.92.

(1)
The landowner should be allowed to control which Operators are using their land as joint venture companies can allow two or more Operators to use a site without paying a further consideration to the landowner.

(2) The landlord should have the ability / allowed to control the identity of the Operator on their land.

(3) If an intensification of use occurs the landowner should receive a consideration to reflect the benefit.

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

Consultation Paper, Part 3, paragraph 3.94.

We do not see any ancillary rights are necessary or appropriate.

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.

Because of The Code the Operator looking to gain access should not have an issue as ultimately they have the Code to rely upon. Eg, Cabletel Surrey and Hampshire Ltd v Brookwood Cemetery Ltd [2002]

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.

Is the current Code not sufficient? In effect this gave rise to Code Powers being used against Brookwood Cemetery Ltd to gain access over a roadway to supply a relatively small number of subscribers.

With regard to Paragraph 8, it may be easier and more beneficial if it is the Operator that has greater power, rather than pass the problem of lack of access back to the subscriber to resolve.

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.

Not aware.

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) No experience to allow constructive comment.

(2) No experience to allow constructive comment.

(3) Making it a criminal offence, compels the Police to take action, which can only be of benefit to the Operator to remove the unlawful interference.

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.

If a Code Operator did not carry out their obligations to a landowner a fine based system of fixed fines, or penalties, where the fine goes to the landowner may be an incentive to encourage the Code Operator to comply with their obligations.

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.

Agreed. This has worked well in practice for below and above ground 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.

Based on our experience of The Crown Estate, the current regime works well for tidal waters (to include tidal rivers) and lands held by Crown interests in that there is Crown immunity, however, this allows a negotiation to an appropriate consideration.

Under The Crown Estate Act 1961 there is an obligation to obtain best consideration. This should, prima facie, include the value to the grantee, and in particular the value, if any, to the grantee as a special purchaser. This best consideration should have regard to all the circumstances of the case but exclude any element of monopoly value attributable to the extent of the Crown's ownership of comparable land.

The Crown Estate have a number of telecom sites on their Rural and Urban Estates. This would include mast sites on farms and upon buildings, including some in central London. On the Marine Estate, which includes tidal waters there are cable crossings on both foreshores and across rivers. These agreements have been put in place through negotiation, so demonstrates The Crown Estate's willingness to allow telecoms installations upon their landholdings.

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 are owned by private individuals / organisations as well as The Crown Estate. As such these areas should come under the General Regime as far as non Crown interests but Crown interests should have Crown immunity.

(2) Crown interests should have Crown immunity as the current Code. Based on our experience of The Crown Estate, this has worked well in practice and ensures that any acquisition is by agreement. It is important that cable crossings are not forced through potentially interfering with other oil, gas and cables or to the detriment of a potential offshore windfarm.

(3) Yes - Crown interests should have Crown immunity as the current Code. This should be for both tidal waters and other land.

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) The General Regime should suffice.

(2) Linear obstacles are difficult and expensive to divert around, eg a canal or a railway line and for this reason they were singled out, when the General Regime if correctly written could apply to these as much as a landowner who had a large landholding that was also in a position where they felt able to ransom the Operator.

(3) Civil sanction probably more appropriate.

(4) If use of General Regime altered to take in linear obstacles this may make interpretation easier and less ambiguous for different types of land acquisition.

(5) As above consideration should be given to bringing under the General Regime.

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.
Agreed.	

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.
Agreed.	

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
Agreed.	

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk.

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.11.

Agreed as it is important to balance landowners interests with that of the Code Operators to run and maintain a network.

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.

It is important that landowners and those with in an interest in land to have the ability to require the Operator to alter, move, remove or replace the telecoms apparatus to allow the land to be improved / redeveloped without the telecoms apparatus hindering redevelopment. The Operator does require an element of protection but this needs to be balanced with bringing forward land to be used more intensively for the economic benefit of the landowner and the area in general.

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.

Disagreed. It is likely Operators will seek this as the norm and once this is signed up it gives the landowner very little power to seek alteration of apparatus to allow land to be used for a more beneficial purpose at some point in the future.

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.

It is important that landowners of linear obstacles have the ability to seek Operators to make alterations so as not to impede use of the linear obstacles where changes to how they are needed to be used for operational reasons is required. Eg alteration / relocation of rail layout on a railway line.

Telecoms use should not hinder the original intended operational use of land, eg railways, tramways or canals.

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

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.47.

We do not agree that the Code should restrict the rights of landowners to seek removal of apparatus installed by Code Operators. However, we feel that there ought to be realistic time limits set to allow a set period for operators to acquire an alternative network provision but one that gives landowners their land free of apparatus at the end of the set period.

10.37 We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully.

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.48.

We agree, however, there needs to be provision to allow Operators to install temporary installations / apparatus to service particular needs or provide continuity of network in emergency situations, so that end users are able to have a service provided as required.

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 should be on the landowner to enforce removal.

There should be a set procedure and timescale, so as to give the Operator ample opportunity to relocate / redesign their network but at the same time providing the landowner a certain date when they can have full vacant possession of their land, free of telecoms apparatus.

This could be achieved by the landowner giving the Operator Notice to remove equipment within a predetermined time. The minimum Notice given should be a year.

If the Operator stays in occupation beyond the removal date they should pay the landowner a large penalty payment per day of extended occupation as well as any compensation for loss suffered by the landowner due to the presence of the telecoms apparatus.

10.39	We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus. Consultation Paper, Part 5, paragraph 5.50.

If an Operator stays in occupation beyond when a landowner has sought removal then there should be a large penalty payment per day of extended occupation as well as any compensation for loss suffered by the landowner due to the presence of the telecoms apparatus. Eg if the landowner cannot redevelop his land as desired the Operator would have to pay compensation for any loss of value due to the presence of the telecoms equipment in addition to a pre set penalty payment.

The penalty payment would be to encourage removal and the compensation to compensate the landowner for actual loss incurred. If the Telecoms apparatus prevented the redevelopment of land to a shopping centre or large office block or block flats the compensation is likely to be far greater than the inability for a farmer to extend a barn to house livestock / store tractors within.

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.

This sounds a good idea but in practice it is very unlikely that Code Operators would allow landowners to sign up to this.

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.

Landowners should have the right to require alteration of all apparatus / equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of the revised code. It is important that the presence of Telecoms apparatus does not prevent redevelopment / re use of the landowners land as they see fit.

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.

Not agreed.

The landowner should have a consideration, rather than compensation. The value of the land to the Operator needs to be reflected in the payment made to the landowner / grantee. The amount also needs to be fair and reasonable.

The consideration should be by reference to Market Values, ideally set by comparable evidence. Where an appropriate consideration cannot be agreed and the Operator enforces Code Powers to seek an acquisition the consideration should be fair and reasonable and take into account the market value and bargaining position of the parties and any consideration should not involve an element of profit share or ransom. Where comparables are difficult to obtain then it is appropriate that there is subjective opinion applied by the party determining the consideration / value to be paid. The decision in the case of Mercury Communications Ltd –v- London & India Dock Investments Ltd (1995) is testament to this and thus the principles within the Code should remain to reflect this.

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 agree in this instance that those that are unable to remove electronic communications apparatus from their land should be compensated for the loss they suffer. However, so the Operators do not use this as a means to stay on site without paying an appropriate consideration to reflect the value to an Operator we feel that the Operator should pay the higher of compensation or consideration, so that a landowner is appropriately rewarded.

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.

Not agreed.

The consideration for rights conferred under a revised code should be assessed on the basis of their market value between a willing seller and a willing buyer. It should not ignore the special value to the grantee or to any Code Operator.

The Consideration should reflect that Code Operators are commercial entities who run their businesses on a competitive basis to generate profits for owners and shareholders. It is therefore appropriate to allow the consideration to be determined by market forces.

If landowners get relatively small sums of money (hundreds of pounds to a few thousand pounds as a one off compensation) they will resist / not be willing to enter in to agreements for Operators to use land. Particularly as above ground mast installations are not attractive to look at. Thus the Operator is likely to force through acquisition against a landowners wishes using compulsory powers. On new mast site telecoms installations that require planning approval the landowner is likely to object, as too are neighbours where LPA's would then likely refuse the planning application because of local pressure to do so. Operators would then have to go down the appeal route to obtain planning and in turn compulsory acquisition. This will only delay roll outs of new sites.

10.45	Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable). Consultation Paper, Part 6, paragraph 6.74.

We should be looking a consideration, not compensation.

Compensation, even with a statutory uplift is unlikely to reflect a fair and reasonable value to reflect use of land for telecoms apparatus.

We feel that it is fairest if a consideration is paid and that this is to be determined by market forces. Where there is non agreement and a consideration needs to be ascribed it may be something for the Lands Chamber to determine, so that a degree of consistency applied in determination of in essence valuation issues.

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.

Agreed on the proviso that the landowner should receive consideration rather than compensation.

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

Agreed.

This would ensure that alterations were made for the appropriate reason. The mechanism to determine should be a set formula, and there should also be a third part determination in the case of dispute. As in essence a valuation issue this could be by reference to the DVS / VOA or for the Lands Chamber to determine

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.

Agreed.

It could be the DVS / VOA in respect of pure valuation matters, or for the Lands Chamber to determine on more complex valuation / legal issues. If the first stage was the DVS / VOA then the appeal route by an aggrieved party should be the Lands Chamber.

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) The Lands Chamber would be an appropriate body to settle dispute with the ability to transfer appropriate cases to the Property Chamber of the First-tier Tribunal or vice versa.

(2) This may not be seen to be fair and provide neutrality, and so not agreed.

(3) If matters were mainly of a valuation nature it could be up to the DVS / VOA to provide a binding view on the appropriate value.

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.

Agreed. This gives the Operator certainty over land acquisition in a timely manner in order that they can provide a network / telecoms service and as far as payment / consideration allows parties time to make representations or for the matter to be referred to say DVS / VOA or the Lands Chamber to determine the appropriate consideration to reflect the circumstances.

10.51	We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.

Have a set procedure as far as the Operator serving Notice on the landowner and if terms / consideration not agreed within a set time that, the Operator may take access and the matter is referred to the DV / VOA or Lands Chamber to impose terms / conditions / consideration based on evidence presented to them by the Operator and the landowner.

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

(1) Agreed that all costs should be paid by the Code Operator, unless the landowner's conduct has unnecessarily increased the costs or the landowner has been vexatious.

(2) No not agreed as this puts the Operator in a dominant position and the fear of costs could bully the landowner in to agreeing / settling something that was not in their best interests because of a fear of 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.

It is the Operator who is looking to acquire / gain something from a landowner and if there is a dispute and a landowner is not able to get rid of / tell the Operator to go away and leave him alone, then it is only fair and equitable that the Operator pays the landowners cots providing the landowner is not vexatious.

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. This will provide a clear un ambiguous procedure that should not give rise to dispute through lack of clarity.	

10.55	Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? Consultation Paper, Part 7, paragraph 7.53.
There should be prescribed forms of Notice set down in legislation (Code) with appropriate “health warnings” similar to Notices that are required under various aspects of Landlord and Tenant Acts.	

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.
In any Notice there needs to be a clear health warning that professional / legal advice should be sought	

10.57	We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.

It would be difficult to impose on landowners and Operators a set form of legally binding agreement as this may be to rigid and in flexible to reflect the circumstances.

Operators should be encouraged as best practice and landowners to also use a form of Heads of Terms something similar to The Code for Leasing Business Premises in England and Wales 2007.

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.

Where an Operator has contracted out of the security of tenure provisions of The Landlord & Tenant Act 1954 the Operator should not be able to rely on Code Powers to remain on site indefinitely against the landowners wishes. If the Operator does rely on Code Powers to remain on site the landowner should receive compensation due to loss of potential to use the land, if they have a real intention to redevelop and consideration to reflect the value to the Operator. There needs to be a mechanism to resolve any dispute in these instances and one wonders if The Lands Chamber to be the appropriate forum, where the Operator would pay all costs, providing the landowner had not been unreasonable and / or vexatious.

If the lease is within The Landlord & Tenant Act 1954 the landowner should be able to rely on one or more of the specified grounds for determination and non renewal.

Where issues / disputes at renewal occur for protected leases the Courts should be the arbiter to determine, as in the case of all leases renewed within The Landlord & Tenant Act 1954. Why should telecoms leases protected by The Landlord & Tenant Act 1954 be any different to a business lease also protected by The Landlord & Tenant Act 1954 on say an office, industrial or retail premises.

Timetables within the Code should be brought in line with time critical events within The Landlord & Tenant Act 1954 for ease of renewal utilising both regimes in parallel.

Due to the complex procedures of obtaining removal of a telecoms installation under Code Powers, and the associated costs, it has put Operators in a strong bargaining position to remain on site after the expiry of a lease and the Operators bullying tactics in trying to impose draconian terms for new leases / lease renewals on landowners, in the knowledge that it expensive and protracted to seek removal under the Code. Rents on many sites are in the low thousands of pounds per annum and the professional fees that a landowner incurs in dealing with these are disproportionate to the income that can be generated.

Where an Operator has contracted a lease outside the Security of Tenure provisions of The Landlord & Tenant Act 1954, it is not in the spirit of entering in to such a lease to then use Code Powers to remain on site at the lease expiry or landlord break. Code powers should be amended so that where leases are outside the Security of Tenure provisions of The Landlord & Tenant Act 1954 that Code power rights to remain on site are watered down or a large penalty payment payable to the landowner on a day rate basis imposed to encourage either removal of the Telecoms apparatus or agreement of a new lease.

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.

Agreed. This makes it clear that the subject land has been granted rights to a Code Operator and in any land sale ensures that this fact is brought out within Land Registry searches.

Where the interest is registerable the basis terms of the transaction including any term and consideration should be stated and not withheld on the basis of confidentiality. This would also allow comparables to be far more accessible to parties other than Operators.

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) Not aware of any such call having been made.

(2) Not aware, so able to comment.

(3) There ought to be a regime to cover potential liabilities arising from a Code Operator's streetworks otherwise an un necessary burden may be placed on those maintaining the publicly maintainable highway in the event of an Operator ceasing business / losing its Operating licence, as far as decommissioning / removal of sites, so that the party responsible for maintaining the publicly maintainable highway was not economically disadvantaged in removal / making safe of unwanted telecoms apparatus.

(4) There should be a Bond of some sort or an insurance policy similar to that of a contractor who undertakes highway works have to have in place.

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.

Some very sound concepts in this regulation.

Further encouragement should be made so that another Code Operator (eg electricity supplier) lays conduits when installations underground and that there is spare capacity in them to allow sharing so as to minimise disruption to the public at large when installations / maintenance is carried out, especially when such apparatus are in the street.

Telecom Code Operators should be encouraged as far as possible to share apparatus to minimise proliferation of apparatus. Eg sharing of ducts and mast sites.

Consultation response 63 of 130

Linney, James

From: Wiseman, Clare
Sent: 26 October 2012 14:13
To: LAWCOM Property and Trust
Subject: Government Consultation- The Electronic Communication Code
Follow Up Flag: Follow up
Flag Status: Orange

Can you please a nil return for Newcastle City Council

Our only comment would be to section 10.25

Yes
'The correct notifications and provision of information to Local Authority's would ensure that accessibility is maintained and that this would minimise restrictions for road users'

Many thanks

Clare Wiseman

Street Works Officer
Highway Network and Traffic Management
Technical Services
Environment and Regeneration
Newcastle City Council

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October 25 2012

Review of Electronic Communications Code

A submission to the Law Commission by the British Property Federation

1. These comments by the British Property Federation have been prepared in response to the Law Commission's consultation paper on the review of the Electronic Communications Code which governs the rights of electronic communications network providers to install and maintain infrastructure on public and private land.

2. The British Property Federation (BPF) is the voice of property in the UK, representing businesses owning, managing and investing in property.

Overview

1. As highlighted in the consultation paper, there is general agreement that the Code is badly drafted, famously described by a High Court judge as "one of the least coherent and though-through pieces of legislation on the statute-book". There is little doubt that it would benefit from a comprehensive rewrite. The lack of clarity surrounding the Code is compounded by the fact that there is virtually no relevant case law.

2. Another problem is that the Code started out nearly thirty years ago in 1984 as the Telecommunications Code. It was, therefore, conceived in a different era in which telecommunications tended to mean cables, telegraph poles, etc. The advent of more advanced electronic services required by mobiles and the need for fast broadband links now demands transmitters in places which can impose much greater constraints on the ability of property owners to upgrade or redevelop their property.

3. We fully accept that good communications are key to a properly functioning society and that operating a network would be difficult if companies had to negotiate access with every single landowner without legislative help. A code that imposes some restriction on landowners' rights to refuse permission is, therefore, reasonable. However, fairness demands that the interests of landowners and network operators are balanced appropriately. The current Code fails to achieve this and leaves property owners exposed to considerable potential risk. The proposals in the consultation paper introduce some welcome changes but there are areas where we remain concerned about the balance being struck.

4. Commercial property owners recognise that the ability of their occupiers to access an effective telecommunications network is vital and will generally adopt a positive approach. The key concern they have is that they should be able to refurbish and redevelop their properties as the need arises and, if for any reason this is not possible, that they should be fairly compensated. The present position in this area is confused and relatively untested. This uncertainty means that some landowners simply refuse to house equipment at all.

5. Significant conflict between operators and property owners has been averted up to now because operators have a strong interest in maintaining good relations with landowners and so have generally adopted a non-confrontational approach. Hence they have been reluctant

to use their Code powers and have relied instead on the high availability of suitable locations to secure sites. Nonetheless, the underlying risk for property owners remains. Many developers agreed to take kit on their building for fairly modest reward without thinking too much about the consequences. However, many are now questioning whether the potential difficulty and costs involved in obtaining vacant possession at the end of an agreement may well outweigh the short-term financial gains and may make property less valuable on a sale .

6. There is a danger, too, that the comparatively non-confrontational approach so far taken by operators could change. The Government wants to see faster broadband connections and so operators are under pressure to find more sites to improve coverage. Indeed there is some evidence that operators are now serving Paragraph 5 Code notices and counter-notices to Paragraph 21 notices more frequently, putting additional pressure on landowners to accept reduced licence fees and other less favourable terms. Increased competition also means that operators are under pressure to drive a harder bargain in order to reduce capital and operational expenditure.

7. A fundamental problem for property owners in dealing with this issue is the lack of transparency on the part of operators. For instance, there is usually no information available about the level of traffic passing through apparatus. This makes it hard for a property owner to challenge the need for particular apparatus. Information about the traffic passing through apparatus should be available to occupiers on request to create a more level playing field.

8. Another issue is that the Code operates completely separately from and in addition to other statutory forms of tenure including the Landlord and Tenant Act 1954. This causes a range of problems which need to be addressed and we are pleased that the consultation tackles this issue.

9. We would also draw attention to the disproportionately severe impact that the Code could have on smaller landowners who may have just one property in an area. Large property companies often have a range of buildings in an area. This enables them to deal with a group of operators. It also means that if they are planning to develop a building which contains operators' apparatus they may find it easier to arrange for such apparatus to be transferred to another of their buildings in the area. Smaller landowners, perhaps with a single building, will not have this flexibility.

Contracting out

An issue that we wish to raise at the outset is contracting out. Where the parties both wish to contract out of the Code altogether and negotiate alternative arrangements we can see no reason why they should not be allowed to do so. Many of the larger property owners fully accept the need for apparatus to be located on their buildings and are very willing to enter into pragmatic and balanced arrangements directly with operators. As long as the relevant operator is happy to proceed in this way, we think that this would often be the best way forward.

Principles that should apply to a new Code

The key principles which we believe should inform the redrafting of the Code are:

Clarity

12. In view of the near universal view that the Code is poorly drafted and unclear, it is essential that it is completely rewritten to make its meaning clearer and more consistent.

Transparency

13. The Code should make clear the need for greater transparency to ensure that operators and property owners have greater equality in their bargaining position. Operators should have to demonstrate much more transparently that there is a need for apparatus to be installed or maintained.

Fair compensation

14. the potential impact on the ability of property owners to optimise the use of their property there is a need to ensure that any resulting loss is fairly compensated and that landowners receive fair payment for the use of their land which reflects both the fact that a public service is being provided and that network operators operating as private companies are making large profits in the process.

Better dispute resolution procedures

15. The county court is not the best equipped body to deal with is area and the way in which disputes are handled needs to change with opportunities for alternative dispute resolution where the parties agree.

Alignment with other forms of tenure

16. There is a need to align the Code as closely as possible with other forms of tenure.

Detailed Comments

We have attempted to answer the questions posed in the consultation paper and attach the Commission's questionnaire duly completed.

BPF contacts

Michael Chambers

Ghislaine Trehearne

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.

As we have stressed above, we accept that good communications are key to a properly functioning society and indeed to the success of any commercial development. Operating a network would clearly be much more difficult if companies had to negotiate access with every single landowner without legislative help. We accept, therefore, that a code that imposes some restriction on landowners' rights to refuse permission is reasonable. However, fairness demands that the interests of landowners and network operators are balanced appropriately. We have real concerns that the Code at present fails to achieve this and leaves property owners exposed to considerable potential risk. We have no issue, therefore, in principle with the concept of code rights as proposed in the consultation paper. Our concern is that they should be properly offset by appropriate safeguards for landowners.

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

Consultation Paper, Part 3, paragraph 3.17.

In general, we think that the code rights are reasonable as long as there are complementary rights that enable a property owner to retake possession (for instance, when there is a need for redevelopment or refurbishment); or, on the rare occasions when alternative arrangements for hosting equipment cannot be made, that the landowner receives full compensation for his inability to optimise the value of his property.

However, with regard to security of tenure, we do believe that there is scope for reducing code rights in order to encourage more property owners to make 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.

We agree that any other arrangement would be very complex and could lead to the kind of distortions mentioned in the consultation paper. We have no problem with a technology neutral approach, therefore, as long as consideration and market rents take suitable account of the 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 should:

- Spell out that a code operator is liable for any damage that arises from the presence of the equipment that they have installed unless the damage has arisen from some specific action or failing on the part of the landowner.
- require the operator to restore the property on which the apparatus was located to its condition prior to installation. We would emphasise that telecom companies can come and go and the landowner can be left with equipment that they have to pay to have removed. We suggest that operators should have to provide a bond to guarantee that redundant equipment will be removed
- require the operator to compensate landlords for providing access procedures over and above consideration and 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.

We consider that the proposed definition which was revised in 2003 is reasonable. Whilst it is comparatively broad we recognise that the technology is liable to rapid change and it would be wrong to impose a definition that soon became out of date or stunted the development of new technology. We agree that widening the definition to take in ancillary works such as fencing is unnecessary. We are not aware of any issues that have arisen that would justify such an extension.

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.

Currently landlords can be tied in to agreements entered into by tenants – even if entered into in breach of the lease. We think that it is entirely wrong that, contrary to the principles of common law, a lessee of land is able to bind their landlord or others with a superior interest. It is transparently unfair that a party that had no knowledge of an installation should then be bound by it.

We would particularly stress that if a lessee allows an operator to install equipment then the freeholder may then be faced with the costs and delays of Court proceedings to get it removed on reversion. As the freeholder may not have been aware of the presence of the equipment this could disrupt his plans for the future use of the property. Moreover, the freeholder will not have received any consideration during the Code operator's use of the property.

Accordingly we believe that

- a telecoms operator should be obliged to seek the consent of all parties with an interest in the land or property
- if landlords are not party to the agreement, they should have the automatic right to require removal if the tenant vacates.

This view is supported by the case of 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.

10.9 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) We do not believe that the fact that the landowner can be adequately compensated (by the sum that the Code Operator could be asked to pay under a revised code) should be sufficient in itself for the Tribunal to make the order sought. An order should be dependent **both** on there being a sufficiently weighty benefit to the public interest and on the payment of adequate compensation. If the public benefit is small then it would be wrong to enforce code rights and cut across legitimate interests in property simply because some compensation can be made. If a landowner's rights are to be breached then there has got to be a significant degree of public benefit to justify this.

(2) We do not believe that any rights should be taken away unless those rights can be adequately compensated.

(3) The Code should indicate that the grant of an order should depend on there being a degree of public benefit sufficiently important as to override private interests; that other options not requiring the grant of an order have been considered and found wanting; and that full and appropriate compensation can be payable. The Code should also spell out the need for a balanced, common sense approach. For instance, if a landlord is aiming to develop a property in twelve months time then it would generally be inappropriate for an operator to seek to install equipment on it.

We would have major concerns about any change from the current position of no person being denied access to an electronic communications network towards a position of no person being denied access to a fast, robust, modern network. That would make it a great deal easier for the operator to argue that they need to invoke statutory rights to provide such access and it would be very difficult for a landowner to mount an effective challenge.

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 operator should be responsible for seeking the consent of all interested parties. It would be unreasonable for any 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.
Some extension to include rights to cut back other vegetation might be reasonable. However a proposal to extend the right to include the cutting back of vegetation causing interference with wireless signals might have a much wider impact. We would need to be shown evidence that this was a major problem before agreeing to such an approach. We would also suggest that operators should be required to make it known, possibly by a notice in the press, that they are intending to enter land to carry out work such as lopping trees. This would enable landowners to be aware of any action taking place on their land, not least to enable them to direct any complaints about the lopping of trees, etc that sometimes arise from local people to those responsible for the work.

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.
It is already usual practice for telecoms agreements to contain provisions regarding upgrades. Whilst these tend to give a good deal of flexibility they do allow for restrictions on the amount of apparatus permitted on a roof. Maintaining rights to restrict apparatus is important. This is partly because unfettered upgrades could lead to unsightly accretions on buildings. However, it would also introduce an unacceptable degree of uncertainty for a landlords who have a legitimate interest in the scale of the equipment installed on their property and may be concerned about other implications for e.g. health and safety. Our view, therefore, is that as usually happens at present 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 the consideration that they are prepared to pay. We think it right that additional consideration should be paid when upgrades are made, the basis of which is likely to be spelled out in the initial agreement. if this was not the case then an operator could install a minor piece of apparatus and agree a correspondingly small payment but then replace it with a much more powerful and / or more intrusive equipment without making any further payment. If apparatus is installed which brings greater benefits to the operator then the property owner should be entitled to some part of that additional benefit. It would be helpful if this principle was set out in the code.

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.

Sharing apparatus can clearly bring some benefits, particularly in terms of reducing visual intrusion, and has been a feature of the telecoms market from the outset. We believe that any sharing arrangements should be agreed by the parties to the initial agreement. In agreeing to accept apparatus the landowner / occupier is being paid for the intrusion on his property by a commercial company which will be making a profit from the use of that apparatus. If other operators wish to share those facilities and equally profit then they, too, should pay the landowner / occupier accordingly for the benefit that they are receiving. Where an operator receives rent from other operators for hosting their equipment then that must be disclosed it is entirely reasonable for a landlord to request a proportion of that rent.

We would also stress the need for landowners to be aware of all operators who may be using equipment on their land not simply for the purposes of receiving due payment but because they may need this information for other purposes, for instance to serve orders on all relevant operators for the removal of equipment.

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

Consultation Paper, Part 3, paragraph 3.88.

We are not aware of any instances where section 134 has been used. It is usual practice for a landlord to permit competition between Code operators to provide services to the direct benefit of their tenants. In the unlikely event that this does not occur and where there may be a prohibition in a tenant's lease we can see the benefit of landlords having to be reasonable in considering whether or not to grant consent.

In this context we would raise the issue of good spectrum management within the context of a shopping centre, airport or other multi-occupied large commercial premises where it should be considered reasonable for a landlord to refuse consent in the interests of good estate management, e.g. to avoid frequency conflicts between tenants and landlord WiFi systems.

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 contain the right to assign the whole. As the market has already developed to permit assignment of the whole without further consideration there seems no need for further interference in this area. In exceptional cases where specific provision has not been made in an agreement to allow for assignment then we believe that a fresh agreement should be required including any additional payment that might be appropriate. The real concern from a landowner's perspective is that if an operator assigns an agreement conferring code rights to an operator with lower covenant strength, then that new operator may be less able to fulfil their obligations to the landowner. This could make it hard, for instance, for the landowner to get apparatus taken away at the end of the lease. In such circumstances the landowner should have recourse to the person who assigned the benefit to ensure removal takes place.

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.
We are not aware of any problems in the commercial sphere. This might have more relevance in the residential sphere.	

10.21	Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.
No. We believe that the market will resolve any issues.	
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	

<table>
<tr><td>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.</td></tr>
<tr><td>No evidence is presented about the scale of the problem that operators encounter. We doubt whether any changes in enforcement provisions would be appropriate. Creating a criminal offence should be very much a last resort and would need to be justified by evidence of a major and widespread problem.</td></tr>
</table>

<table>
<tr><td>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.</td></tr>
<tr><td>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.</td></tr>
</table>

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

<table>
<tr><td>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.</td></tr>
<tr><td>We accept the importance of maintaining an effective telecommunications network. However, it is essential, too, that those with an interest in land retain the right to require the alteration of apparatus when improvement or redevelopment is necessary.

Para 20 is a source of confusion When a contract is negotiated landlords usually include terms at the outset that provide for either "lift and shift" onto the same landlord's land or for termination if they have no alternative site to offer. Accordingly, a landowner 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. Equally Code operators would expect to plan their network based on the contractual arrangement that they have entered into and on the assumption that a landowner would not use statute to override an agreed contract. If contractual obligations for 'lift and shift' and termination are not included in an agreement then the landowner would expect to enter into negotiation and pay costs to relocate or remove a Code operator within the terms of an agreement. Where, then, there is an existing contract between the parties we are firmly of the view that Para 20 and 21 need not apply and the contractual arrangements should override statute.

It is only when a contractual arrangement does not already exist or has expired that , Paragraphs 20 and 21 become of particular importance. This includes circumstances here the "occupier" has granted consent (possibly without consent and in breach of the lease) and the land or property reverts to a superior interest. 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 operator's occupation in the first place.

Equally, if Code operators are permitted to hold over under the Code it needs to be clear that the reversioner can exercise lift and shift provisions or terminate occupation at any time and in short notice. Also, 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.</td></tr>
</table>

Both paragraphs need to be redrafted to add clarity as to in what circumstances each applies and to be clear that either one or the other applies 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 need for such a regime where a contractual arrangement has been entered into and subsists. Otherwise it strikes a fair balance for adjacent landlords as those wanting the equipment relocated have to pay for its relocation. There is some dispute as to what these costs are and whether they 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 t 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 outset.

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

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.13.

We see no reason why a contracting out option should not be an option available to the parties.

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). They should not apply 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.

We agree on the need for restrictions but subject to the payment of compensation where the landowner is unable to realise the value of his asset through refurbishment or redevelopment.

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 could let space to operators with greater 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.

However, we do recognise that lack of security could be used by a landlord as a negotiating position to secure better terms. To ensure that there was a fair balance, therefore, contracting out could be permitted only in situations where allowing equipment to remain would adversely affect the landlord's interest e.g. where it would impact adversely on redevelopment, refurbishment or improvement of a property, change of use and occupation by a landlord or one of their commercial tenants for their own purposes.

We recognise 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.

We accept the need to protect the network but this should not mean giving the Code operator an advantageous negotiating position.

One way of dealing with this could be to have two procedures rather than one which is in line with that under the Landlord and Tenant Act 1954. Firstly, an opposed notice procedure where the landlord requires vacant possession at the end of the term and secondly an

unopposed notice where the landlord is willing to grant a new agreement but simply wants to agree terms in a timely and cost-effective manner. Our response in 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.
We agree.

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.
At expiry of the agreement the current procedure for getting the operator to remove their equipment is cumbersome, protracted and inequitable. Once the landlord serves notice on the operator, if a counter notice is served the operator has an indefinite period to make new arrangements and the landlord has to bring things to a conclusion by court proceedings. In the interim there is no payment and lack of certainty around maintenance obligations etc since no agreement is in place. Therefore an improvement in this area would be very welcome. We support the ability to contract out but where this does not happen there still needs to be greater clarity around the procedure at expiry and the introduction of a quicker, more equitable (and cheaper) process than currently exists. Comments under Para 10.36 above suggests the splitting of Para 21 into opposed and unopposed notices to deal with enforcing removal and renewing agreements on a separate basis. If the landlord serves an opposed notice for vacant possession 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, and if not then either party can apply to the Lands Chamber to decide the matter.

Where a telecoms agreement is contacted out and the landlord's intention is true, then the position is clear. Both parties have clarity and no surprises and can plan their respective business interests on this basis.

Vacant possession notices should always be served in good time. 12 months is suggested.. 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 counternotice within 28 days is of little use to either party. To allow sufficient time a Code operator could 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 cannot agree renewal terms. In such circumstances an unopposed notice could be served without any need for a counter notice. An application to Alternative Dispute Resolution or the Lands Chamber could be made at any time on the basis that the new agreement will commence from expiry of the old, removing any 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 an 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 shoud 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 iproposal that the 1954 Act 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.

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.

At expiry and until removal of equipment, we suggest that the arrangements under the expired agreement should continue. In other words, the operator should continue to be liable for maintenance and should continue to pay the same passing rent as was payable at expiry of the Code rights until removal and reinstatement occurs to the landowner's reasonable satisfaction. 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 afterall 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.

We think that this would be a very positive step. Currently, many landlords are discouraged from making sites available for telecoms use because of the security of tenure rights under the Code and this results in a lower supply of sites and increased rents due to an imbalance in supply and demand. A contracting out option can be sensible for both sides – landlords get more certainty and operators get more sites since landlords are more comfortable with the process at expiry.

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 only to allow 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 intention to redevelop, etc 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 or a genuine need to use the space 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.
One of the issues that is considered unfair is for Code rights to be retrospective. For instance, under the current regime, where a landlord had negotiated terms in good faith with a non-Code operator he could be faced with that operator applying to OFCOM for Code rights at some point in the future and for the alterations and removal restrictions to be imposed on him by statute. Had the landlord known that from the outset the landlord may have taken a different view on the terms within the telecoms agreement. For the same reason, where site providers have willingly entered into agreements with known Code Operators, those agreements have been structured to fit with the current regime. It would not seem fair for either party to have a revised regime imposed retrospectively. However, if existing agreements continued to benefit from the old (existing) Code provisions, this would mean that there would be two regimes running in parallel. There are other examples of this , such as the Landlord and Tenant (Covenants) Act 1995. It is not ideal but it is fair. You can provide that any renewal agreement would be governed by the new code. You could also allow the parties to adopt the new code voluntarily for existing agreements, although this is likely to be unattractive to one or other of the parties (depending which of the two the new code principally benefits).

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.

Holdings in land and property can be complex and it would be very difficult for the Code to cater for all eventualities, existing now or created in the future. The Code should be flexible and be able to apply to all circumstances. A single entitlement may not achieve this.

It does seem appropriate that compensation can be awarded at any time as all interested parties may not be aware of telecoms agreements from the outset.

We do not agree to a single entitlement to compensation but that compensation should be available to each party at the point that their diminution in value, loss or damage is realised. This could be on reversion or it could be sooner if a property is sold, for example. If a Code operator ensures that all interested parties are aware at the outset, then that would be the date of valuation for all parties with an interest in the land/property. If they do not then they should face a potential claim for diminution in value, loss and damages at some future point. This would encourage consultation with all interested parties from the outset. Similarly if the Code Operator wishes to avoid a potentially large claim on expiry of the occupier's occupation or on the transfer of a property then the Code Operator could vacate.

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 agree that 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 should also be entitled to compensation. The Code operator should be required to identify the superior interests and to ensure that they are party to any contract, within which they will receive compensation and possibly consideration (see below). If Code Operators do not involve all parties from the outset then there should be recourse for an interested party to make a claim for diminution in value, loss and damages incurred.

There is a strong case for not binding parties who have not given their consent to the operator's occupation of their land and property. The Code operator then has to decide whether to involve such party from the outset or to face a possible network risk on expiry of the consent granted by the occupier. Even then, there remains a potential diminution in

value, loss or damages claim from dealings in the subject property as an investment which may be during the term of an occupiers lease.

We would also make the point that consideration may also be appropriate, as well as compensation. In practice, superior interests, may require consideration to be paid in return for permitting an occupier to sub-let part of their demise to a Code Operator. If they have been denied consideration then any subsequent loss could also include loss of income from the date of occupation by the Code operator.

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

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

Consultation Paper, Part 6, paragraph 6.73.

We agree that the payment of consideration is justified for the reasons outlined below. However, we believe that the definition of consideration should follow current market practice and be based on market rental value and not using the second rule contained in section 5 of the Land Compensation Act 1961.

The telecoms property market has developed over nearly 30 years 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. We note the Law Commission's desire expressed in paragraph 3.13 to maintain a consistent approach across all technologies 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 Commission's 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 Cemetery (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 makes 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 on 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 it is possible that 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 principles 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 rights, 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 reduced significantly. 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 TMobile (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.

Neither compensation nor an uplift on compensation is appropriate. The onus should be on market rental value and creating a quick and cost effective dispute resolution process. These would do more to achieve the network coverage needed.

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.
We have no great problem with this but are unclear why it has been raised as we are unaware of any case where a landlord has sought to use Para 20 when there is an existing contractual right for the Code operator to be in occupation.	

TOWARDS A BETTER PROCEDURE

10.48	We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes. Do consultees agree? Consultation Paper, Part 7, paragraph 7.26.
We agree that the County Court is not the best placed forum to settle disputes. The Lands Chamber has more appropriate expertise, particularly as most disputes are about the market rent. However, whenever possible we would like to see disputes referred in the first instance to an alternative dispute resolution process.	

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.
As indicated above, we believe that the Lands Chamber would be a more appropriate body to settle disputes than the County Court. However, procedures there can be both slow and costly. Every opportunity should be taken, therefore, to use alternative dispute procedures before matters are escalated to Lands Chamber level. Settling disputes should be seen as part of a stepped process: • The first solution and the most used method of agreeing terms for telecoms agreements is by negotiation, However, to encourage reasonableness, both parties need to know what further recourse they have should 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 what is at issue – particularly whether it is just market value or other terms of the agreement. 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 with the terms agreed under mediation 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 landowner's reasonable costs incurred.

The above steps could be subject to a timetable, but negotiations should be as flexible as possible to allow both parties to allocate enough time to agree terms voluntarily. If the Code Operator feels matters are being delayed then they could apply for mediation by a trigger notice, which would set any timescales in motion, provided that at all times the parties remain 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.

The consultation paper asks whether a Party Wall dispute procedure would offer a way forward. We do not think that would be feasible. 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 procedure could 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.

We would strongly oppose such a move as it would both stack the cards heavily in favour of the operator and open the door for operators to use such an approach as routine practice.

A Code Operator should be able to use negotiation, mediation, ADR and the Lands Chamber to achieve a quick resolution to terms and get occupation. This will often run concurrently with an application for planning permission or a GPDO notification.

However, if terms cannot be agreed, permitting the occupation of the site without an agreement would give rise to too many uncertainties on the terms of occupation and the rights of both parties will be unclear across a range of terms, especially on indemnity and insurance issues. Early occupation as proposed might also override any other interests in the land whose consent should be sought. It is not clear how their interests and rights would be considered, especially as statute would override their contractual rights.

We are particularly concerned that this option could become the default position for operators who would simply use it whenever faced with any challenge by a landlord to the occupational terms that they are seeking. Once firmly ensconced on a site and generating revenue for their business they would have little interest in a speedy resolution of outstanding issues.

Our view, therefore, is that what the Law Commission proposes 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.

In any event if an operator is allowed to go down 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.

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

As long as there is recourse to alternative dispute resolution and consideration remains payable in return for the grant of Code rights then we believe that costs should follow the event. The only exception should be for mediation where costs should be split between the parties. It would also be appropriate for reasonable abortive fees to be paid by a Code operator should they withdraw during or after mediation.

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.

There needs to be provision to prevent an operator lavishing resources on a particular case to try to create a precedent for many other potential cases. A cap on costs based on a multiple of the final rent agreed could be one solution as the parties will then ensure that costs are proportionate 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 are a central principle of Arbitration.

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. As we have indicated above, 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.
We agree	

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 need to be much shorter and 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 landlords of any proposed new installation that falls within the ambit of the Code and spell out the implications of that on those with a relevant interest in the land.

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 are aware that standardisation of legal documents is becoming more common and accept that, where it is feasible, this can bring benefits. However, in this case there is concern that a mandatory form might be problematic in view of the different factors that need to be taken into account in individual cases. 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 could be out-of-date very quickly and would not be able to move with changes in technology.

If, therefore, standardised forms of agreement may be step too far we would nonetheless favour the use of standardisation as far as it is practicable. For instance, the parties already agree precedent documents where possible and use multi-site agreements to try and standardise terms across a portfolio of properties. If, therefore, a standardised form of agreement is not thought be feasible. We also see merit in exploring whether a voluntary form might be useful in serving as a starting point for negotiations.

INTERACTION WITH OTHER REGIMES

10.58 We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease.

Do consultees agree?

Consultation Paper, Part 8, paragraph 8.22.

We agree that the 1954 Act should not apply to equipment which is covered by the Code and agree with the proposal to exclude this since it makes it very difficult for the landlord to terminate the agreement if the lease is within the Act. It is common market practice for telecoms agreements to be excluded from the Landlord and Tenant Act provisions.

However, we would stress that this exclusion should not extend to any commercial property that the operator occupies and that we are assuming that the method of valuation under the Code will be based on market rent.

Code operators do not just occupy land and property for network purposes. They also occupy shops, offices and industrial units, often installing network equipment within or on top of those buildings. It would be wholly wrong for them to claim that a microcell within a shop or switch sites within industrial units or offices are part of their network and therefore the shop lease should be renewable under the Code rather than the L&T Acts. To avoid this the L&T Act should continue to apply where the primary use of the property is for standard commercial purposes and where the network equipment is ancillary.

Finally, if L&T Act is not to apply then it must not apply for the duration of that telecoms agreement. Assignment could 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 Act 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 opposed and unopposed 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/expert determination or Lands Chamber.

In fact, it would be sensible to consider using the existing lease termination and renewal provisions in the L&T Act as a model for how the code provisions are drafted.

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

We agree.

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:

Landlord and Tenant Act 1987
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 operator's network roll-out. Currently, it is not clear how the 1987 Act applies in relation to agreements for telecoms equipment.

Limitation Act 1980
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.

NFU Consultation Response

To:	Law Commission	Date:	26.10.2012
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The NFU represents 55,000 farm businesses in England and Wales involving an estimated 155,000 farmers, managers and partners in the business. In addition we have 55,000 countryside members with an interest in farming and the country.

The Electronic Communications Code

Background
The Law Commission has stated that electronic communications have come to play a vital part in our lives and that the transfer of information now includes electrical, magnetic and electro–magnetic which has enabled cable television, mobile and fixed line telephones and the internet. These are now essential in both private life and in business.

Networks for electronic communications rely on networks of masts, cables, wires, servers, routers and exchanges to make communications possible. The difficulty is that these networks have to be located upon land that does not belong to those who own the equipment. The electronic communications code has to strike a balance between the rights and interests of landowners and network operators when securing the right to install and maintain apparatus on land that does not belong to the network operator.

The Law Commission states that concerns the over the balance of rights and interests of operators and landowners have been raised, and as a consequence, the electronic communications code needs reviewing.

The consultation has considered the rights and powers required by Code Operators, the protections required for landowners and the need to provide for special cases.

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?

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The NFU agrees with the principal code rights as set out in paragraph 2(1) of the Code and as stated above. We agree that these rights should focus on the physical works and the maintenance of electronic communications apparatus.

This protection should only be available to the Code Operator seeking to rely on the rights and to that Code Operators apparatus only.

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

The NFU feels that the rights should not be extended to include further rights for Code Operators but should be retained as above.

10.5 We provisionally propose that code rights should be technology neutral. Do consultees agree?

Electronic communications are a rapidly developing area, and it is impossible to predict what developments are likely to occur in the coming years. The NFU agrees that code rights should be technology neutral so as to be able to accommodate all types of electronic communications equipment and networks including future developments.

Different technologies require different arrangements on the ground and will have different implications for landowners. For example, a mast is likely to require a lease of the land, whilst a cable may require an easement or wayleave. So whilst it is right that the code should be technology neutral, it is important that the code is capable of allowing, and where necessary, reflecting these differences.

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

The NFU believes that Code Operators should be liable for any damage caused by their apparatus, and should insure against any damage to land arising from the apparatus that is present.

It is also important that the Code Operators liaise and negotiate with the landowner promptly when required (e.g. when existing agreements are coming to an end).

The NFU believes that there should be an obligation to have a written agreement if the operator is to rely on the code rights, and that written agreement should specify that the code rights apply.

Therefore code rights should generate obligations upon Code Operators and this will need to be statutory.

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?

The NFU agrees that the definition should stay general as it is, with equipment defined by its purpose rather than described specifically, as this will enable the code to adapt to technological changes.

The definition of electronic communications apparatus should not include ancillary equipment or works that are necessary for the proper use of the apparatus.

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.

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The NFU believes that the code rights should be created with the agreement of the occupier of the land, as they will be directly affected by the apparatus. The NFU believes that this should include the freehold owner and a long lease holder but not a short term tenant. As many tenants will be prohibited from granting such rights over the land by the terms of their tenancy, it is vital that the freehold owner is always involved in negotiating agreements, even where there is a long term tenant on the land.

The NFU believes that code rights should not bind someone with a greater interest in the land than the person granting the rights (i.e. rights granted by a tenant should not bind a landowner). Landlords have expressed concern that the actions of tenants can leave them unable to secure the removal of apparatus, even where the tenant is in breach of the terms of the lease by agreeing to installation of the apparatus and the landlord has not agreed to it. For that reason, the NFU believes that Code Rights should always be discussed and agreed with the owner of the land, in addition to the occupier.

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?

The NFU believes that it should not be possible for code rights to be imposed on landowners without also weighing the public benefit of the proposal against the prejudice to the landowner. The justification for the code is that it is in the public interest that everyone should have the right to access telecommunications networks, so it is right that operators should have to demonstrate a public interest in a particular proposal before rights can be acquired under the code.

(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?

As the code deals with rights to install apparatus on land, it is unlikely that there will be a situation when compensation cannot be sufficient.

In the event that such a situation did arise the NFU believes that the operator should be required to show that there will be a very significant public benefit as a result of the proposal.

(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?

Any test contained in the revised code must be clear, readily understood and balance private prejudice against public benefit. The access test must highlight the need for gain to public access to electronic communications to be balanced against the interference suffered by the landowner. Landowners should not be prevented from negotiating with different operators to obtain the best possible agreement.

The test must take into account the fact that it is a right to access services generally that is in the public interest, not right to access the services of a particular operator. So, the test should take account of the services that are already available, when assessing the degree of public benefit in the proposal.

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.

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An occupier's agreement for access to their land should not bind others with an interest in the land unless they have been notified of it. This enables those individuals to plan their activities and make arrangements to minimise the disruption caused to them and their businesses as a result of the interference. Any concerns raised by those with an interest in the land should be taken into account, and if possible, arrangements should be made to reduce the harm suffered by those individuals. It should not be possible to bind superior interests.

As mentioned above. The NFU believes that it should be necessary to secure the agreement of the owner of the freehold in all instances, especially in regard to agricultural tenancies, as the tenant will not usually have the power to grant code rights.

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.

It is not uncommon for modern machinery, in particular combines, telehandlers, tipping trailers and irrigation equipment to reach heights of more than 3m. So, lines installed across agricultural land at a height of 3 meters could cause significant difficulties for farmers. In view of this, the NFU believes that the height at which lines can be installed without separate agreement should be reviewed, and increased to reflect the height of modern machinery.

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

The NFU believes that there should be an opportunity for the landowner or occupier to object to the installation of overhead apparatus before the apparatus is installed. This could save landowners and occupiers being subjected to difficulties as a result of inappropriately installed apparatus and would also save operators the costs associated with moving such apparatus after 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.

The NFU questions whether there is a sufficient deterrent value on Code Operators to justify having this as a criminal offence rather than using other enforcement tools, such as civil sanctions, to deal with breaches of this nature.

A further option that could be considered, which is likely to have a deterrent effect, is to deny operators the benefits of code rights if they do not fulfil their obligations under the code.

The NFU also believes that the requirement should be amended to say that if the public does not have access to the apparatus the notice should instead be fixed at locations which are accessible to the public, near to where the apparatus is located. This should help to ensure that members of the public are always able to access and read the notices, with minimal difficulty.

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?

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The NFU believes that it would be acceptable for it to include and extended to cover vegetation generally. This would remove the potential for disputes as to what constitutes a tree.

The NFU would be content for the right to be extended, so that it is not be limited to interference with apparatus on a street, provided that sufficient safeguards are in place to protect land owners and occupiers. For example, occupiers should be adequately compensated for any costs incurred in carrying out the work, and also for any losses directly arising from the work. It would be essential that the landowner received a notice of the work intended from the operator.

The NFU strongly believes that the ability to require vegetation (or trees) to be lopped should not be extended to wireless technology. Where a wireless signal passes over land which has no apparatus on it, the owner/occupier of that land may not have been consulted about, or even notified of, the presence of the signal. They may not be receiving any payment in respect of the fact that the signal is crossing their land, and therefore should not be subject to any obligations in respect of that signal. Further, it will be more difficult for landowners/occupiers to ascertain where the signal passes, and therefore to ascertain exactly what needs to be done in order to remedy any disruption to the signal. In many instances, landowners/occupiers will have no independent means of ascertaining whether the works carried out have been successful in resolving the issue. In those circumstances, the extending the provisions to cover wireless signals would be unduly onerous on landowners and occupiers.

The NFU also believes that future development of land should not be restricted by the fact that there is a wireless signal passing over land.

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.***

The NFU believes that where Code Operators wish to have the right to upgrade apparatus they should specifically include that right in the agreement with the landowner, and the parties can then reflect this in the compensation which is to be paid.

Where the agreement does not specifically make provision for the operator to be able to upgrade apparatus, there should be no such general right. Operators should have to negotiate with the landowner, or seek a new agreement if they wish to alter what is installed on land if they have not previously agreed terms on which upgrades can take place with the landowner/occupier. This is particularly important if the upgrade would result in a greater interference with the rights of the landowner or occupier.

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.***

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The NFU recognises that sharing apparatus can reduce infrastructure costs and the visual and environmental impacts of apparatus, and so is generally supportive of operators sharing apparatus. However, the NFU believes that it is important that apparatus sharing should be the subject of agreement and negotiation between landowners and operators, and there should not be a general right for operators to share equipment. Operators and landowners should be able to agree the extent to which sharing will be permitted, and what level of compensation, if any, should be payable when apparatus is to be shared.

Where agreements do permit sharing to take place, compensation provisions should be incorporated into the agreement so all parties know where they stand at the outset.

Contractual terms restricting or prohibiting apparatus sharing should not be void. The parties should have the freedom to negotiate agreements on terms of their choosing. Any restriction on apparatus sharing would be reflected in the level of compensation payable, so making such terms void would have an unfairly prejudicial impact on landowners.

The NFU believes that compensation should always be payable when sharing apparatus occurs unless the owner agrees otherwise.

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.

The NFU has no experience of the use of this provision.

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.

The NFU believes that Code Operators should not benefit from a general right to assign the benefits of their agreements. Where the operator wishes to have such a right it should be expressly recorded in the agreement with the landowner; the fact that there is such a right can then be taken into account when compensation is agreed.

If Code Operators are to benefit from a general right to assign code rights then it is essential for there to be an additional payment to the Landowner. Further the landowner's solicitors' fees associated with the assignment must be covered by the Code Operator.

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

The NFU does not believe that any further ancillary rights should be available.

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.

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The NFU is not able to comment on this.

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?

The NFU does not think that this is necessary.

10.22 Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used?

The NFU is not able to comment on this.

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.

The NFU has no knowledge of situations in which there has been interference with code operator's equipment.

The NFU agrees with the Law Commission that a criminal offence should <u>not</u> be created.

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.

The NFU believes that landowners and occupiers do need additional provision to enable them to enforce operators' obligations, and the provisions which already exist should be reviewed to make them more efficient.

In particular, it must be possible for landowners to terminate agreements, and ensure that equipment is removed promptly, if the Code Operator is in breach of the agreement. Operators should not be able to retain the benefit of their code rights if they do not comply with the terms of their agreements with landowners.

The NFU also believes that there should be provisions which ensure that Code Operators act promptly when agreements come to an end, particularly where they wish to negotiate a new agreement as this currently causes landowners significant frustration. These provisions should also ensure that landowners should be adequately compensated for any period during which apparatus remains on land without an agreement being in place.

There needs to be a penalty on the operator if certain time limits are not met, in order to provide an incentive for operators to negotiate with landowners promptly. This could be, for example, the loss of the ability to rely on code rights if the Operator does not comply with its obligations.

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THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

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

Do consultees agree?

The NFU is in agreement that the right under code 9 to conduct street works should be incorporated into a revised code and with the limitations existing.

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.

The NFU has had no involvement in relation to the current regime for tidal waters and lands held by Crown Interests.

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?

The NFU believes that there should be as few regimes as possible and so does not think that the Crown Interests should be treated differently.

The NFU does not see why tidal waters and lands should be subject to the special regime and thinks that it should be under the General Regime.

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)?

The NFU believes that it is not necessary to have a special regime for linear objects and that the General regime should suffice.

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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?

The NFU completely agrees that it is essential for agreement to be sought at all times before anything can happen in a "relevant conduit" from the authority with control of it.

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?

The NFU has no experience or information on how the code governing undertakers works.

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?

The NFU completely agrees that no new special regimes should be proposed and as stated above believes that the special regimes that exist are not necessary.

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?

The NFU agrees that the code has to contain procedure for those with an interest in land or adjacent land to require the alteration of apparatus and should include as it does at the present time "the moving, removal or replacement of the apparatus". Failing to include such provisions would restrict the landowner's ability to make changes to land management or to develop land, which may not be adequately compensated by the payments made by the Code Operator. It is very important that the importance of the development to the land in which the owner has an interest is taken into account. A development should not be stopped. There will always be an alternative or a way to meet the Code Operators' network.

Where landowners are required to cover the costs of moving or altering apparatus, the Code Operator should be required to provide sufficient information regarding the costs of the operations to enable landowner to ascertain whether the quoted costs are accurate. Code Operators should be required to take steps to ensure that the costs are reasonable, and should not be allowed to hold landowners to ransom by charging extortionate fees for moving apparatus.

It is essential that the procedures which are put in place insure that landowners requests are dealt with promptly.

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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?

The NFU believes that from a landowners' perspective the alteration regime is too Code Operator based. It is essential that the revised code outlines a more balanced procedure to be followed.

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?

The NFU agrees that it should not be possible to contract out of alterations regime.

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?

The NFU has no particular view on this.

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?

The NFU does not agree with this and thinks that it is essential that there is a balance between the interests of both the Code Operator and the landowner. Once agreements have ended, it should be possible for landowners to compel Operators to remove their apparatus within a reasonable period of time. Operators could avoid this situation arising simply by negotiating new agreements in a timely manner, and therefore should not suffer any detriment if landowners are able to compel them, to remove equipment in these circumstances.

Speeding up the procedures regarding the negotiation of new agreements and resolving disputes about the removal or alteration of apparatus, particularly in situations where it is necessary for the Operator to make an application to the court/a tribunal would be to the benefit of both parties, and therefore should be pursued. This would minimise the period of uncertainty for all parties.

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?

The NFU agrees that if apparatus has been installed unlawfully then planning authorities should have the power to enforce removal of the apparatus.

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

The NFU believes that the procedure for enforcing removal of apparatus should start with the landowner or occupier, as it currently does with the owner serving notice requiring removal of the apparatus. Obviously, this should not prevent Operator's removing apparatus at their own initiative at the end of the agreement, but in circumstances where this does not occur, it is difficult to envisage any party other than the landowner or occupier who would have a particular interest in securing the removal of the apparatus.

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The Code Operator should then as it does now have 28 days to serve a counter notice but it then must be up to the Code Operator to justify why the apparatus should stay. Operators should also be required to take action promptly in order to secure the rights necessary to retain equipment on the land. If Operators do not take action promptly it should be made easier for landowners to secure the removal of the apparatus. This will encourage Operators to take the steps necessary to obtain the rights to retain equipment on land promptly. Landowners should also be adequately compensated for any period during which apparatus remains on their land without an agreement being in place.

To make the procedure more efficient then the procedure should be dealt with by tribunal and not the county court.

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.

The NFU believes that a further financial payment is necessary between the expiry of code rights and the removal of the apparatus. It is essential that landowners receive compensation for the entire period that the apparatus is on the land, and Code Operators should not be able to retain apparatus on land without paying for the right to do so. This would also provide an incentive for Operators to remove their equipment promptly once their rights have expired, which would not exist if Operators could leave apparatus in situ without making a payment to the landowner.

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?

The NFU agrees that Code Operators should be free to agree that the security provisions will not apply to a particular agreement. Code Operators will be able to negotiate a price for their rights which reflects the fact that they have agreed that the security provisions will not apply, and can seek to negotiate a new agreement with the landowner before the expiry of the agreement should they wish to retain their apparatus on the land.

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?

The NFU believes that is essential that the provisions in a revised code relating to a landowner's rights to require alteration and security of apparatus even if the apparatus was installed before the Code Operator had the benefit.

FINANCIAL AWARDS UNDER THE CODE

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

Do consultees agree?

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The NFU believes that all individuals bound by code rights should be able to apply for compensation in respect of all losses that they are able to demonstrate. The NFU can see no reason for restricting the right to apply for certain heads of loss to certain categories of individual.

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.

The NFU believes that the right to compensation should be extended to persons who will subsequently be unable to move electronic communications apparatus from their land, provided that they can demonstrate that they have a claim.

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.

The NFU does NOT agree on this approach.

Consideration should not be assessed using the second rule contained in section 5 of the Land Compensation Act 1961. This does not take account of what is happening or has happened in the actual market of rents between Code Operators and landowners for masts or cables underground. This approach would completely undermine the current rental market and be extremely unfair to landowners.

The NFU agrees with the CLA in that Code Operators are commercial entities who run their businesses on a competitive basis. Code Operators are not obliged to provide a universal service and the service does vary greatly across the country. Consequently, the NFU believes that Code Operators should pay a market value for the rights that they are seeking to acquire. It is right that benefits that the code operator expects to gain from the arrangement play a part in determining the price that Operator is willing to pay for the rights.

The NFU believes that the assessment of consideration should be left entirely to the market place. Therefore it should be the 'fair value' to what parties would agree. Fair value is defined as "The price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between wiling market participants possessing full knowledge of all the relevant facts, making their decision in accordance with their respective objectives." It has regard to general market transactions between specific participants like the landowner and the Code Operator.

Paying less than a genuine market value may make landowners more resistant to having a mast on their land which is then likely to lead to disputes surrounding the installation and retention of apparatus. This could lead to increased workloads and costs for operators, and therefore would not be beneficial for either landowners or Code Operators.

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

Statutory uplifts would not provide an effective solution if there was a move towards a valuation process which did not take account of the scheme which was being pursued by the operator, unless the uplift

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was very substantial. A better approach would be to retain the current, market value based, approach to compensation.

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?

The NFU is in agreement that there should only be one regime for consideration and so should not be any different for crossing a linear obstacle.

10.47 We provisionally propose that, where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid.

Do consultees agree?

The NFU agrees that in these cases the appropriate body should be able consider whether any portion of the payment originally made should be repaid. Repayment may be appropriate where there was a one off payment at the start of the agreement, but is less likely to be appropriate where provision is made for annual payments, as the operator will cease paying/alter payments going forward in the event that the recipient requests alterations.

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?

The NFU is in complete agreement that the revised code should no longer specify the county court as the forum for most disputes.

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.

The NFU would like to see the Lands Chamber of the Upper Tribunal and, if appropriate, the Property Chamber of the First–Tier Tribunal to be the forum used for dispute resolution. It is a forum that already works well within the agricultural sector.

However, if the dispute only relates to the value of the compensation payable, the NFU believes that it would be more appropriate for the dispute to be resolved through arbitration.

In every case the dispute forum has to be effective, appropriate, proportional and accessible.

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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?

The NFU does not believe that this should be introduced.

Code rights must not be conferred until any dispute over the payment for those rights has been resolved. If Code Operators were given early access before the payment was agreed the delay in agreeing the payment could be even greater. The negotiating position of landowners would also be unfairly prejudiced as the apparatus would already be in situ, and they would have to go through formal processes and procedures in order to get the apparatus removed if the situation is not ultimately resolved.

Operators, on the other hand, have the option of initiating formal procedures in order to resolve any dispute regarding payment, or seeking alternative sites if they think that would be an easier/more cost effective solution, and so are subject to less prejudice if they are unable to access land until all terms of the agreement have been finalised, including those relating to payment.

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

The NFU has no additional comments to make

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.

Where disputes relate to whether rights should be acquired at all, the NFU believes that all reasonable cost incurred by the landowner in connection with the acquisition of the right should always be met in full by the operator. This is because it is the Operator's choice to initiate the procedures and the Operator who will ultimately benefit from the arrangement.

Where disputes relate purely to the value of payments, the NFU feels that costs should be covered by the losing party.

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

See above.

10.54 We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service.

Do consultees agree?

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The NFU agrees that the revised code should prescribe consistent standardised notice procedures and should set out rules for service. This is very important for both the understanding of the Code Operator and the landowner.

10.55 Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how?

All forms should be simple and straight forward and written in plain English, so that they can easily be understood by landowners who do not have experience in dealing with code rights. It should also be clear from the information provided that the forms/notices relate to code rights.

10.56 Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided.

The NFU believes that more information is needed for landowners and it would be helpful if this was set out in an information pack when the Code Operator first makes contact with the landowner.

The information pack should explain the key provisions of the code, and explain the procedures that apply. In particular, landowners should be informed of the provisions which apply at the end of the agreement, and the procedures in place for securing the removal or alteration of apparatus.

Information provided to landowners should also highlight topics of particular relevance to landowners in the context of the notice of form that they are accompanying.

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.

The NFU feels that each case should be dealt with individually, so that the nature of the rights and apparatus can be taken into account. Consequently, the NFU does not believe that standardised agreements would be suitable.

However, operators wishing to rely on Code rights should be required to enter into a written agreement with landowners. That agreement should clearly state that the agreement is governed by the Code.

INTERACTION WITH OTHER REGIMES

10.58 We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease.

Do consultees agree?

The NFU agrees that Part 2 of the Landlord and Tenant Act 1954 should not apply if rights are obtained under the code, as the overlap of the two systems creates additional, unnecessary, complication. The code provides appropriate provisions regarding security of tenure to ensure that operators are protected without needing to rely in the provisions in the 1954 Act.

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

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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?

The NFU is in agreement that the new interest in land should be registrable under the land registration legislation. The NFU believes that it is important that code rights are recorded at the Land Registry so that they can easily be discovered by interested parties, such as potential purchasers, especially in view of the security of tenure that accompanies code rights.

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LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

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

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

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

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

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

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

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

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

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

Tel: 020 3334 0200 / Fax: 020 3334 0201

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

Freedom of Information statement

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

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

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

Your details

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

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

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

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

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

(3) to enter land to inspect any apparatus.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.16.

The Faculty restricts its comments to paragraphs 10.44, 10.49 and 10.58 below.

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

Consultation Paper, Part 3, paragraph 3.17.

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

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

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

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

10.8	We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.

10.9	We ask consultees for their views on the appropriate test for dispensing with the need for a landowner's or occupier's agreement to the grant of code rights. In particular, consultees are asked to tell us: (1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought without also weighing the public benefit of the order against the prejudice to the landowner? (2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code? (3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how? Consultation Paper, Part 3, paragraph 3.53.

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

10.11	We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused. Consultation Paper, Part 3, paragraph 3.67.

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

10.13 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence. Consultation Paper, Part 3, paragraph 3.69.

10.14 Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended: (1) to vegetation generally; (2) to trees or vegetation wherever that interference takes place; and/or (3) to cases where the interference is with a wireless signal rather than with tangible apparatus? Consultation Paper, Part 3, paragraph 3.74.

10.15	We ask consultees: (1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and (2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus. Consultation Paper, Part 3, paragraph 3.78.

10.16	We ask consultees: (1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice; (2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or (3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus. Consultation Paper, Part 3, paragraph 3.83.

10.17	We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate. Consultation Paper, Part 3, paragraph 3.88.

10.18	We ask consultees: (1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice; (2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and (3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement. Consultation Paper, Part 3, paragraph 3.92.

10.19	We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code. Consultation Paper, Part 3, paragraph 3.94.

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

10.21	Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.

10.22	Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.

10.23	We ask consultees: (1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers; (2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and (3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights. Consultation Paper, Part 3, paragraph 3.106.

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

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

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

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.11.

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

Consultation Paper, Part 4, paragraph 4.20.

10.27 We seek consultees' views on the following questions.

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

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

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

Consultation Paper, Part 4, paragraph 4.21.

10.28	We ask consultees:
	(1) Is it necessary to have a special regime for linear obstacles or would the General Regime suffice?
	(2) To what extent is the linear obstacle regime currently used?
	(3) Should the carrying out of works not in accordance with the linear obstacle regime continue to be a criminal offence,or should it alternatively be subject to a civil sanction?
	(4) Are the rights that can be acquired under the linear obstacle regime sufficient (in particular, is limiting the crossing of the linear obstacle with a line and ancillary apparatus appropriate)?
	(5) Should the linear obstacle regime grant any additional rights or impose any other obligations (excluding financial obligations)?
	Consultation Paper, Part 4, paragraph 4.30.

10.29	We provisionally propose that a revised code should prevent the doing of anything inside a "relevant conduit" as defined in section 98(6) of the Telecommunications Act 1984 without the agreement of the authority with control of it.
	Do consultees agree?
	Consultation Paper, Part 4, paragraph 4.34.

10.30	We provisionally propose that the substance of paragraph 23 of the Code governing undertakers' works should be replicated in a revised code.
	Do consultees agree?
	Consultation Paper, Part 4, paragraph 4.40.

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

ALTERATIONS AND SECURITY

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

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

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

10.35	We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code? Consultation Paper, Part 5, paragraph 5.18.

10.36	We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.

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

10.38	We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.

10.39	We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus. Consultation Paper, Part 5, paragraph 5.50.

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

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

FINANCIAL AWARDS UNDER THE CODE

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

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

Do consultees agree?

Consultation Paper, Part 6, paragraph 6.35.

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

Consultation Paper, Part 6, paragraph 6.36.

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

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

Consultation Paper, Part 6, paragraph 6.73.

The Faculty does not express a view whether "consideration" should be calculated by reference to the principles contained in the Land Compensation Acts. This is essentially a political issue. There are no doubt political arguments associated with the pros and cons of providing private companies with statutory powers of acquisition with the full benefit of the Land Compensation Statutes. These statutes were largely designed for the acquisition of land for public purposes.

The Faculty therefore seeks only to criticise the logic which has led to this proposal, and to consider the implications.

It is fair to infer that "consideration" payable by electronic communications operators has long been assessed on the basis of *Mercury Communications Limited -v- London and India Dock*

Investments Limited (1995) 69 P&CR 135. Compensation is assessed by reference to market value without strict reference to the Land Compensation Statutes. The Faculty understands this has led to a valuable and mature market; for example for landowners in the rental of land for telecoms masts. Moreover there is a substantial market for the sharing of these masts whereby a host operator shares the mast with another operator and a "payaway" (a form of overage) is paid to the landowner. In many cases the area of land let is simply a small part of a field or little used land. Should the *Pointe Gourde* principle apply, no account of the scheme (however that may be defined) could be taken in the assessment of market value. In practice there would be many cases where the land value would be assessed only with regard to its existing use. So in the case of the field or unused ground the Faculty would expect expert valuers to suggest there would be little value at all, perhaps not even worth the cost of entering into a legal transaction. Thus "consideration" would be reduced to "compensation."

We agree it is desirable the law should be clarified, so the industry knows whether *Mercury* has, by implication, been undermined by *Bocardo SA -v- Star Energy [2011] 1 AC 380.* We should say, however, that it is far from clear this is the case. *Bocardo* did not overrule or criticise *Mercury*, despite its being founded upon by the dissenting Justice. The leading opinion of Lord Brown of Eaton under Heywood at [90] refers to at least one factor which is not applicable in telecoms namely the fact that by statute Parliament had vested all property in petroleum in the Crown. It would therefore rightly seem an improbable result if other parties could in effect exact "key value" for the extraction of the petroleum. We also note that Lord Hope of Craighead at [30] and Lord Brown at [73] had in mind "compensation" rather than "consideration".

We think there is much to be said for the logic, similar to the view of Lord Clarke in *Bocardo* at [138] that if Parliament had intended to apply the land compensation statutes in the Electronic Communications Code with regard to "consideration", it could easily have said so. If genuine "consideration" is to be given to landowners, as we indicate above it would probably not be very meaningful in many cases if the statutes or equivalent applied. By analogy, we agree with the Law Commission at 6.42 that compulsory wayleaves acquired by electricity providers recognise an element of payment for "the wayleave"'; i.e. something more than mere "compensation" but a form of "consideration".

We do not agree with the Law Commission at 6.49 suggesting comparables are difficult to find for telecoms sites. In our experience we have come across specialist surveyors who hold databases with rental levels for literally thousands of telecoms mast sites.

There is perhaps a discrete Scottish point. Following *ITA -v- Assessor for Lanarkshire 1968 SC 249* and Assessor for *Aberdeenshire -v- Pye Telecoms Limited 1973 SC 157* there are particular issues for Scottish Valuation for Rating. Sharing of telecoms masts is a widespread practice. We understand Scottish Assessors treat shared telecoms masts as being in the occupation of both the host operator and the sharer operator. Thus a shared mast may result in two or more assessments for rates. We understand this is different to England where statute deems a telecoms mast to be in occupation of one operator only. Thus if the proposal were to result in the fall or even collapse of the rental market - and we would defer to the opinion of specialist surveyors in this matter - then there could be a significant impact for Scottish local government finance.

10.45	Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable). Consultation Paper, Part 6, paragraph 6.74.

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

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

TOWARDS A BETTER PROCEDURE

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

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.26.

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

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

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

(3) any other form of adjudication.

Consultation Paper, Part 7, paragraph 7.27.

We agree that the forum for dispute resolution in Scotland should be the Lands Tribunal for Scotland. Its panel includes expert valuers.

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

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.31.

10.51	We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.

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

10.53	We also ask consultees whether different rules for costs are needed depending upon the type of dispute. Consultation Paper, Part 7, paragraph 7.38.

10.54	We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.

10.55	Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? Consultation Paper, Part 7, paragraph 7.53.

10.56	Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.

10.57	We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.

INTERACTION WITH OTHER REGIMES

10.58	We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease. Do consultees agree? Consultation Paper, Part 8, paragraph 8.22.
	The Code requires to interact with several other regimes. Scotland has its own discrete regimes in respect of land ownership, landlord and tenant, and public roads. The Faculty welcomes the intention to consult with the Scottish Law Commission to ensure these regimes are taken into account.

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.

Mr James Linney
Law Commission
11Tothill Street
London
SW1H 9LJ

26 July 2012

Dear Sirs

Law Commission Consultation Paper 205
The Electronic Communications Code

I am responding to this consultation on behalf of the Country Land and Business Association, and a completed copy of the response form is attached.

The Country Land and Business Association (CLA) represents more than 34,000 members in England and Wales. Our members both live and work within rural areas; they operate over 250 different types of rural businesses including agriculture, tourism and commercial ventures, and own more than half the land area of England and Wales.

A considerable number of our landowning members are affected by, or provide sites for, electronic telecommunications equipment and infrastructure, and some of the proposals set out in your consultation paper will have a significantly adverse effect upon our members' interests, if implemented. A considerable proportion of the thousands of telecommunication masts and the hundreds of thousands of miles of cable which together deliver the telecommunications system across England and Wales are sited upon, or run under or over, land in the ownership or occupation of our members.

Although Code Operators pay landowners for the use of their land on which to site equipment, it should be appreciated that this is not a conventional landlord and tenant situation. Firstly, most landowners are in a "flyover" or "by-pass" situation: cables and wires cross their land on their way to somewhere else, and masts are positioned to send signals out across the countryside. The landowners derive little or no benefit from this infrastructure themselves. In the case of wireless links, the landowner or occupier may have no idea that the link passes over his property, and receives no remuneration for it, but the operator of the link may object to any development - whether a building, woodland, or other – which may affect the link.

Secondly, Code Operators often have a stronger bargaining position than landowners in negotiating the terms of any letting arrangement. They are major companies with very substantial financial resources, not averse to playing one landowner or occupier off against another, especially where a site is being shared by more than one operator. Landowners are not a cabal, working together to achieve to fix prices and achieve the best return from telecommunication rentals, but as individuals they do frequently find themselves in competition with their neighbours.

Thirdly, once equipment is in place, landowners often experience difficulties in requiring Code Operators to act in accordance with obligations placed upon them. For example, one of the

most frequent complaints that we receive from our members concerns the failure of Code Operators to deal with lease renewals in a timely fashion, and to remove equipment when leases come to an end.

Given the unequal negotiating position our members frequently find themselves in, the CLA is strongly opposed to the proposals contained in the consultation paper to alter the basis of payments for the siting of telecommunications equipment on their land. The current market-based approach has not stopped the roll-out of both mobile and landline services to the vast majority of the population. The Code Operators are large companies which are run for profit, and they should pay the market price for siting their equipment on someone else's land. They are not compelled to provide a mobile telecommunications service, and they choose sites which are economically viable for them, based on demand.

We have carefully considered all the questions posed in the consultation paper, and there are a number of other issues which will be of concern to our members. In some cases, we have tried to provide examples of the sort of difficulties faced by them, and where we do not consider that the majority of our members would be affected by a proposal, we have made this clear. Equally, where we do not consider that changes need to be made, or where we have no evidence to suggest that difficulties are being encountered, we have stated that this is the case.

Yours faithfully

Tim Woodward MSc MRICS
Interim Chief Surveyor
Country Land and Business Association

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

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

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

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

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

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

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

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

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

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

Tel: 020 3334 0200 / Fax: 020 3334 0201

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

Freedom of Information statement

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

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

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

Your details

Name:
Tim Woodward MSc MRICS
Email address:
[redacted]
Postal address:
Interim Chief Surveyor *Country Land & Business Association* *16 Belgrave Square* *LONDON SW1X 8PQ*
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):
Country Land & Business Association *16, Belgrave Square* *LONDON* *SW1X 8PQ*
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, provided that landowners/occupiers are adequately compensated, after negotiation, to an open market level. Rights to enter land should extend only to electronic communications apparatus owned by the Code Operator.

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

Consultation Paper, Part 3, paragraph 3.17.

Code rights should be neither extended nor reduced, and should be freely negotiated.

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

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

In principle, yes, although since different technologies may have different impacts upon land holdings, it should be open to landowners and Code Operators to negotiate terms.

Telecommunication masts and ancillary equipment, which occupy an area of ground on which the landowner will be precluded from farming, for example, will normally be dealt with under a lease. Cables, on the other hand, will normally be the subject of easements or wayleave agreements. As the nature of the right taken in each case is different, the market for each differs.

Leases are commercial agreements, with the terms agreed between the parties, and open market rents are normally negotiated. Easements and wayleaves have commonly been dealt with by reference to nationally negotiated rates, on a £ per metre run basis, agreed between the NFU and the CLA on the one hand and certain operators on the other, as they are in the context of utilities such as electricity. Negotiations on a national broadband wayleave agreement have been taking place, and the agreement should be launched in November.

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 CLA has called for an enforceable and comprehensive Code of Practice to ensure that powers of compulsory purchase are not abused by acquirers. We do not believe that it is necessary for Code Operators to expressly insure against damage to the land as long as this is covered by third party liability insurance. There should be an obligation upon Code Operators to enter into a written agreement with the landowner/operator, which will clearly define the responsibilities of both parties.

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

The definition should remain in general terms. Technology is continually evolving, and equipment should not, therefore, be too precisely defined.

10.8	We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.

We do not believe that a landowner (freeholder) should be bound by code rights negotiated by parties with lesser interests in the land, and certainly not beyond the term of their tenure. Negotiations should be with the party with the strongest interest in the land.

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

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

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

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

Consultation Paper, Part 3, paragraph 3.53.

(1) The landowner should be fairly and adequately remunerated for the granting of code rights, and the public benefit of the scheme should be assessed before compulsory rights are granted.
(2) No
(3) *Public benefit should be assessed as very significant before code rights are granted, and the landowner/occupier should be fairly compensated. A stringent test is needed, since there will be a range of issues to consider.*

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

Consultation Paper, Part 3, paragraph 3.59.

See our response in 10.8 above. Neither the landowner nor neighbouring landowners - the parties with the strongest interest in the land - should be bound by rights negotiated by those with a lesser and temporary interest in the land.

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

Consultation Paper, Part 3, paragraph 3.67.

Compensation should continue to be paid if the land over which the lines pass can be shown to be injuriously affected, as set out in paragraph 16 of the Code. Cables as low as three metres above the land are likely to interfere with agricultural operations, and Code Operators should be required to liaise with landowners to check whether this will be the case. If necessary, they should be required to raise the cables or bury them.

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

There should be a right to object to overhead apparatus, if the landowner believes that his land will be injuriously affected by the presence of that apparatus, or that his agricultural operations will be restricted.

Underground apparatus should also be taken into account, since although it is less likely to interfere with agricultural operations, it could have an effect upon equipment and fixtures such as irrigation service pipes or field drainage schemes.

10.13	Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence. Consultation Paper, Part 3, paragraph 3.69.

This obligation should remain in place.

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

(1) to vegetation generally;

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

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

Consultation Paper, Part 3, paragraph 3.74.

No – these rights should not be extended. Code operators should only be able to go on to private land to carry out work to trees or vegetation having first served notice on the landowner. We are concerned that work to vegetation other than trees – such as hedges – could interfere with a landowner's/occupier's claims for Single Farm Payment, may affect cross-compliance, and reduce his eligibility for Environmental Stewardship payments.

There may be justification for extending rights to wireless signals, but notice provisions should extend to this as well.

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. Formal consent in writing should be required, since landowners may not otherwise know whether apparatus is being upgraded.
(2) *Yes.*

10.16	We ask consultees:
	(1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice;
	(2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or
	(3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus.
	Consultation Paper, Part 3, paragraph 3.83.

(1) We do not believe that difficulties are being caused, in practice, save for situations where Code Operators are being required to pay extra consideration for sharing apparatus, as we believe they should.
(2) No.
(3) Yes, a figure should be separately negotiated by the Code Operator and landowner. This is especially appropriate where it is proposed that different kinds of equipment will share infrastructure: fibre optic cables in telephone conduits, for example, operated by two different companies.

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 section enables apparatus to be shared, subject to the consent of the lessor, such consent not to be unreasonably withheld. Provided that the lessor is able to request an adjustment to the rent to reflect this, we have no comment to make, and see little point in the drafting of further provisions.

10.18	We ask consultees: (1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice; (2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and (3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement. Consultation Paper, Part 3, paragraph 3.92.

(1) No, we do not believe that difficulties are caused by this.
(2) No – these are commercial arrangements, and commercial leases customarily require the consent of the lessor to an assignment by the lessee to another party.
(3) *Not necessarily, but any costs incurred by the landowner/occupier in checking or completing the documents should be met by the Code Operator.*

10.19	We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code. Consultation Paper, Part 3, paragraph 3.94.

No – we consider that existing rights are sufficient.

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

No – although we are largely concerned with rural land, where this may not be an issue.

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 – see our answer in 10.20 above.

10.22	Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.

No.

10.23 We ask consultees:

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

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

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

Consultation Paper, Part 3, paragraph 3.106.

(1) We have seen no evidence to suggest that this is a significant problem, restricting the provision of a good service.
(2) This does not appear to significantly affect the service provided.
(3) *No, not without substantial evidence to support such a change. We believe that existing legislation provides sufficient redress.*

10.24 We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator. Consultation Paper, Part 3, paragraph 3.107.
One of the most frequent and persistent complaints that we receive from our members concerns the failure of Code Operators to progress - in a timely fashion - lease renewals. Members find that it can be next to impossible to meaningfully engage with Code Operators' representatives about the renewal of leases even when they try to begin negotiations well in advance of the lease expiry date. Code Operators appear to sit back and do nothing, relying on their statutory powers. Letters remain unanswered and Operators ignore landowners' agents and refuse to engage in rent negotiations. If landowners wish "to do something" then they are faced with significant legal costs which are unlikely to be recovered from the other side unless the matter progresses to trial. The usual course seems to be to threaten to bring the lease to an end which is often not in fact what either parties seriously intends. *We would suggest that the Code should include provision for a financial penalty, based on a daily rate and charged to the Code Operator, where the Operator has failed to conclude a lease renewal by the time that the previous lease has come to an end. This would encourage Code Operators to start negotiations for a lease renewal well in advance of the expiry date of the existing lease, which clearly is not happening at present. However, there would need to be an exemption to cater for the situation where the landowner fails to engage in the process, but our experience is that this is very much the exception to the rule.*

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.

This is mainly an urban issue, and comparatively few of our members will be affected by street works. However, the Government has recently announced that planning rules are to be relaxed for telecommunication infrastructure works. If the provision of faster broadband requires the provision of infrastructure such as cabinets to be provided in rural areas, we would not object.

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.

Although a number of our members will be affected by this, no concerns have been raised by them.

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.

We do not believe that a special regime is needed, as comparatively few renewals or new services will be carried out each year which are affected by tidal waters and lands.

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.

See our answer at 10.27 above.

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, we agree with this. Operators should not be able to use a conduit for conveying new services without the agreement of the authority responsible.

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. See our answer at 10.27 above.

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. No new special regimes are needed.

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, but we feel that there should be a balance between the respective interests of Code Operators and landowners, and the need to improve public access to telecommunications.

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

Consultation Paper, Part 5, paragraph 5.12.

Yes, we consider that it does.

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. We feel that it should not be possible for either party to an agreement to contract out of the alterations regime.

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.

No, we do not agree. There should be an opportunity for landowners to remove apparatus, under certain circumstances, and for freedom of contract. The method by which parties may contract out of the security of tenure provisions of the Landlord & Tenant Act 1954 should be reproduced in the Code. Problems often arise where landowners become frustrated by the failure of Code operators to remove equipment after the expiry of an agreement, and so there needs to be a means by which negotiations can be concluded without delay.

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, agreed, if apparatus is erected unlawfully.

10.38	We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.

No, the burden should be placed on Code Operators to justify the retention of the apparatus on the land affected. Without this, there is little incentive for the Code Operators to do anything. The procedure should be made speedier and more efficient, perhaps by removing it from the jurisdiction of the County Court. Landowners/occupiers could be enabled to remove the apparatus, after serving notice, if it is not removed by the Code operator within a set period, or if negotiations are not actively in train.

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.

With freedom of contract – which we believe should apply – then these would be freely negotiated between landowner and Code operator. If apparatus remains on site after the expiry of code rights, the landowner/occupier should be able either remove it, or charge a fee.

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

Yes, freedom of contract should apply.

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

Yes – if the apparatus was not installed under the provisions of the Code, then there should be no retrospective application of code powers.

FINANCIAL AWARDS UNDER THE CODE

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

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

Do consultees agree?

Consultation Paper, Part 6, paragraph 6.35.

No, we do not agree with this proposal.

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

Consultation Paper, Part 6, paragraph 6.36.

Yes – it is only fair that compensation should be payable if a landowner cannot remove apparatus which was installed under Code powers by agreement with a third party, such as a tenant or other party with lesser powers.

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

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

Consultation Paper, Part 6, paragraph 6.73.

We do not agree with this proposal. It will substantially reduce the level of payments made to landowners, while boosting the payments made to Code operators. They are companies which are, after all, run for profit, and they should pay the market price. Although Code Operators assert that payments to landowners at current levels increases the cost to consumers, the present market-based approach to payments has worked successfully and has not prevented the roll-out of comprehensive telecommunications services across Britain. Operators have successfully negotiated many different agreements with landowners and occupiers.

The Commission should appreciate that there is a degree of competition among landowners for telecommunication deals; there is no landowning cabal operating to fix prices. On the other hand,

Code operators use site sharing to increase their profits.

10.45	Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable). Consultation Paper, Part 6, paragraph 6.74.

We feel that there should therefore be a presumption in favour of the status quo.

Where existing networks are in place, payments should be at market rates. However, the market value using compulsory purchase principles might be appropriate in those parts of the country where there is either no access or very limited access to electronic communications, and especially to the laying of cables.

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. There should be no distinction, and one regime.

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.

No – the payment was made for the original installation of the apparatus for the period it was in place.

TOWARDS A BETTER PROCEDURE

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

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.26.

Yes. The County Court probably lacks the necessary expertise and specialised knowledge.

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

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

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

(3) any other form of adjudication.

Consultation Paper, Part 7, paragraph 7.27.

The most expedient and least costly option would be preferred, which would suggest the use of independent valuers or arbitrators, with specialist knowledge of the telecoms market. It should be remembered that Code Operators will be in possession of considerably more funds than most landowners.

Generally, disputes under the terms of an agreement (such as rent reviews) could be dealt with under arbitration. Issues concerning rights in land might be best dealt with by the Lands Chamber. There must also be an appeals system, as currently in place.

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

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.31.

No: once Code Operators are in possession of land, difficulties can be encountered in getting them to conclude negotiations. We suggest that it should be possible for interest or penalty charges to be charged on payments if negotiations are not concluded within an agreed timescale. Payments and code rights should be indivisible.

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

Consultation Paper, Part 7, paragraph 7.32.

See 10.50 above.

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

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

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

Consultation Paper, Part 7, paragraph 7.37

Essentially, we believe that the present procedures should be left unaltered. However, we feel that there is merit in requiring the losing party to pay costs, unless compulsory powers are being utilised under the Code. In this instance, the Code Operator should bear the 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.

Yes.

10.54	We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.

This, on the face of it, seems a sensible idea, and notice procedures and rules for service could be set out in an information pack (see 10.56 below), with topics clearly grouped under headings. This would help to avoid extra and unnecessary costs.

10.55	Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? Consultation Paper, Part 7, paragraph 7.53.

10.56	Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.

Yes, we do believe that more – and better – information should be made available to landowners, so that they are able to deal with these matters rather than having to employ paid advisors. There should be an information pack, written in plain English, so that the procedures are easily understood.

10.57	We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.

Again, we can see merit in this, if it would simplify and reduce the cost of the process. See our response in 10.54 – 10.56 above.

INTERACTION WITH OTHER REGIMES

10.58 We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease.

Do consultees agree?

Consultation Paper, Part 8, paragraph 8.22.

We agree that the current arrangements - with two procedures - create difficulty, and confusion, and are undesirable. We would agree that it seems sensible for the Code to be the sole operative mechanism.

However, we believe that it should remain open to the parties to agree to contract-out from which ever procedure continues to operate, should they mutually agree to do so. May we also suggest that if this proposal meets approval and the parties do agree that a tenancy should be contracted-out of security of tenure provisions, then the revised code should provide that any subsequent tenancy between the parties, or any holding/over or continuation of an expired tenancy, should automatically continue to be on a contracted-out basis?

The reason for asking this is that our members' experience is that the Code Operators can be extremely dilatory about renewing leases that have expired, even where a landowner has attempted to start negotiations for lease renewal a year in advance of the current lease expiring. Engaging with Code Operators on lease renewals often proves next to impossible. This in itself causes ill-feeling between the parties and often leads to a frustrated landowner making a request for the removal of apparatus in order to bring matters to a head. This is counter-productive and leads to legal costs escalating.

Our proposal would have the advantage of removing anxiety from landowners in continuing to accept rent for any period after the lease has expired. It would also, by default, give effect to the parties' original intentions rather than counter-intuitively producing the opposite result.

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

Do consultees agree?

Consultation Paper, Part 8, paragraph 8.33.

We would suggest that a requirement to register is an additional and unwelcome administrative burden on Code Operators, resulting in higher administrative costs. We are not aware that there are material problems caused by utility companies not registering their rights. Often there are problems with plans where pipes and cables are not actually laid in the position indicated on the plans. Failure to remove registered entries also causes problems for landowners when rights come to an end.

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.

Abacona
Investments Ltd

Steps House, Glebe Rise, Austrey, North Warwickshire. CV9 3HF Telephone: [redacted]

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

23rd October 2012

Our ref: MBP/VP/Telecom Sites

Dear Sir

Re: Response to Law Commission Consultation Paper No 205 on the Electronic Communications Code

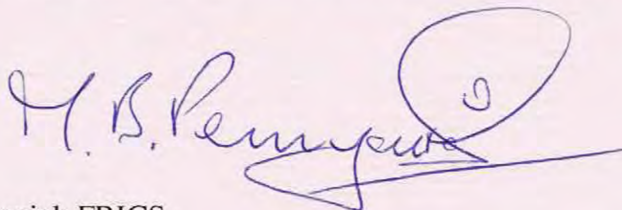
Abacona Investments Limited has four telecom sites all let to national operators and these are situated on two blocks of residential flats in the Birmingham area. It has always been our policy to share rents received from telecom sites with lessees of the flats and they have received substantial benefit by reduction in their service charges. It is important to lessees and this company therefore, that the present arrangements of negotiating rental with the telecom companies be maintained, that is, open market rent should apply.

There is a considerable move towards site sharing by the telecom operators, who wish to reduce their costs however this should not be a reason for overriding existing lease arrangements. Site sharing brings with it additional traffic on roofs from engineers regular visits and works of upgrade. Enhanced site sharing rental, where agreed, goes some way towards the additional and more frequent costs of roof repair. Only this week I have had to write to three telecom tenants whose contractors have caused damage to a roof. Telecom tenants require twenty-four hour access, site sharing usually means more visits by contractors, which is a nuisance to our residential lessees, especially at night.

A landlord must have control over the placing and amount of equipment on the telecom site, particularly with regard to leaving proper access for roof maintenance and existing lease provisions should apply.

Our agent, Batcheller Monkhouse, is also responding to the Consultation Paper and I hereby endorse such responses as submitted on our behalf by that firm.

Yours faithfully



Malcolm B. Pennycuick FRICS
Managing Director

COMPANY REGISTRATION No. 1679842 ENGLAND

Pippingford Estate Company Ltd.
Pippingford Manor, Pippingford Park, Nutley, East Sussex TN22 3HW
www.pippingford.co.uk

23/10/12

Response to Law Commission Consultation Paper No 205 on the electronic communications code

I hereby endorse the enclosed responses to the above consultation paper submitted on our behalf by Batcheller Monkouse.

Our main concerns are that there will be a determination in favour of telecoms companies which are profit making organisations that overrules existing agreements that are legally binding. This then becomes state interference at the expense of our profit in favour of another companies profit under the pretence of public benefit…

We are entitled to determine the rents set on our land and the method upon which reviews and sub use is implemented. Any change to our rights to do so will in my opinion be a breach of the European Human Rights act with reference to the ownership and operation of land. It will also be completely at odds to a free market economy.

Our customers are entitled to go wherever else they want to and make a deal to replace their existing use of our land and we are entitled to strike the best deal we can for our land. State interference is most unwelcome and is most likely a vehicle to the benefit of telecoms companies at the expense of small business with no perceivable benefit to the general public. Where existing infrastructure is operating well and with full representation of all telecoms companies who wish to be there why on earth change things ? How on earth can the Law Commission ensure that any savings to the telecoms companies are directly passed on to the consumer ?

Yours Sincerely

Richard Morriss

St. Margarets Court (Rottingdean) Ltd.
20 St. Margarets Court
High Street
Rottingdean
Brighton BN2 7HS

RECEIVED
26 OCT 20

Tom Bodley-Scott
Batcheller Monkhouse
No.1 London Road
Tunbridge Wells
Kent TN1 1DH

October 24th 2012

Dear Mr Bodley-Scott,

Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

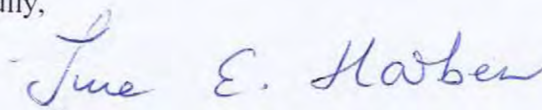
In support of Batcheller Monkhouse's submission to the Law Commission Consultation we should like to underline our support for them and the need for arbitrators in the conflicting interests of landowners and telecoms operators.

There is a presumption in law that people who own land and people who want to use it should be free to negotiate whatever contracts they wish, subject to the general law of the land (including the 1954 Landlord and Tenant Act). We have found that already operators are slow to implement the law as it stands.

The proposals in the consultation paper would appear to leave landlords considerably out of pocket without their having the opportunity to withdraw from dealing with the telecoms companies. This exacerbates the present situation where the telecoms companies already seem to hold all the cards. If the proposal is that they could requisition land without the need to search for alternative sites that would be cavalier. This could affect the possibility of change of use or redevelopment of land/roof space in perpetuity; unless these are deemed to be major redevelopments.

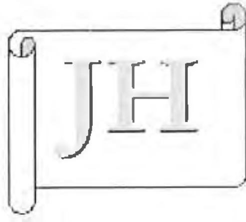
Because of these potential sweeping powers, and what we have experienced as their lack of care of other people's property, we would not advise other landlords to get involved with telecom companies. Proposals that further adversely affect the rights of landlords, and the publicity this will engender, could be counterproductive to the intention of expansion of the network as landlords would be loathe to cooperate.

Yours faithfully,



June E. Harben
Company Secretary

Directors: G.W.Ainscow, M.Clift, S.Rushton-Read Co. Secretary: June Harben Co. No. 3143657



W O & P O JOLLY HOLDINGS LTD
PHILIP HOUSE, ST WILLIAM COURT
MAIN ROAD, KESGRAVE, IPSWICH IP5 2QP

25th October 2012

Tom Bodley Scott Esq., MRICS FAAV,
Batcheller Monkhouse,
No 1 London Road,
Tunbridge Wells,
Kent
TN1 1DH

Dear Mr Bodley Scott,

The Law Commission Consultation
Consultation Paper on The Electronic Communications Code

Many thanks for your note drawing our attention to the Law Commission's consultation regarding the Electronic Communications Code.

We are very concerned at the changes proposed by the legislation that would effect our position as a landlord of a telecommunications mast.

We have purchased farmland, including a mast, and have relied on the background rental terms remaining broadly unchanged. These were commercial deals entered into in good faith.

I would be grateful if you would include this letter with any representations you are making to The Law Commission regarding this consultation.

Yours sincerely,

C M Rope
Director

Registered Office: Philip House, St William Court, Main Road, Kesgrave, Ipswich IP5 2QP
Registered In England and Wales No: 2943137
VAT Registration No: 638015646

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:	
Danielle Drummond-Brassington and Patrick Wetherall	
Email address:	
Postal address:	
c/o CMS Cameron McKenna LLP Mitre House 160 Aldersgate Street London EC1A 4DD	c/o Bond Pearce LLP 3 Temple Quay Temple Back East Bristol BS1 6DZ
Telephone number:	
Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):	
Property Litigation Association The PLA Law Reform Committee is a committee of the Property Litigation Association. The Property Litigation Association has over 1,000 members, all of whom are lawyers who deal at least 50% of the time with property-related disputes. Members deal with disputes in the commercial and residential sectors.	
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, we agree, subject to such rights being exercised in relation to the apparatus permitted by the agreement. The rights should not be exercisable in relation to other apparatus not expressly permitted by the agreement. See our response to question 10.15 for further detail.

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 comment

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

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

No comment

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.
No comment	

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

10.8	We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.
We agree that as a starting point the Code should not enable an occupier to create rights that exceed his or her own interest in the land. Where a Code Operator needs a right that exceeds what the occupier can grant, and the owner of the superior interest who can grant the right is not willing to do so, an application should be made. We are content with the "priority provisions" described at paragraph 3.33 etc. but would suggest that further thought is given to amending the provisions described at paragraph 3.36 etc. which have the effect of binding those who have not agreed to the conferral of a right. A landlord should not be prevented from removing apparatus as a result of its tenant's agreement with a Code Operator, where the tenant is in breach of the terms of its lease by agreeing to the installation of the apparatus – and where the landlord has not agreed to it. Paragraph 2 (3) of the Code should be amended accordingly.	

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.

Paragraph 5(3) should be amended to provide a clear and readily understandable test which balances public benefit (i.e. access to an electronic communications network or services) against the prejudice caused to the affected private landowner.

If a landowner cannot be adequately compensated in money, it should only be possible to dispense with the landowner's agreement following due consideration of the balancing exercise described above.

The Access Principle requires amendment to confirm that the tribunal should always give due consideration to the prejudice caused to private interests; i.e. the tribunal still needs to consider the balancing exercise when the prejudice is capable of being adequately compensated for my money.

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

Consultation Paper, Part 3, paragraph 3.59.

We agree 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, but only insofar as dealt with by the "priority provisions" – namely those other interests who agree to be bound, successors in title and derivative interests.

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.

We are of the view that the operator should be able, at its cost, to require trees and other vegetation to be removed. However, we are also of the view that such powers should not be able to be exercised against someone who is not a party to the contract.

This raises an interesting problem where the original landlord sells/gifts adjoining land. Should the operator be able to exercise lopping rights against the new owner? Does it make any difference whether the new owner is a bona fide purchaser for value? How should lopping rights be treated for registration purposes? Although we suspect that in reality this issue seldom arises.

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) We do not believe that Code Operators should benefit from an ancillary right to upgrade their apparatus. It is important for landowners to understand what apparatus is on their land, and whether it remains the same as originally authorised. It is likely that the Code Operator's apparatus is not the only equipment on the land and if works need to be carried out to other pieces of equipment, or even other Code Operator's apparatus it is important the landowner knows what equipment is on its land so that any works required do not inadvertently interfere.

As most Code Operators occupy land either under a lease or a licence, it is likely the landowner will be liable for any interference with the equipment by third parties. If a landlord does not know what apparatus is installed and he grants licence to a third party to do works that inadvertently interferes with apparatus he did not know was installed he should be protected.

Further in circumstances where a Code Operator has obtained an order pursuant to paragraph 5 of the Code, a Code Operator should be restricted to the equipment he has sought an order for and should not be permitted to upgrade without the landowner's consent.

One of our members recently acted for the owner of a building who needed to carry out repairs to the buildings services such as the air conditioning. Much of the plant was on the roof. There were also a number of Code Operators who had apparatus installed on the roof. When the landlord came to carry out the works it soon became apparent that the Code Operators had installed new apparatus and new energy supplies that made it very difficult for the landlord to carry out necessary repairs to his own building. The landlord had to commission a roof top survey to understand what equipment was installed, where all the

cables ran and what equipment was redundant as the lease plans did not match with what was installed on the roof.

We believe that provided the Code Operators have an ability to alter the equipment, subject to landlord's consent this should be sufficient to balance the interests of both parties. Section 19 of the Landlord and Tenant Act 1927 means that where the landlord's consent is required, such consent is not to be unreasonably withheld.

We do not see any problems with the definition of alter being stated to include upgrades in equipment. However, again we believe this should be with the landowner's consent, such consent not to be unreasonably withheld.

(2) It is unusual in commercial leases for landlords to be able to demand payment for consent to alterations. However, there have been concerns recently in respect of site consolidation, in which landlord's would wish to see a payment for consent – see our response to question 10.16 below.

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) Our members did not report any difficulties in this regard.

(2) We do not believe that Code Operators should benefit from a general right to share their apparatus with another nor that any contractual term restricting that right would be void. For the reasons set out above in response to question 10.15 it is important that a landowners know who is in occupation on their land and what apparatus they have installed on their land.

It is open to the Code Operator and the landowner to agree the terms of the agreement permitting the installation of the equipment. This is an arms length commercial negotiation. If the Code Operator wishes to be able to share the equipment and or assign its rights to another Code Operator we do not consider that Code Operators are at any disadvantage in seeking to agree such terms. We do not consider that legislation should be passed that makes any term restricting such rights void. If the Law Commission were minded to recommend such a proposal, then any proposal should go no further than a requirement that any sharing / assignment is to be with landlords consent. This would mitigate against those agreement provisions that expressly prohibit sharing / assignment, whilst balancing the need for a landowners control over his land. Further in circumstances where a Code Operator has obtained an order pursuant to paragraph 5 of the Code, he should not be entitled to share without the landowner's consent.

As in relation to alterations, if sharing, assignment is permitted subject to the landlord's consent, any consent is not to be unreasonable withheld.

(3) Payment for sharing may be appropriate in certain circumstances. One member reported an occasion where a client had 5 Code Operators installed on the roof of its building. Due to a series of site sharing arrangements between the 5 Code Operators the client was left with 2 leases in place, thereby reducing the amount of rent received, yet with all 5 Code Operators operating from its roof.

That said, we do not consider payment should be enforced, but should rather be left to market forces and as a matter of negotiation between the parties. It should be open for landowners and Code Operators to agree that if site sharing is to be permitted then payment is to be made.

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 do not have any comments in response to this question.

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) Our members did not report any difficulties in this regard.

(2) We do not believe that Code Operators should benefit from a general right to assign their code rights to another nor that any contractual term restricting that right would be void. For the reasons set out above in response to question 10.15 it is important that landowners know who is in occupation on their land and what apparatus they have installed on their land.

It is open to the Code Operator and the landowner to agree the terms of the agreement permitting the installation of the equipment. This is an arms length commercial negotiation. If the Code Operator wishes to be able to share the equipment and or assign its rights to another Code Operator we do not consider that Code Operators are at any disadvantage to any other commercial occupier in seeking to agree such terms. We do not consider that legislation should be passed that makes any term restricting such rights void. If the Law Commission were minded to recommend such a proposal notwithstanding our comments, then any proposal should go no further than a requirement that any sharing / assignment is to be with landlords consent. This would mitigate against those agreement provisions that expressly prohibit sharing / assignment, whilst balancing the need for a landowner's control over his land.

As in relation to alterations, if sharing, assignment is permitted subject to the landlord's consent, any consent is not to be unreasonable withheld.

(3) Payment for an assignment may be appropriate in certain circumstances. One member reported an occasion a client had 5 Code Operators installed on the roof of its building. Due to a series of site sharing arrangements between the 5 Code Operators the client was left with 2 leases in place, thereby reducing the amount of rent received, yet with all 5 Code Operators operating from its roof.

That said, we do not consider payment should be enforced, but should rather be left to market forces and as a matter of negotiation between the parties. It should be open for landowners and Code Operators to agree that if assignment is to be permitted then payment is to be made.

10.19 We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code. Consultation Paper, Part 3, paragraph 3.94.
We do not consider that any ancillary rights are necessary. Code Operators are sophisticated commercial entities. If they require any rights they are capable of negotiating such rights with landowners.

10.20 We ask consultees to tell us if they are aware of difficulties experienced in accessing electronic communications because of the inability to get access to a third party's land, whether by the occupiers of multi-dwelling units or others. Consultation Paper, Part 3, paragraph 3.100.
We are not aware of any difficulties.

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 comment.

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

10.24	We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator. Consultation Paper, Part 3, paragraph 3.107.
No comment	

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.

The alteration regime in paragraph 20 was inserted at a time when a network was in the process of being established. It was therefore important that the Code Operator's network was not at risk. Things have changed considerably since then and networks are well established in the majority of England and Wales. We consider that the current regime is too weighted in favour of the Code Operators and that any revised code that has a similar emphasis is not striking the right balance.

The Landlord and Tenant Act 1954 permits a landlord to oppose a tenant's statutory right to a new lease on the grounds of redevelopment or by providing suitable alternative accommodation. The tenant's considerations are not taken into account. If the landlord succeeds then the tenant is entitled to statutory compensation by reference to the rateable value of the premises. The checks and balances are provided by the Court which has to be certain that the landlord has the necessary intention to redevelop or that the alternative accommodation is suitable. There is a wealth of case law on point so there need not be any concerns in understanding the provisions if they mirror the 1954 Act. We consider that a similar regime to that in the 1954 Act would balance the interests of both parties and provide a forum for resolving the issue.

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.

Our members reported that there were a number of issues with paragraph 20 of the Code.
In the first instance there is uncertainty as to how the Courts will look at this provision. It therefore does not offer either party the certainty of protection it should.

Termination of the Lease
It is our view that a notice under paragraph 20 of the Code does not determine the property interest, particularly if a Code Operator occupies land under a lease. It is therefore difficult to see how paragraph 20 permits the outright removal of the Code apparatus notwithstanding the terms of the lease. This view has been supported by various Counsel members have been to over time. Therefore paragraph 20 is considered to be more about alterations of the apparatus on site, even then the provision is more akin to a shift and lift provision, rather than a right to terminate the lease.

Notice requirements
Technically, the notice requirements of paragraph 20 require the person serving the notice to be the person who intends to carry out the alteration. Often that person will not be the same. Removal of Code apparatus is usually required in connection with redevelopment of land. It is common for parties to enter into an agreement for sale of land to a developer conditional on vacant possession. If Code apparatus is present, the person serving the notice (i.e. the seller who has to procure vacant possession) will not be the same as the person carrying out the alteration (i.e. the purchasing developer). We are not aware that this point has been taken to the Courts as yet. However, significant time and money could be saved by altering

paragraph 20 so that it follows section 30(1)(f) of the Landlord and Tenant Act that simply requires the person to evidence the intention to redevelop at the Court hearing, thereby allowing a transfer in land after a notice has been served.

Proving alteration
We are not aware of any case law on what is required to prove that an alteration is required to be carried out. However, if the wording of section 30(1)(d) or (f) were followed, given the volumes of case law on this point all parties would understand what was required.

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

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.13.

The answer to this ultimately depends on the view relating to termination of the agreement permitting the installation of the apparatus, and whether exercise of paragraph 20 terminates such an agreement.
If the paragraph 20 regime were to work in a similar fashion to section 30(1)(f) of the 1954 Act then it would not be necessary to consider this question. The parties could simply include a provision in the agreement permitting the installation of the equipment allowing the parties to terminate the agreement if the landowner wishes to alter/redevelop in accordance with paragraph 20. Therefore we consider it would be best that the parties contract in to this right.

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.
We consider that a fairer balance would be struck between the parties if the security provisions of the Code were akin to the Landlord and Tenant Act 1954. This would mean that Code Operators would be able to remain in situ at the expiry of a relevant agreement (unless the Code did not apply – see below) unless the landlord objected. If the Code does not apply then the landowner should be able to remove the apparatus without further consultation.	

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.
We consider a more structured timetable would assist the parties. Currently members have reported that an application under paragraph 21 can be very long and drawn out. By putting in place a statutory timetable the parties would have longstop dates by which time the issue should be addressed. Again, the Landlord and Tenant Act 1954 provides a model for this. This allows either party to commence the process for renewal / removal. A Code Operator could therefore seek a renewal agreement with a landowner and a landowner could either ask whether the code operator wanted a new agreement or seek to determine the same.	

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 if an Operator keeps his apparatus in place after expiry of the relevant agreement then he should be required to reimburse the landowner for such period of occupation. Again, by way of analogy, the Landlord and Tenant Act provides for this by way of interim rent and we do not see any reason why this could not apply in this case.	

10.40	We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development. Do consultees agree? Consultation Paper, Part 5, paragraph 5.51.
We agree. Members reported that it is a common feature of negotiations with Code Operators that where the land on which apparatus is situated is ripe for redevelopment, Code Operators are willing to agree to liquidated damages clauses in the event they do not vacate at the lease / licence expiry. This is to prevent them relying on code rights. Given it is questionable whether such a provision is enforceable we consider it appropriate that the parties be able to contract out if they wish to do so. The regime works well under the 1954 Act and we see no reason why an exclusion regime should not apply to the Code Operators.	

10.41	Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code? Consultation Paper, Part 5, paragraph 5.56.
Yes, we consider that to operate two regimes would cause confusion. Therefore any revised code should apply to all agreements, even if the apparatus was installed before the revised code came into force.	

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 comment

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.
No comment

10.44	We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator. Do consultees agree? We would be grateful for consultees' views on the practicability of this approach, and on its practical and economic impact. Consultation Paper, Part 6, paragraph 6.73.
No comment	

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.
No comment	

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

TOWARDS A BETTER PROCEDURE

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

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.26.

We agree, for the reasons stated in the consultation paper, that the revised code should no longer specify the county court as the forum for most disputes.

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

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

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

(3) any other form of adjudication.

Consultation Paper, Part 7, paragraph 7.27.

We would agree with the recommendation that the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber) is the appropriate forum for these disputes.

In order to expedite matters, however, we agree that it would be sensible to have some form of alternative dispute resolution also available. It may be sensible if a procedure similar to that contained in the Party Wall etc. Act 1996 is adopted, but we would also suggest that provision is allowed for the parties to mediate the dispute between them, as an alternative.

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

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.31.

We have some concerns about the proposal that it should be possible for code rights to be conferred at any stage in proceedings pending the resolution of dispute over payment. If Code Operators are given an effective right to take entry at an early stage of proceedings this could enable Code Operators to use this right to run rough-shod over resistant occupiers.

In the circumstances, we would suggest that it should only be possible where terms of occupation are fully agreed save for rent or whether the Code Operator can establish a cogent reason to the Lands Chamber to allow early access.

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 proposals allowing alternative dispute resolution via a procedure akin to the Party Wall etc. Act, together with mediation, should mean that delays are reduced.

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

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

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

Consultation Paper, Part 7, paragraph 7.37

We are of the view that the costs procedure should provide for a narrow category of costs to be payable by the Code Operator in any event (in a manner akin to that provided for by the leasehold enfranchisement provisions).Thereafter, costs should be at the tribunal's discretion following the usual "losing party pays" principle.

To allow landowners any more than a limited automatic right to certain costs could encourage landowners to litigate unnecessarily. On the other hand, given that the Code Operator has considerable statutory protection by virtue of the Code, it is right to balance this with a limited liability for the landowner's costs in any event.

If the proposal that the Code Operator be liable for certain limited costs *in all cases* is not adopted we would suggest, as an alternative, that the Code Operator should at least be liable for limited costs in all cases where it is seeking to acquire rights, without the landowner's agreement, pursuant to Paragraph 5.

In all cases, a procedure akin to Part 36 of the Civil Procedure Rules should be introduced to allow parties to make reasonable offers to thereafter give themselves costs protection, with the usual consequences to follow in costs if reasonable offers are not accepted.

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.

Please see above.

10.54	We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.

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.

We are of the view that the form of notices available could benefit from being simplified including the warnings given to landowners. We also believe that it would be helpful for a suite of notices to be made available to landowners, although perhaps their use should not be mandatory.

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

10.57	We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.
We believe that whilst it may be useful to have a standardised form of agreement and terms, it would not be practicable for the Code to facilitate an agreement on the basis of these terms and they should only be used on a voluntary basis.	

INTERACTION WITH OTHER REGIMES

10.58 We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease.

Do consultees agree?

Consultation Paper, Part 8, paragraph 8.22.

The view of the overwhelming balance of members consulted is that the proposal to exempt the 1954 Act is correct.

As indicated in the consultation paper, many of our members have found numerous practical and legal difficulties with the application of two regimes, as currently applies. Fundamentally, the two regimes are incompatible with each other: there are different notice requirements; the grounds for possession are different; and in order for a landlord to serve notice under paragraph 21, the lease must already have ended – but, as the paper highlights, it is arguable that the lease does not end until such time as 1954 Act rights are determined.

We would also agree with the consultation paper that tenancies which are entered into primarily in order to place electronic communication apparatus on land are not typical of business tenancies and were not intended to be protected by the 1954 Act.

It is, in our view, not sufficient simply to say that parties are able to contract out of the 1954 Act – the lack of clarity that exists currently as a result of the two regimes being (potentially) applicable is unsatisfactory and causes additional delays and costs. This will not always be solved by the availability of the parties being able to contract out as this only happens sporadically with the parties' agreement.

We therefore agree that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus- and which is protected under the revised code - the 1954 Act should not apply.

We do not accept the suggestion that simply because on occasions Code leases can be assigned to non- Code Operators, this gives good reason for the 1954 Act to remain applicable. In these circumstances, the lease could become "unprotected" (by either the Code or 1954 Act); or this could be resolved by allowing for the 1954 Act to apply following assignment to a non-Code Operator.

<table>
<tr><td>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.</td></tr>
<tr><td>We do not agree that an interest in land created by the Code should be registrable under the land registration legislation, for this to be rendered meaningless if there is a failure to register, because the Code's provisions prevail. This will undermine the Land Registration Act 2002. Code rights could be treated in the same way as overriding interests, binding on successors and overriding interests only until they are registered. However, the intention of the Land Registration Act was to incorporate such rights in the register. If the interests created by the Code are required to be registered under the land registration legislation they should not be legal interests until registration has taken place, as is the case for other registrable interests.</td></tr>
</table>

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

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:
Malcolm Bush
Email address:
[redacted]
Postal address:
[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):
British Telecommunications plc BT Centre 81 Newgate Street LONDON EC1A 7AJ
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. All three rights are essential for the proper running of our networks.

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.

Additionally, it would help us to deliver and repair services faster if we could have a right to access private land, for or in connection with, the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus installed or to be installed pursuant to Paragraph 10 of the Code (so-called “flying wire” rights).

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

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

Yes, Code reform should not favour one technology type over another.

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

Yes. BT believes that the existing Code sets out an appropriate set of obligations that address legitimate concerns of landowners and other stakeholders such as local authorities.

We would also observe that extending these would be likely to increase costs for operators, and would not speed up delivery of services to end users. From discussions with occupiers we know that the operation of the Code to date has not led to appreciable infringements of occupiers rights, strongly suggesting there is no substantive need for change.

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.

BT increasingly places "active" equipment (powered by mains electricity) in the highway. To avoid doubt in dealings with Highway Authorities, contractors and others, we ask that the Commission recommend that the definition be amended expressly to cover apparatus that provides electrical power to other types of electronic communications apparatus.

10.8	We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.

The manner in which the Paragraph 2 of the Code is presently drafted has caused us difficulties in practical terms for the following reasons:

1. The wording of Paragraph 2 is complicated. Legislation must be precise and comprehensive but ideally it should also be comprehensible and useable by non-lawyers. The current Code does not meet those tests and this has led to a lack of its appreciation by commercial and operation staff, for whom it was presumably intended.
2. It creates uncertainty about the party with rights to sign, such that our operational team have, in the past, believed they should, to minimise legal risk, enter into agreements with both landlord and the tenant, leading to duplication and additional costs.
3. Further uncertainty is created in the long term when the tenant is no longer in occupation and BT wishes to enforce the agreement it has entered into with the tenant. This can lead to disputes with the landlord who is not aware he is bound by the agreement.
4. Landowners routinely do not inform their successors in title of the existence of an agreement when selling on their title. This causes BT difficulties in terms of enforcement of its wayleave particularly in relation to apparatus which is located underground.
5. We think there may be a risk of opening an extended technical legal argument about the subject matter of Paragraph 2. We wish as far as possible to focus that debate on those points which can be taken forward with clear practical advantages. We propose that Paragraph 2 remain largely unchanged in substance, but that Paragraph 2(3)(a) be extended to cover all tenants or licensees of social housing. We make this specific proposal as we have experienced growing problems dealing with development works on

current or former "Council housing". We are faced with arguments that occupiers of such housing have no right to permit installation of electronic communications apparatus, or that a Council is not bound by such an agreement. This line of argument is then used to argue that the Council has no obligation to meet our expenses for any alterations necessary to accommodate the Councils proposed alterations.

6. Our proposal in (5) will help greatly to clarify this area, making for greater certainty and avoiding lengthy and expensive disputes, and indeed damage to network apparatus.

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. This would reduce the amount of legal analysis required.

(2) Where an owner or occupier cannot adequately be compensated we suggest that their agreement should be dispensed with if doing so will provide access to the particular applicant operators' network. That principle could be made conditional on the court being satisfied that the operator has no reasonable alternative to placing its apparatus on the land in question.

(3) The Access Principle does require amendment. It should be made clear that firstly, the the burden in demonstrating such prejudice must (in keeping with the burden of proof generally) rest with the landowner. Support for this can be gleaned from the case of *Petursson v 3G [2005] EWHC 920.* The test should be an objective one, rather than a subjective one. The landowner's perceptions of the effect of the apparatus upon their enjoyment of the land are not sufficient.

As a general principle we believe that electronic communications apparatus causes little if any prejudice to owners and occupiers. It does not involve high operational risks, and typically causes little or no noise, smell or other nuisance. On that basis, the requirements of operators and those who seek their services should normally be allowed to decide the issue. In practice, we do not experience many disputes about this part of the Code.

There is one specific circumstance where we ask that the Code be amended. This is the new build or "New Site" scenario. We have experience of being unable to secure agreement to install network apparatus at certain new residential developments. The common theme is that another operator installs a network, and the developer then will not agree to ours being built. The point that we believe the Commission must address is the lack of clarity as to how the court should consider the Access Principle where a competing or parallel network has already been installed. We do not believe that this should justify or require the court to refuse any and all subsequent operators requests to build and suggest that the Code should be amended so as to clearly permit full infrastructure competition. This could be achieved by a modest amendment to Paragraph 5(3) to state that "no person should be denied access to the network of the applicant operator" ".

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

Yes, this is vital in terms of enforcement. We would also like to see a definition of 'occupier' for the purposes of granting such permission.

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.

This right is vital for the operation of BTs' access network, much of which relies on final drops by radial overhead distribution. Occasional complaints indicate that the existence and scope of the right is not widely appreciated by all sections of the public.

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

We consider the provisions of Paragraph 17 to be a helpful part of the Code which gives clear parameters for objections to be raised for overhead apparatus whilst maintaining a fair balance between the necessary rights required by the operator and remedies available for land owners.

In terms of the framing of those objections and any considerations as to prejudice again the Code should make clear here that any test of prejudice should be an objective test.

10.13	Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence. Consultation Paper, Part 3, paragraph 3.69.

No comment.

10.14	Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended: (1) to vegetation generally; (2) to trees or vegetation wherever that interference takes place; and/or (3) to cases where the interference is with a wireless signal rather than with tangible apparatus? Consultation Paper, Part 3, paragraph 3.74.

There would be a benefit to an extension of these powers to all vegetation and to any land, including the publicly maintainable highway. This would help to deal with not only situations where trees/vegetation directly damage apparatus, but also a small number of cases of electromagnetic interference to fixed copper networks caused by electric livestock fences, where vegetation around a fence touches the fence and conveys interference to the ground, and thence to the fixed network. The operation of microwave radio apparatus would also benefit.

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) We seek to cover upgrading in commercial agreements. However, it would speed up deployment if the right to upgrade could be allowed for. This should be restricted to cases where an upgrade did not, objectively, affect enjoyment of the land
(2) We seek to cover this commercially. We think consideration should be available where the upgrade materially increases the capacity of the network, and should be assessed in line with the current paragraph 7(1)(a).

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.
No comment.

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 suggest that S.134 could be amended to make prohibitions or restrictions void. S.134 is not widely known of, but we believe that its restricted and qualified effect makes it of little practical use. If a revised S.134 contained an unequivocal right for end user tenants to have uninhibited access to the network of their choice, it could become a useful provision.

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.
No comment.

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.
This is the central area of difficulty for BT. Nearly all our Code-related costs, delays and disputes arise in this context. A typical scenario is the tenant of part only of commercial premises who wants a new line. We also experience similar difficulties as we seek proactively to build out our new Fibre to The Premise ("FTTP") network to blocks of flats. THIRD PARTY SCENARIOS GENERALLY Where new apparatus has to be installed outside that part of the premises leased to the tenant, but within the remainder of the premises, BT must secure the agreement of the occupier/ landlord. We experience significant delay and cost in securing that agreement. Thousands of our installations each year fall into this category. Often the service on order is a high-capacity circuit, perhaps for a mobile network operator or an expanding technology business. Delay in providing that circuit delays the development of the end-user, whether consumer or business, as well as delaying revenues for BT. The range of disbenefits caused by this delay can be seen in the case of a large Ethernet project in which Openreach was asked to provide new fibre Ethernet circuits to a business with thousands of high-street premises. Many of these are rented, and BT sought many new Code agreements from a range of landlords. Significant delays arose in this aspect of the project. As a result, the end user business could not complete its new electronic communications network, delaying delivery of new capabilities and, presumably delaying efficiency saving for their own operations. BT experienced delayed receipt of connection and rental revenues. Given that the subject matter of the delays was in each case a very modest amount of small diameter cable and a modestly sized network terminating unit, we feel that the delays here have been extremely unfortunate and show that the current legislation is less than fully effective at managing this type of activity. It might be thought that the only parties which gained a benefit were the professional advisers to the landlords.

More often than not commercial landlords will pass our request for agreement to a professional adviser, be that a lawyer or surveyor. The ensuing negotiations over terms (typically not about consideration, but related to indemnity, insurance and application of Paragraph 20 and 21 provisions) can be extended over many weeks or even several months. Whilst of course it is open to an operator to manage such a situation as they see fit, the delay leads to a poorer service for every party in the value chain – end user, communication Provider and network operator.

From this perspective, BT is clear that Code reform must address these issues and provide quicker results from the necessary interactions between network operators and third party landlords/occupiers.

MULTI-DWELLING UNITS AND MULTI-OCCUPANCY UNITS

In addition to the above points, BT has experienced particularly acute issues with plans to build FTTP NGA network to MDUs, and to other multi-occupancy units/buildings, such as commercial office buildings (“MOUs”). Our comments here should be read as of equal application to MDUs’ and MOUs’.

Our build activities at MOUs and MDUs is part of both our commercial roll-out, and BDUK activity.

We have run a programme seeking Code agreements from MDU landlords. We have found that typically 40% of these landlords show no interest in engaging with us, and this leads to slower and more restricted roll-out of NGA. We are, simply, hampered by the current need to secure written agreement. To make NGA deployment work better, which is what we understand to be the common goal, we must look for practicable new ways to secure rights to deploy in MDUs.

What can be done? We think there is a range of options, below, which the Commission should assess and then make a clear recommendation. Any recommendation might amount to a new Special Regime, to which your question at 10.31 refers.

The Code could provide for a statutory right for a Code operator to install and keep apparatus in an MDU.

Alternatively, such a right could be conditioned by a requirement to serve Notice of Intent, with no response being deemed to be consent. The MDU occupier might have rights to control to some extent the timing and method of installation.

Whatever the precise mechanism, we think it is essential to the speedy deployment of NGA into MDU’s that the law be changed so as to create a presumption that NGA build work can and will go ahead; the only issues then being the detail as to how and when that would happen.

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. BT has sought on occasion to raise with customers this means of resolving Code issues. Greater benefits could be derived even from the existing Code provision but we have found that our customers are often not aware of the legal powers they hold, and are in any event reluctant to use them. The existing provision should be retained in substance but we feel there is merit in the industry, Ofcom and Government exploring ways in which customers could access information and support from a trusted source, be that Government, Ofcom or elsewhere.

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. This seems not to have happened to any significant degree, if at all. We believe this is for the reasons set out in the paragraph above. Code reform should empower end customers to feel they can address third parties directly to secure permissions. This could be a quicker and cheaper as often the end user and third party may already be in some form of legal relationship, e.g. landlord and tenant.

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.
This response does not deal with the organised theft of copper cables. Metal theft is a national problem and BT is playing a full part in co-operating with the Police and prosecutors in initiatives to address it. In this section we deal with damage and interference arising from otherwise lawful activities and which are therefore perceived as falling with in the civil law domain. We have a growing number of cases where unlawful interference (usually in the form of damage) has been caused to our apparatus. This is a significant and rising trend, probably related in part to the current economic climate, which drives unlawful cost-cutting measures by developers and contractors, but also to an apparently growing disregard for the property rights of network operators. Electronic communications apparatus can often be damaged or interfered with, without the prospect of physical harm to the perpetrator, unlike some utility infrastructure, and the perpetrator can often quit the scene without detection. We also have a small number of cases where another operator has trespassed and installed apparatus within our network or alternatively in circumstances where (for

example) developers have been built around BT apparatus in order to avoid the cost of altering that apparatus.

In relation to damage the usual tortious remedies are followed, i.e, damages claims in negligence through the county courts and are generally adequate. However where damage or interference are repeated or substantial, or where they cause loss of service, BT has to consider emergency remedies such as injunctions. Such proceedings are costly, resource-intensive and they divert management time away from serving customers. Identification of the correct potential defendants presents technical difficulties. The civil courts are therefore a less than wholly adequate means of controlling the problem.

In the case of trespass by means of seeking to share BT apparatus without authority, it can be difficult to establish a legal cause of action in tort particularly where there has been no damage.

In all these circumstances, a separate statutory provision, preferably criminal, specifically referring to unlawful interference would simplify the legal position and speed up proceedings.

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

Consultation Paper, Part 3, paragraph 3.107.

We are not aware that additional provisions are required. Apart from private law rights, affected parties can raise matters with Ofcom, which has legal powers under the Communications Act 2003 to intervene and regulate the use of Code rights by network operators. The range and severity of remedies available to Ofcom act as an effective control mechanism on network operators.

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.

The right to install and keep network apparatus in the highway is fundamental to the effective operation of the BT fixed networks. Currently the right is limited to highways maintainable at the public expense. In a small number of places, we experience difficulty in identifying and working with those responsible for highways and streets not maintainable at public expense. It would directly benefit end users who receive services over network apparatus in unadopted highways and streets if the current Paragraph 9 could be extended to all such locations.

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.

We have not experienced any particular problems in relation specifically to tidal waters.

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.

We believe there is no objective basis for a distinction between tidal lands/waters, and the General regime. We believe that the Code could be simplified by removing the tidal waters special regime.

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) We think it is right that linear obstacles should continue to be subject to a special regime. In particular, we are clear that Code operators should continue to enjoy the existing limited rights of installation without consideration. Without a special regime Code operators would face significantly greater barriers to efficient deployment of networks.
(2) BT has comprehensive agreements with operators of railway and canal networks in the UK. Given the scale of both sides operations these are essential for orderly and efficient co-working.
(3) We are not aware this scenario is a problem.
(4) We believe the current special rights are sufficient.
(5) We see no necessity for change here.

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.
Agreed. We have had no difficulties with this provision to date but it remains an important regime.	

10.31	We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.43
We seek a new, special regime around NGA build at MDUs and MOUs; our response at 10.20 refers and we ask the Commission to accept this as our response to this question.	

ALTERATIONS AND SECURITY

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

Yes. We believe that the current provisions of Paragraph 20 and 21 have proved to be broadly acceptable as striking a fair balance between the interests of those with an interest in land, and of operators and their customers.

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 Paragraph 20 does balance the requirements of the network against the wishes of the landowner. Any revised Code should ensure that the provisions of Paragraph 20(8) as regards reimbursement of the Code Operator's costs are maintained.

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.

Our experience suggests that BT has not been asked to contract out of the alterations regime to a significant degree.

As a broad principle, a revised Code should allow parties to negotiate freely to the largest extent possible, but this approach must be conditioned with an overriding requirement that the continuity and efficiency of the network services covered by an agreement must be protected.

Whilst preventing contracting out of Paragraph 20 may seem attractive, we know that owners and occupiers will seek ways to avoid the consequences thereof, as they currently do in relation to Paragraph 21, where contracting out is currently not allowed.

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.
We agree. Investments in network build are capital-intensive and designed for the long-term. Networks would not be deployed if those investments were at risk from arbitrary demands for removal. Therefore, it is necessary for restrictions to be placed on the right to require removal and we believe that the existing provisions have been shown by experience to strike a proper balance here.	

10.37	We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully. Do consultees agree? Consultation Paper, Part 5, paragraph 5.48.
No comment.	

10.38	We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.

The responsibility for serving notice should remain with the landowner.

We have no significant issues with the process other than failures of landowners to serve notices in accordance with paragraph 24. It would be helpful if any revised Code could specifically declare notices served otherwise than in accordance with Paragraph 24 be void, as this will avoid uncertainty as to when any counter-notices may need to be served.

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.

No comment.

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 strongly disagree. If implemented, we believe that all occupiers would be likely to insist on contracting out of the substance of the current Paragraph 21. BT would oppose this, as our fixed line networks invariably must pass to a defined location. Our planners will select a route that is most efficient and will only seek Code rights where there is no reasonable alternative. To agree to disapply security rights would render our apparatus liable to arbitrary removal, so we will not do so.

In this way, BT would probably be compelled to take vastly more cases to formal dispute resolution, leading to unacceptable delay and increased transactional costs.

Implementation of this proposal would probably lead to widespread breakdown of orderly negotiations between BT and grantors of Code agreements.

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. Paragraph 21(9) could be amended to make it clear that it applies to all apparatus regardless of when it was installed. We often find ourselves in situations where we are dealing with apparatus installed prior to 1984 where a wayleave may have existed but which cannot be located, or where a wayleave was not necessary. Furthermore, we often deal with cases where land has been broken up and sold resulting in apparatus which previously provided services to occupiers of the original land holding (and therefore did not require a wayleave) now crossing third-party land. We are usually not made aware of these sales and so therefore cannot put in place a new agreement. Accordingly any replacement for Paragraph 21 should apply to all such apparatus.

FINANCIAL AWARDS UNDER THE CODE

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

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

Do consultees agree?

Consultation Paper, Part 6, paragraph 6.35.

We believe the current provisions on compensation, as distinguished from consideration, are adequate and have not led to disagreements or disputes.

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 would oppose such a proposal. We require certainty and finality as to the liabilities to be incurred so that business cases for network investment are accurate and predictable.

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

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

Consultation Paper, Part 6, paragraph 6.73.

We do not agree that it would be appropriate for compulsory-purchase principles of market value to be adopted for the revised Code. For a variety of reasons, BT is often obliged to provide services which strictly commercial considerations would not support. To be asked to pay consideration on a compulsory-purchase basis, particularly related to land value would impose a large financial burden upon BT in relation to such scenarios.

We are concerned that adoption of a land-value basis for consideration would require inputs from land professionals. Any such development would tend significantly to increase BTs' transactional costs of securing relevant agreements. That would be an adverse result leading to less funding to be available for network deployments, or higher prices, or both. It would also be likely in our

view to make the process longer, which would be counter to the objectives of the Consultation.

Whilst the current statutory provisions make lack the certainty that some would wish for, the principles of fairness and reasonableness, and the requirement of a willing grantor, are in our experience, sufficient to regulate the assessment of consideration. We see no case for making changes here.

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

Consultation Paper, Part 6, paragraph 6.74.

We believe that the current provisions on consideration are adequate and effective. Many agreements we make do not provide for consideration, or compensation. Accordingly, we believe this is not a central issue for the consultation.

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.

Agreed, where consideration actually arises as an issue between the parties.

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.

No comment.

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.

As we understand that Code operators do not frequently litigate, it is inevitable that the county courts tend to have limited experience of the provisions of the Code and perhaps appreciation of the commercial dynamics of the industry. This causes delays and uncertainty. The courts can seem unwilling to follow the short form Part 8 Procedure meaning that the more lengthy Part 7 procedure is more routinely applied again leading to delays in the resolution of disputes.

There are several ways in which these issues could be addressed. Certain County and Sheriff Courts could be designated as specialist centres, with appropriate training provided. We have seen that where a particular Court, e.g, Birmingham County Court, develops a particular expertise in Code cases, the results can be excellent. The County Courts should remain a central feature of Code dispute resolution. Their relative accessibility fits the needs of many litigants (including litigants in person) with whom BT deals.

We accept that the Lands Chamber could have a role as a referral court from other courts in complex valuation cases, but in our experience these are in the minority.

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.

Please see 10.48. We suspect that the Lands Chamber would not be logistically suitable for most of our disputes, many of which involve non-commercial occupiers and relate to relatively small, low-value installations.

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.

It would be extremely helpful for BT to be able quickly to secure interim Code rights in a temporary form modelled on the existing Paragraph 6. Presently the County Courts do not grant BT temporary rights pending the resolution of a dispute under the Code even in circumstances where the only issue is payment.

We are clear that this simple measure would greatly benefit BT and the end customers we serve.

10.51	We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.

Currently it is necessary to give 28 days' notice under Paragraph 5. Often the Para 5 notice is served following lengthy negotiations with the landowners. The landowners in question often reject the notice out of hand immediately. We must then wait for the expiry of the 28 day period before issuing proceedings. Delays could be minimised by permitting issue of proceedings immediately upon receipt of the rejection.

We also ask that the 28-day period under Paragraph 5 be reduced to 14 or 21 days.

The factual issues surrounding wayleave cases are not complex. Accordingly, we believe that the short form procedure should be agreed very much in the same way as in the Small Claims Court i.e. limited disclosure and service of witness statements with a hearing 14/28 days later.

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 follow the event. To insist that costs are paid only by the Code Operator is likely to encourage more litigation and discourage amicable settlement.

10.53	We also ask consultees whether different rules for costs are needed depending upon the type of dispute. Consultation Paper, Part 7, paragraph 7.38.
No. We consider that costs should follow the usual rules in all types of dispute.	

10.54	We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.
We agree. The existing provisions have proved to be valuable in that they provide clarity. Network operators are large and diverse operations. Standard notices allow those employees and managers dealing with occupiers to quickly recognise Code notices for what they are, and for appropriate action to be taken accordingly. Similarly, we believe that clear rules for service benefit operators and occupiers. Each is entitled to be clear as to what constitutes good service, so that relations can proceed on the correct basis. Neither side should be allowed to gain a commercial advantage through a lack of clarity here.	

10.55	Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? Consultation Paper, Part 7, paragraph 7.53.
We have no suggestion to improvement to the current Ofcom notices.	

10.56	Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.

We would support a web-based information service for occupiers dealing with Code operators. We suggest that Ofcom should be closely involved in running this.

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.

Whilst recognising the likely difficulties in this, we support an attempt to seek greater standardisation. The benefits in terms of accelerated delivery of agreements and network could be substantial.

Key here would be to identify a credible neutral broker, such as the Law Society of England and Wales.

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 comment.	

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

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us:

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

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

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

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

Consultation Paper, Part 9, paragraph 9.14.

(1) We understand that this may have arisen in the case of one operator.
(2) Minimal
(3) It is a prudent precaution. We remain content with the current arrangement provided finance can be secured at reasonable expense.
(4) The current regime is adequate.

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.

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THE CROWN ESTATE

Law Commission Consultation Paper 205

The Electronic Communications Code

Response from The Crown Estate

October, 2012

Contents

Introduction ... 1

The Rights and Obligations of Code Operators: Special Contexts ... 2

Financial Awards under the Code ... 6

Contact ... 7

Background Information on The Crown Estate ... 8

Introduction

The Crown Estate welcomes the opportunity to respond to this consultation on proposed changes to the Electronic Communications Code (referred to in our response as the code). The statements contained in this response are in the context of The Crown Estate's interests and ownership of almost the entire seabed. This response is informed by The Crown Estate's extensive experience of managing activities within the marine environment and, within its core remit, of balancing economic activity with stewardship of natural resources for future generations to use and enjoy. We are committed to working with government departments, stakeholders and industry in helping to manage the coastal and marine environment.

The Crown Estate interests include urban, rural and marine property, all of which will be impacted by proposed changes to the Electronic Communications Code. Our feedback is limited to those aspects impacting on marine property, particularly the special regime for crown owned tidal waters and lands. The impact of proposed changes on our rural and urban properties will be analogous to the impact felt by other urban and rural landlords and in this respect we consider our views to be aligned with those addressed by Country Land and Business Association (CLA).

The Crown Estate can bring to bear a high level of knowledge and expertise on issues relating to management of the foreshore, the territorial seabed and continental shelf, and we are committed to working with the UK and Devolved Governments and all stakeholders on issues which affect these areas. Our responsibility of the Rural & Coastal and Energy & Infrastructure portfolios comprise virtually the entire UK seabed out to the 12 nautical mile

The Crown Estate, 16 New Burlington Place

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THE CROWN ESTATE

territorial limit, in addition to the sovereign rights to explore and make use of the natural resources of the UK continental shelf, with the exception of oil, coal and gas. We own around half of the foreshore and beds of estuaries and tidal rivers in the United Kingdom. Our expertise includes marine resource management (e.g. marine aggregate extraction, marine renewable energy installations (offshore wind, wave and tidal) seabed infrastructure, aquaculture and new activities such as gas storage and carbon capture and storage and its interplay with other marine activities such as defence, energy, navigation and marine safety. We have a strong understanding of the needs of a broad range of coastal and sea users, as commercial partners, customers and stakeholders.

The Rights and Obligations of Code Operators: Special Contexts

Comments are given on the special regime afforded to Crown owned tidal waters and lands. Our feedback is limited to The Crown Estate's position and does not reflect on or should be read to be representative of other Crown bodies.

10.27 We seek consultees' views on the following questions. (Consultation Paper, Part 4, paragraph 4.21.)

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

Tidal waters and lands hold strategic importance for the delivery of nationally significant infrastructure projects. Inappropriate or indiscriminate use of tidal waters and lands could impact on the development and delivery of important projects including the UK's commitment to low carbon generation. Tidal waters and lands are a critical part of the coastal and offshore assets managed by The Crown Estate which extend from the foreshore beyond territorial waters to interests in the renewable energy zones and on the continental shelf.

Apart from telecoms cables, offshore transmission cables are needed to export electricity generated offshore to the national grid. The point onshore where cables make landfall is determined by a number of aspects (environmental features, physical conditions, other seabed activity, onshore infrastructure etc.), the result being that there are only a very limited number of viable landings for telecoms and export cables. The Crown Estate is concerned that the General Regime would not afford tidal waters and lands the protection they merit and may lead to key landings becoming sterilised.

Similar circumstances apply to Oil & Gas pipelines, which, together with other coastal activity (tidal energy schemes, marinas, ports, moorings, fish farms, recreation) highlight the importance of tidal waters. This importance will increase as additional onshore services are needed for the construction and operation of offshore generating stations.

We feel that the General Regime (of its very nature) does not recognise the special nature of particular land features, of which tidal waters and lands is the most significant. It is clear that tidal waters and lands are geologically different to onshore lands and thus that different considerations sensibly should apply to

The Crown Estate, 16 New Burlington Place

London, W1S 2HX

THE CROWN ESTATE

them. In addition to the inherent difficulty in finding appropriate areas of tidal waters and lands for submarine cable activity and landings referred to above, the nature of the subsea terrain makes for particular difficulties in installation activities and thereafter maintenance and decommissioning. These difficulties require that much greater space be available around and about laid cables to facilitate such works, with the result that indiscriminate use of tidal waters and lands by operators will have a much greater chance of adverse consequential effects than in relation to onshore lands. Please note, by way of example, that the safe working zones around cables can be hundreds of metres either side of a cable.

Elsewhere in the Consultation Paper there is discussion of the appropriate test for dispensing with the consent of the landowner. Currently that test is formulated in terms of balancing the prejudice to the landowner and compensation, and the benefit to the person seeking access. However that test may be reformulated, it is unlikely to be appropriate (were it potentially applicable as a result of the General Regime applying to tidal waters and lands) to tidal waters and lands. Here it may be a question of balancing the interests possibly of different infrastructure providers (telecoms energy aggregates etc.) against the needs of the Code operator. A generic test on land will focus on the prejudice to individual landowners e.g. a farmer whose land may be affected and the needs of e.g. the remote householder needing a telecoms connection; a much broader approach is required in tidal waters and lands.

The General Regime has no mechanism for recognising these difficulties, and hence is inappropriate for application to tidal waters and lands.

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

Given the strategic importance of tidal waters and lands, the special regime should seek to ensure that:

a) Tidal waters and lands are not used in an indiscriminate way that might see short term convenience for one particular Code operator result in unacceptable long term detriment for other (potentially more significant) schemes or operators (either inside or outside the Telecoms field).

b) Again given the strategic importance of tidal waters and lands, but bearing in mind consideration (a) above, Code operators should not face the possibility of having disproportionately onerous terms imposed on them for the right to execute works on tidal waters and lands, and should be able (subject to the rights of any existing operators) to have the ability to carry out works without being unreasonably delayed by any land owner's consenting process.

c) The terms upon which any land owner's consent should be granted should avoid any disproportionate/ransom position arising, whilst at the same time taking into account the twin facts that:

i. A landing on a particular piece of tidal water or lands may be of considerable strategic and commercial importance to the operator concerned, and

ii. Potentially sterilising one landing, or area of tidal waters and lands might preclude the opportunity for the land owner to agree terms for another operator (Telecoms or otherwise) to install a potentially significant project which could properly command appropriate consideration for the grant of rights over the relevant area of tidal waters or land.

The Crown Estate, 16 New Burlington Place
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THE CROWN ESTATE

In view of these three considerations, The Crown Estate submits that the regime currently in place for Crown tidal waters and lands strikes the right balance for the reasons set out in the next response.

Insofar as this leaves tidal waters and land not as part of a Crown interest, then The Crown Estate comments that:

a) That position does not benefit from the stewardship role outlined below and thus the position is intrinsically less satisfactory but
b) It would be dangerous (given the potential significance of areas of tidal waters and lands) to vest any particular significant power of consent in the hands of a private land owner (which would be the position even if the general regime were to apply), so
c) The current Code position (where private landowners have no ability to obstruct cable landings) produces the best solution that the circumstances will allow, with strategic land usage falling back to the determination of the MCU/MMO in its more general regulatory role.

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

Yes. Under the Crown Estate Act 1961 (the Act), The Crown Estate has a duty to 'maintain and enhance its value and the return obtained from it but with due regard to the requirements of good management' (Section 1(3)). In practice, we have two core objectives: to benefit the taxpayer by paying our revenue surplus to the Treasury, and to enhance the value of the estate and the income it generates. The Crown Estate thus has a considerable imperative to act in the public interest. In managing this substantial and diverse estate we have adopted three core principles of commercialism, integrity and stewardship.

Tidal waters and lands which belong to Her Majesty in right of the Crown comprise a significant proportion of tidal waters and lands in the UK (even excluding tidal waters and lands owned by the duchies of Cornwall and Lancaster). This ownership places The Crown Estate in a unique position, having a significant ownership stake, but also (as a result of such stake) unique knowledge and experience of the issues surrounding tidal waters and lands, and the current and prospective uses (not just by Code operators) for such areas. We have a database of such existing uses (named internally the "phone book") that will be available for potential operators to consider when planning a project. We have commissioned and completed a number of studies around issues arising out of the use of tidal waters and lands, and have developed protocols and precedents for use with operators so as to optimise the use and exploitation of such areas. We would refer to our website http://www.thecrownestate.co.uk/marine/cables-and-pipelines/for much fuller details of these activities, which are illustrative of the proactive role that The Crown Estate currently takes in respect of tidal waters and lands.

Governance of The Crown Estate under the Act makes it distinctly different to private owners of tidal waters and lands. We are compelled, by statute, to recognise all circumstances of a case and this would include the wider public good brought to effect from the laying of electronic communications apparatus.

The Crown Estate, 16 New Burlington Place
London, W1S 2HX

In addition, it should be noted that pursuant to section 3(1) of the Act, The Crown Estate does not seek to take advantage of any “monopoly value” which may be attributed to our ownership of tidal waters, which is in stark contrast to how a private landowner may approach negotiations.

Our obligations are evident from existing practice (as referred to on our website, as above). We are accustomed to providing, in any licences granted for users of tidal waters and lands (including Code operators) that there should be a "Works Restriction/Exclusion Zone" in the proximity of the relevant installation designed to ensure that no other operator can subsequently make an installation within the relevant WEZ/WRZ without first obtaining the consent of the existing operator (not to be unreasonably withheld/delayed); this contributes to ensuring that tidal waters and lands are used/exploited in a coherent fashion to the ultimate overall benefit of all operators and eventually the public. Should Code operators have the ability (through the exercise of Code rights) to override this methodology for the grant of rights designed to maximise effective interaction between all operators (Code and non-Code) to the overall benefit of them all and thus the public generally, this would potentially have a serious effect on the ability of all operators (Code and non-Code) to optimise exploitation of tidal waters and lands. All operators in this area must have the same rights applied uniformly to all to create an undistorted market; to give Code operators extra rights would be harmful to the delicate balance that has to be struck between all operators wishing to install works in tidal waters and lands.

Our methods for managing disputes are well established. For example, we provide for referral to an independent party, should the parties be unable to reach consensus. Our preference is to agree on the appointment of an expert or arbitrator, however, where an agreed selection is not possible a suitable party will be selected by the relevant body. For valuation matters we have, historically, referred to the Valuation Office Agency (an executive agency of HMRC) and in the majority of instances had our methods and rates endorsed.

The Crown Estate’s role as a steward for the marine estate is long established and The Crown Estate has sought to facilitate sustainable development with regard to wider society and community benefit, a direction which is enshrined through our operating obligations. From our focus at a strategic level we can establish the wider consequences of project's specific impacts for example; the award of code rights to a code operator for an area of tidal waters could sterilise a landing for an export cable. The impacts of this are not limited to the immediate project but have far reaching effects for the supply chain and offshore wind, wave and tidal programmes more generally.

The consultation asks whether the provisions of the Marine and Coastal Access Act (MCAA) are sufficient protection for coastal activity. Prior to the setting up of the MMO/MCU as regulatory bodies for coastal activities, paragraph 11 of the Code required operators to seek the approval of the Secretary of State for proposed works, in addition to the consent of the Crown Estate Commissioners (in the case of Crown tidal waters and lands). There is therefore a long established principle of there being separate regulation of marine/coastal activities quite apart from the stewardship role that The Crown Estate, with its background knowledge as set out above, will also play in the ultimate public interest. The amendment of the Code by MCAA to remove the need for the Secretary of State's approval to be sought, and instead require such from the MCU/MMO is not to be taken as suggesting that the MCU/MMO should be the only

The Crown Estate, 16 New Burlington Place
London, W1S 2HX

THE CROWN ESTATE

bodies involved in the process. We expect operators first to obtain appropriate approvals from the MMO/MCU before operators approach The Crown Estate for requisite consent, and The Crown Estate will be influenced by any approval conditions that may have been imposed when considering the basis of The Crown Estate's consent.

Under both the Water Industry Act 1991 (section 221(6)) and Electricity Act 1989 (section 63) there are similar Crown Savings clauses which require the consent of The Crown Estate before water/electric companies can install works which they would have the absolute right to do were the relevant land where the works are to be carried out not in the ownership of The Crown Estate. The current paragraph 11 of the Code replicates these provisions in the case of Code operators in respect of tidal waters and lands. Given the strategic importance of tidal waters and lands, we believe it is clearly desirable for a broadly consistent regime to apply to all of water, electricity and telecoms operators who may wish to lay cables/pipelines in Crown tidal waters and lands.

We feel that any suggestion that the current form of the Code either puts The Crown Estate in an unacceptably powerful and unaccountable position or that The Crown Estate in some way misuses the Code position, is unjustifiable. The Crown Estate (as set out above) is governed in the way that it can and should act by the Act, and any attempt to reform the Code so as to prescribe the way in which The Crown Estate may or may not deal with applications for consent is both unnecessary (as the Act so prescribes) and runs the risk of an inconsistency with the Act.

Further, it is an accepted principle of the constitutional approach to Crown land that, without the express consent of the Crown, Crown lands are not subjected to compulsory purchase rights. Whilst there are some very limited examples of compulsory purchase rights being used over Crown land, these are strictly the exception to this established principle, and any erosion of that protection should be resisted.

The Crown Estate therefore strongly submits that the Code in its present form should not be amended insofar as it relates to tidal waters and land in the ownership of the Crown.

Financial Awards under the Code

The Crown Estate has not, for the purposes of this response to the Law Commission's consultation, focussed on the basis for compensation on exercise of Code rights. To the extent that The Crown Estate were to be subjected to such compensation procedures in relation to tidal waters (which you will appreciate from this response is very much viewed as an undesirable approach) then we would welcome the opportunity to discuss such matters with the Law Commission, as the unique nature of tidal waters should be addressed in any compensation regime applicable to them.

We trust that you will find these comments helpful and constructive. We would be very willing to provide additional information on any of the points we have raised above and be very pleased to discuss these matters with you further. All of this response may be put into the public domain and there is no part of it that should be treated as confidential.

Contact

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THE CROWN ESTATE

Background Information on The Crown Estate

The diverse portfolio of The Crown Estate comprises marine, rural and urban properties across the whole of the United Kingdom valued in total at £7.6 billion (2012 figures). Under the 1961 Crown Estate Act, The Crown Estate is charged with maintaining and enhancing both the value of the property and the revenue from it consistent with the requirements of good management. We are a commercial organisation guided by our core values of commercialism, integrity and stewardship.

The Crown Estate's entire revenue surplus is paid directly to HM Treasury for the benefit of UK citizens; in 2012 this amounted to just over £240 million.

Our ownership comprises virtually the entire UK seabed out to the 12 nautical mile territorial limit, in addition to the sovereign rights to explore and make use of the natural resources of the UK continental shelf, with the exception of oil, coal and gas. We own over half of the foreshore and around half the beds of estuaries and tidal rivers in the United Kingdom. A wide variety of businesses and organisations conduct economic and conservation activities across the seabed, with an estimated total value of some £587 million providing almost 890,000 jobs.

The Crown Estate manages its marine assets on a commercial basis, guided by the principles of sustainable development and social responsibility. We take a consistent approach to the management of our activities around the UK, whilst retaining flexibility to take local factors into account whenever necessary. The Crown Estate can bring to bear an unparalleled level of knowledge and expertise on issues relating to management of the foreshore, the territorial seabed and continental shelf. We have a strong understanding of the needs of a broad range of sea users, as commercial partners, customers and stakeholders.

LAW COMMISSION CONSULTATION PAPER NO 205 ON THE ELECTRONIC COMMUNICATIONS CODE

A Response from the National Trust to the Law Commission

October 2012

The National Trust is pleased to offer the following response to the Law Commission's consultation paper on the Electronic Communications Code (the "**Code**").

In summary

We know that communications networks are an integral part of today's society, allowing people, communities and businesses to connect with each other. It is clear to us that improving communications networks could have a widespread positive economic and social impact and that this might be particularly the case in rural areas.

But the benefits of expanded communications networks must continue to be weighed against any potentially negative impacts, particularly the impact on sensitive landscapes, which provide such benefit to the nation and are always at risk of being taken for granted.

We agree that enhanced access to communications networks must be supported by a workable regulatory regime. The current Code would certainly benefit from a degree of clarification and as such we welcome the Law Commission's review of the Code.

The Law Commission's review should focus on reducing unnecessary delays and costs caused by the current system. Any changes made with this aim must not reduce the ability of landowners to have a voice in decisions that affect their land or diminish the protections given to special places of natural and historic importance.

The Law Commission's review should reflect the fact that our communications sector is now of a different nature and scale to the one which existed when the current Code was enacted. The number of operators, and the number of installations, has greatly increased and is likely to continue to increase. The Code should be amended where necessary to protect landowners and our country's natural environment where they have become threatened by the rapid growth of the communications industry.

We cannot at this stage see any compelling need for the scope of Code rights to be widened to give Code operators greater powers, and can see real disadvantages were that to happen. We also think that it would be helpful to reflect the importance of balancing economic growth against the impact on landscapes by making express, in paragraph 5(3) of the Code, the need for the court to consider the impact on landscape. We agree with the Law Commission that the alterations and removals provisions of the Code must be clarified to give landowners more certainty and to incentivise Code operators to act. Finally, we believe that it would be a retrograde step to remove or dilute any of the existing protections given under the Code to land with a particular natural, historical or social value.

The Role of the National Trust

The National Trust is Europe's largest conservation body with over 4 million members and an annual turnover of more than £400 million. We currently manage over 250,000 hectares of countryside, several hundred historic houses, gardens and parks and more than 700 miles of coastline across England, Wales and Northern Ireland.

The National Trust is a major business as well as a charity. We are a major employer and invest in parts of the country that may otherwise be bypassed by normal market forces including having a significant presence in 6 out of the 10 most deprived rural areas. We are also the nation's largest farmer, working with around 2,000 tenants across a diverse agricultural estate.

General Comments

The Trust welcomes the opportunity to comment on the Code and to influence its revision. We offer the following general comments to explain our overall approach to the reform of electronic communications regulation.

The Trust's overriding purpose is to preserve special places for the benefit of everyone. This means protecting the things that matter to us all, from open spaces and green fields to historic villages and landscapes. The wider needs of our nation, public and local opinion, should not be forgotten when considering the impact of the Code. The Code's recognition of the distinct and special value of special types of land must be maintained.

We feel that the current Code provides operators with sufficient powers to maintain and develop their networks effectively. Whilst we agree that the processes governing the creation and operation of Code rights could be made more efficient, any streamlining should not take landowners outside the process. The emphasis should continue to be on Code operators and landowners agreeing on the application of Code rights. Any expansion of the Code which fetters or removes the ability of landowners to influence decisions that affect their land should be carefully considered.

Ensuring landowners, as primary guardians of the land, are fully involved is crucial where Code rights are sought over land with historic, natural or social value. Whilst many landowners might mainly be concerned with retaining private land rights and the availability of monetary compensation, a wider variety of factors are likely to be relevant when looking at land of a special character. There must be an opportunity to assess all Code requests on a case by case basis so that the interests of the landowner, and the public more generally, are considered.

Specific Comments

The Trust welcomes the opportunity to address specific and practical issues faced by Code stakeholders. We do grant, and we intend to continue to grant, Code operators with rights over certain areas of Trust land. We offer the following comments on the questions posed by the Law Commission and, where appropriate, draw on our own experience.

Scope of the Rights

We do not think that the scope of the Code rights should be extended to include any wider or further rights for operators. Both the principal and the ancillary rights currently granted to Code operators are sufficient to enable them properly to establish and operate electronic communications apparatus on private land.

We disagree with the Law Commission's proposal that the ancillary rights granted under the Code should be expanded to grant operators absolute rights to upgrade equipment or to assign Code rights. These issues should be dealt with through negotiations between the Code operator and the landowner, allowing due consideration to be given to the nature of the site and its use.

The ability to share equipment with other Code operators may be useful, provided that any Code operators wishing to share another operator's existing equipment are subject to a process equivalent to the one which Code operators wishing to obtain Code rights are subject to.

We are interested by the Law Commission's proposal that Code rights should generate obligations on Code operators. We would welcome the Law Commission's further suggestions as to the proposed nature and detail of any such obligations.

Test for the Creation of Rights

Whilst certain specific types of land (such as sites of special scientific interest and conservations areas) are given certain protections under the Regulations (as discussed below), it is important to recognise that some special places that do not fall within these precise categories need protection. It is important for the Code to contain a statement recognising the value generally of our country's landscapes and scenery.

We propose that the test set out in paragraph 5(3) of the Code should be amended by inserting the following words:

"… and in determining the extent of the prejudice, and the weight of that benefit, the court shall have regard to all the circumstances, giving due regard to the need to protect landscape and scenic beauty, and to the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services."

Alteration and Removal

It is crucial for public confidence in the Code that the alteration and removal regime under the Code provides sufficient protections for landowners. It is often the security of apparatus provisions in paragraph 21 of the Code that cause landowners difficulties. At present, given the degree of protection Code operators enjoy there is very little incentive for them to engage in discussions with the landowner when a Code agreement ends. Over the course of the period of the original agreement a number of circumstances may have changed and landowners should be given the opportunity to re-negotiate their Code agreements in light of current circumstances.

We agree that the onus placed on Code operators in the current paragraph 21 procedure needs to be reconsidered. We request, in line with the Law Commission's proposal, that the emphasis here should be reversed and that Code operators should have to take positive steps to secure their position.

We support the Law Commission's proposal that it should be possible for parties to contract out of paragraph 21. This would enable all landowners to have greater certainty, and incur fewer costs, when Code agreements come to an end.

The Trust has itself experienced significant delays when renewing and re-negotiating Code agreements, in some cases lasting for several years.

*The Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (the "**Regulations**")*

The electronic communications regulatory regime should continue to contain special procedures for certain types of land with particular natural, historical or social significance, such as national parks, nature reserves and National Trust land, as currently provided for in the Regulations. These special types of land remain as important as ever and a strong justification would be needed to dilute their protections or create any increased burdens on them in any revised Regulations or Code.

We propose that the categories of areas protected in the Regulations should be expanded to include: (i) Grade 1 registered historic parks and gardens, and (ii) world heritage sites.

Regulation 8(1)(d) sets out an enhanced notification regime for Trust land. We propose that Regulation 8(1)(d) should be amended by making the following additions and deletions:

"(d) any land which the National Trust or the National Trust for Scotland ~~has notified the code operator that it~~ owns or holds any interest in, he must give written notice to (in the case of the National Trust) the Secretary of the National Trust or (in the case of the National Trust for Scotland) its relevant regional office."

There are far more Code operators now than when the Code was originally enacted. The increased number of Code operators makes it unreasonable and impractical for the Trust to notify each of them individually of all the land which it holds or has any interest in. As such the protections granted to the Trust under Regulation 8 need to be updated to work as intended. The onus should be placed on Code operators to ascertain whether the land on which they wish to install equipment is Trust land as they are the party seeking to benefit from Code rights over Trust land.

As a practical issue we would ask that the reference to "relevant regional office" should be changed to "the Secretary of the National Trust" for the simple reason that regional offices no longer exist within the Trust's current organisational structure.

It should be made clear that the above comments made on Regulation 8(1)(d) reflect only the views of the National Trust, as we have not yet had the opportunity to discuss this provision with the National Trust for Scotland.

We propose that Regulation 8(5) should be expanded so that the following additional factors are considered when assessing the environmental impact of apparatus: (i) its impact on the significance of heritage assets, including by impact on their setting, (ii) its impact on natural resources (including but not limited to soils, carbon and water), and (iii) its impact on vulnerable undiscovered archaeology and unscheduled archaeology of national significance.

Should you have any questions or wish to discuss any aspect of our response please contact:

Amelia Hutchison
Lawyer
National Trust, Heelis, Kemble Drive, Swindon, Wiltshire SN2 2NA

clarke willmott

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

26 October 2012

Our ref: 1/LT054/KW001

By email & post: propertyandtrust@lawcommission.gsi.gov.uk

Dear Sirs

The Electronic Communications Code – Consultation Paper No 205

We write to respond to the above Consultation Paper and set out our comments below. By way of background, we have been acting for landowners against telecoms Operators for over 12 years. We therefore respond using our own knowledge and views received by our landowner clients.

The need for a Code

It is accepted that businesses are becoming more reliant on electronic communications services and therefore there is a need for the Code or some alternative legislation which allows the telecoms Operators to acquire new sites and/or retain existing sites. However, this should not be permitted at any cost to the landowner. We have had many instances where landowners have innocently signed agreements headed "licence" or "heads of terms" and the Operators have pushed for early access on to a site without the landowner being aware of the consequences, i.e. before the landowner has taken legal advice and/or a lease can be completed. Unknown to the innocent landowner, the Operator has acquired protection and years on when the landowner decides it wants to redevelop its land, it is prevented from doing so and/or is faced with paying the Operators removal costs, which are significantly higher than the entirety of the rent the landowner has received. If there is a genuine need to move Operators then this should be achievable fairly – not at a significant detriment to the landowner. In our experience the Operators usually refuse to relocate or even to search for alternative sites until considerable pressure is put on them and substantial costs have been incurred by the landowner. This can have the effect of ultimately preventing the landowner from developing its land or dealing with the land as it chooses. We hope that this unfairness created by the Code to private landowners will be addressed as part of the Law Commissions proposals.

Clarke Willmott LLP UK
switchboard www.clarkewillmott.com
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Part 3 - The rights and obligations of Code Operators

We would favour Operators having rights to go onto public land (for example; council offices, town halls and on the edges of highways) wherever possible and that only by agreement or as a last resort (i.e. where there is genuinely no alternative – cost not being a factor) should private landowners be forced to accommodate electronic communications apparatus provided they are adequately compensated. We do not agree that telecoms Operators should have the same rights as utilities providers. Utilities apparatus is visually far less intrusive and usually does not prevent a landowner from redeveloping (for example; cabling and drains are underground and can be sited along the edge of land which generally would not restrict the landowners ability to develop or deal with the land as it wishes). Often a development needs to connect to utilities in any event. Residential developers are, however, inclined to avoid sites with telecoms equipment on site – mainly due to perceived health risks. Telecoms apparatus, whilst continually reducing in size, is still more intrusive (as this is usually sited on a rooftop) than apparatus installed by utilities providers.

We agree that, subject to the above, the Operators should have rights to execute any works on land for or in connection with the installation, maintenance, repair, renewal, removal, replacement like for like and to alter but not to increase the amount of apparatus.

We do not agree that telecoms Operators should have a right to add to their equipment without limit. This should be negotiated or determined by an independent surveyor to ascertain whether it is really necessary and there should be an appropriate increase in the basic fee. We agree that the definition of "electronic communications apparatus" should remain a generally wide definition to avoid disputes. It is accepted that with technology changing it would be dangerous to be too specific.

Operators often require 24 hours access 7 days a week. An Operator should be required to reimburse the landowner for any costs it incurs in providing this. For example; one of our clients owns an old warehouse which is currently vacant but it has been forced to employ a security guard to ensure the building is secure and to enable an Operator to have 24 hours access 7 days a week. This cost should not be borne by the landowner.

The creation of Code rights [para 3.40]

Landowners should not be left with apparatus that they are unable to remove when occupiers who were supplied with electronic communications services from that apparatus have left, particularly where a tenant has breached the terms of the lease in agreeing to have the apparatus installed. In our experience, most Operators do seek the landowners agreement in addition to the occupiers and this should continue. There should be an obligation on the telecoms Operator to tell landowners and occupiers that they should seek legal advice before they agree or enter into any such arrangements.

The test [para 3.53]

In our view, if an Operator cannot reach an agreement with a private landowner, it should be incumbent on the Operator to review its options and to utilise any options it has (regardless of cost and convenience) of land already in the public sector – including streetworks. The apparatus will ultimately benefit the public. The Operators should be given powers to enter onto the highway or other public land for the purposes of installing telecoms apparatus, provided they obtain the permission of the public authority. If no agreement is forthcoming, the Operators should be able to

apply to the Upper Tribunal (or similar body) who will dispense with agreement providing it does not unduly interfere with the public use and enjoyment of the highway or other public place. Operators are free to come to commercial agreements with private landowners, but only once they have gone through the process with the public landowner should the Operator be able to make an application to compel rights over private land and dispense with a private landowners agreement.

In our view, the appropriate test when dealing with private landowners should balance the interest of the public (i.e. the right to have access) against the private prejudice that could (not would) be caused to a landowner (to take into account the restriction on future development) and factors to be taken into account should be whether it is necessary, the availability of other sites and other options the Operators have and the benefit it would bring to the public in general. There should be no overriding factor and all of the circumstances should be considered – similar to a balancing exercise the Court has to do when considering whether to allow a break clause to be inserted into a new lease under the 1954 Act. We consider that the issue of compensation should be dealt with separately and should not form part of the test. The cost of removing the Operators from a site should not be borne by a landowner if there is a genuine need for them to move. Currently the costs of moving an Operator is frequently more than the entirety of the rent that an Operator has paid to be there and this cannot be reasonable or fair on a landowner.

Upgrading, sharing and assignment [para 3.75 – 3.102]

Whilst it is accepted that technology changes continually and companies will merge, landowners must have the ability to retain control over their property. They are entitled to know, for example, who is using the site and what equipment will be housed on their property. For security reasons, landowners need to know who is entitled to have access to their land. The Operators should not be given carte blanche to do what they like as this clearly interferes with the landowners' interests.

We do not agree that Operators should have an ancillary right to upgrade their apparatus without first obtaining the landowners consent (if "upgrade" means the Operator can install additional apparatus). We would argue that the right to "alter" apparatus does not give the Operator the right to "add to" apparatus. There is however a need for this to be clarified and it cannot be reasonable for an Operator to have the ability to install unlimited equipment without first obtaining a landowner's consent. We do not agree that Operators should have the ability to share and effectively bring on to the site other Code protected Operators without the agreement of a landowner. By allowing this, it could cause even greater prejudice to a landowner because in the event that a landowner needs to obtain vacant possession, it would potentially have more than the one Operator exercising rights under the Code rather than just the one (or two) Operators it agreed to allow into occupation.

If apparatus is upgraded to increase the speed of a network or to widen the customer base, or to enable other Operators to share the site, we would argue this makes the site more valuable and therefore should be reflected in an additional payment or an increase in rent on review. Operators should therefore not have the ability to assign Code rights without the landowners consent and it should be reasonable for an additional payment to be made by an Operator.

Enforcement of Code Rights [para 3.103 – 3.107]

We agree that the creation of a criminal offence to interfere with a Code Operator's apparatus is not appropriate. The Code Rights affect private land and a landowner has other private remedies. We

are not aware of any instances of a landowner actually physically interfering with telecoms apparatus. We consider that the current use of an injunction/damages is appropriate.

Part 5 – Removal of Apparatus – Paragraphs 20 and 21

We agree that there should be a procedure for landowners or adjacent landowners to require Operators to alter or remove their equipment in certain circumstances (for example; if the apparatus is likely to prevent or interfere with proposed or actual development). There has to be a balance between the interests of the public benefitting from the telecoms services and the landowners' ability to deal with its land as it chooses. It is rare for landowners to rely on paragraph 20 because of the resultant costs implications it has for the landowner. We consider that parties should be free to contract out of the para 21 regime in a revised Code if they so choose, as there may be particular circumstances which make it necessary (for example; in circumstances where the landowner knows it will want to redevelop land in the future after the contractual term has expired).

In relation to paragraph 21, we agree that it should be possible for a landowner to have the right to remove apparatus in the circumstances you describe in paras 5.26(1) to (4). After a Counter-Notice is served however (which usually includes notice that the Operator will seek to rely on its rights under paragraph 5) the onus should be on the Operator and not the landowner to make an application to the determining body. We would favour this procedure being akin to the 1954 Act and so say 6 months after the service of a Code Counter-Notice if no new lease has been completed or the parties have not agreed an extension of the time limits, or no application has been made by the Operator, the Operator will lose its rights under the Code. This ensures that the process is not dragged on indefinitely, will encourage the operator to engage with the landowner and does not force the landowner to embark upon expensive litigation. If the apparatus is important to the Operator, surely the onus should be on the Operator (i.e. the tenant) to make a decision on whether it wants to retain the site and, if so, to take steps to secure its position? In our experience, even though the Code envisages that an Operator should act swiftly to exercise its para 5 rights, negotiations can still be going on many years after Code notices have been served, particularly when a landowner does not really want to incur the costs of making a Court application. In the interim, it is rarely cost effective for a landowner to challenge an Operator's offer to continue to pay the same rent as under the agreement, the contractual term of which has expired and in which there is no provision for rent review. There is a need for a timescale to be placed in the Code to enable both parties to have certainty. In our experience it is not practical or feasible for a landowner to remove telecoms equipment under para 21(8).

In our view, the ability to contract out of the Code would be an advantage to both landowners and Operators. This is particularly in circumstances where the land may in the future be developed. It should not, however, be limited in that way. Contracting out of the Code would give a landowner certainty to obtain vacant possession. An Operator will also know that it needs to search for an alternative site and knows when that search must commence. It would be akin to contracting out of the provisions of the 1954 Act. We agree with your proposals at paras 5.47 and 5.48. We also agree with your proposals at para 5.56 that the provisions of a revised Code should be retrospective, i.e. the Code as amended should apply to existing agreements whether or not the agreement makes provision for this.

Part 6 – Financial Awards under the Code.

We agree that compensation should be paid by the Operators in addition to consideration. We agree, however, that there is a need for clarification on valuing both. We agree that the 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 telecoms equipment from their land.

In relation to how to value consideration, we believe that it should be market forces that determine this by reference to open market comparables. There are comparables available, although Operators are usually unwilling to disclose them and by having a national register of rents etc, this would overcome this hurdle, ensuring the information is more readily available and comparables more easily to hand for surveyors representing landowners. We consider one of the factors to be taken into account is the number of Operators sharing a site, and we consider this should make a site more valuable. In relation to compensation, we believe this should be a paid in addition to consideration and should be based on the diminution in value of the land to take into account for example of loss of the ability to develop.

Part 7 – Dispute Resolution

We believe that the valuation aspect needs to be determined by a specialist valuer and not by County Court Judges. However, there is still a role for the County Court to play in making possession orders/ determining whether an Operator should be allowed to remain on land without the landowner's agreement (and on what terms save for rent) and in determining whether the Code applies. In relation to disputes involving issues of rent review/new rent, this should be determined by the Lands Chamber of the Upper Tribunal but there should be a procedure akin to PACT which would allow the parties to appoint a specialist arbitrator to determine valuation issues if both parties agree. Other forms of ADR, including mediation, should be encouraged.

Generally landowners do not have the means to litigate, which immediately gives the balance of power to the Operators. In relation to questions of valuation, we would suggest costs should be at the discretion of the determining body on the basis that as a general rule the landowner's "reasonable" costs should be paid for by the Operator, unless the landowner's conduct has been vexatious (akin to the regime in the LVT), taking into account offers made so one party would benefit if a calderbank offer was made at an early stage and "beaten" at a hearing. The CPR should continue to apply to matters dealt with by the County Court in relation to possession/development.

Notice procedures

We agree that there should be prescribed notices for both parties with consistent notice procedures and prescribed rules of service (s.192 LPA 1925 should apply for example). We do not agree that this would increase costs to landowners and it would reduce paperwork for Operators who would no longer serve a counternotice to any letter they receive from a landowner "without prejudice to their contention no Code notice has been served". There should be a strict timetable set down and the onus should be on the Operator to apply to the appropriate body within say 6 months of serving a counter-notice. Both parties should be free to agree an extension to the statutory deadline in writing and if that deadline is missed the Operator will lose its rights to remain on the land (assuming the landowner is asking for possession). Currently the procedure is very slow and there is lack of certainty for both parties.

Part 8 Interaction with other regimes

We wholeheartedly agree with the proposals that if an Operator is protected by the Code, an Operator should not have a double-layer of protection of Part II of the 1954 Act. This causes confusion (because of the different notice provisions for example) and simply serves to increase costs for both parties – the Operator forcing the landowner to jump through the 1954 Act hoops before it even gets to the hurdles under the Code. Therefore, if the Code applies, Part II of the 1954 Act should not apply.

We also agree that the agreement creating an interest in land should be registrable at the Land Registry in the usual way. This gives certainty for all parties, particularly purchasers of land.

If you have any questions please do not hesitate to contact us. We look forward to reading your Report in due course.

Yours faithfully

Clarke Willmott LLP

Cable&Wireless Worldwide

David Price, Agreements & Rating Manager
Cable & Wireless Worldwide
Post Point 20, Waterside House, Longshot Lane,
Bracknell, RG12 1XL.

Our Ref: LLC no.205
Your Ref: -

Date 26 October 2012

Law Commission
Steel House,
11 Tothill Street
London
SW1H 9LJ

Dear Sirs,

Law Commission Consultation Paper No. 205

Electronic Communications Code Consultation 2012

Cable & Wireless Worldwide response on behalf of various code operators.

We attach, by way of submission, the formal response to the Consultation made by Cable & Wireless Worldwide Group, encompassing the operators within the Group as set out in our response.

We have made the response by way of the suggested response form attached to the Consultation Paper. As the Consultation is very detailed and the issues are complex, a comprehensive set of questions has been raised on all aspects of the Code and we have sought to address all in detail in our response. However, we would like to highlight a number of areas that we consider the most critical for the operator companies within the Cable & Wireless Worldwide Group, to ensure that the framework of any revised Code protects current and future services, whilst striking a balance between the interests of landowners, operators and subscribers at large.

Financial awards under the Code

We consider that most disputes arising under the Code relate to payments to be made for the grant of the right both prior to the grant and at renewal. Cable & Wireless Worldwide Group has always sought to act in a fair and reasonable manner in dealing with such disputes. It welcomes any proposal to assess market value by reference to compulsory purchase principles disregarding its value to the Code Operator and any other code operator as part of the entire network scheme for which the right is being acquired. Notwithstanding this Cable & Wireless Worldwide Group has doubts as to where reliable comparables will be obtained to assess what the fair market value is, when payments to date have been assessed by grantors on the basis that revenue generated by operators should determine payment price even though case law has discounted such an approach.

In addition, unless the valuation basis and methodology is supported by an expedited procedure or mechanism for granting rights, ahead of an agreement where there is such a dispute, the somewhat false and at times contentious market that has evolved since the inception of the Code will continue, despite any attempts to create a level playing field with other utilities and to take the ransom/special purchaser element out of payments demanded. This is because the anxiety element (for which allowance has been made in case law) will be brought in to account/demanded as an additional head of compensation for taking any prolonged time factor out of the reckoning.

We consider that the infrastructure of public communications providers should have the same status of that given to public utility infrastructure and on that basis should be subject to payments based on the actual physical size of the apparatus installed and its effect on the use and/or enjoyment of the property that results i.e. the burden of the rights required. On this basis, telecommunication cables installed beneath the surface of land within ducts and chambers (all of which are of inert materials that are not transmitting substances that may cause damage or injury) should be subject to a payment that is less than a substantial percentage of the freehold value of land, this is the basis for the equivalence valuation of payments employed by water gas and electricity utilities and persons granted CPO rights under the Pipe-lines Act 1972, whose apparatus, in general, place a higher burden on land than that of electronic communications apparatus.

Security of tenure

We consider that it is essential to maintain security of tenure under the Code, as it is to provide for the exercise of Code rights per se. Based on the above premise, the ability to contract out would lead to another anxiety point at both the time the right was conferred and at the time it expired. As

such a change would not prohibit the application of paragraph 5 in any event, it seems pointless to permit for the electronic communications apparatus to be removed only for the operator to apply of it to be reinstalled for e.g. on a fixed line network where a small number of consents on a route are contracted out.

We have stated that we consider that there should be statutory continuity of the expired terms (with the ability to fix an interim payment either upwards or downwards) so that both parties know where they stand, until the issue is ultimately determined.

We also consider that where a right is conferred by way of a lease or tenancy that security of tenure pursuant to the Landlord & Tenant Act 1954 should be retained to protect all ancillary space and uses required for the support of the electronic communications apparatus. Further, the network site may have an occupational element (for e.g. offices to the business carried on, above the ground floor network equipment areas at the premises) and the demise as a whole.

For the reasons stated we believe that in such a situation where building and/or land space has been demised for the purposes of setting up a complex network site at substantial cost supporting both public and commercial services and on the basis of an open market payment for the term, that paragraph 20 should not have application during the term contracted for, save perhaps in respect of ancillary rights where routes of cabling, ancillary services and access routes to the demise can be diverted without wholesale disruption. It is usual practice for the parties to negotiate for this position in any event.

Ancillary Rights

We consider that the code in its present format was drafted in the main to apply to the rights required for fixed line apparatus. We have set out in detail the types of ancillary rights that may be required to support a more complex communications site and the operation of the electronic communications apparatus and ancillary apparatus that would be required to supply the electronic communications network and/or services. We believe that ancillary rights or rights for ancillary apparatus in support of electronic communications apparatus and/or the services carried over them should be fully addressed and clarified in the primary rights provided under paragraph 2 of the Code. We accept that the court has discretion to grant such temporary rights as the court considers necessary to in effect preserve the services as well as to protect the apparatus on any application for temporary rights pursuant to paragraph 6.

Forum for disputes

Given the nature of the rights and the time sensitivities, it is imperative that both speed and expertise is applied, at a reasonable cost, in dealing with such disputes. The time factor for resolution of disputes in the county court and the subjective approach to paragraph 7, has dissuaded operators from invoking the Code. There is the need for the inclusion in the Code of a pre-action protocol to settle disputes within the period of 28 days from an application for consent first being made by the operator and for the grant of temporary rights on an expedited and perhaps standardised/prescriptive basis if the protocol fails within that time period. We consider that for a new code to provide for equity it is essential that it includes an adjudication process which is based on the Lands Tribunal approach.

Compulsory Purchase powers

Whilst we appreciate that the ability of the Code operator to be authorised to exercise compulsory purchase powers to acquire land and easements pursuant to Schedule 4 of the Communications Act 2003 is outside the scope of this consultation, we would comment that our response to the Consultation is made on the basis that such rights are preserved. We would comment that these are an ultimate necessity (a necessary back stop) in the event of the failure of the Code (in its present form and as revised) to provide the necessary rights and security for the required term.

We wish to acknowledge the support of Ruth Harris, solicitor of Brook Street des Roches LLP in making this Cable & Wireless response to the Law Commission's Consultation.

We thank the Law Commission for inviting Cable & Wireless to make a response to the Consultation.

Yours Faithfully,

David Price

Network Agreements and Rating Manager

Cc. Ruth Harris BSDR.

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:
David Price (on behalf of the Cable & Wireless Worldwide Group of companies)
Email address:
[redacted]
Postal address:
Cable & Wireless Worldwide Post Point 20, Waterside House, Longshot Lane, Bracknell, RG12 1XL
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):
On behalf of the electronic communications operators:- Cable & Wireless UK, Energis Communications Limited, Thus Group Holdings Limited and Your Communications Limited.
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.

C&W Response to Q 10.3

We consider that the right at (3) "to enter land to inspect any apparatus whether on under or over that land or elsewhere" is not sufficient in terms of either; the land upon which the electronic communications apparatus ("ECA") is installed (site land) nor any third party land (access land) that requires to be crossed to get to the land on which the ECA is installed. The right of entry/access in respect of both the site land and the access land should not be limited to inspection, but be expressly extended to access for all of the rights/purposes contained in right (1) above (paragraph 2(1) of the Code). Inspection may not require vehicles plant etc where as installation/maintenance etc is likely to and where the site is accessible with vehicles etc this should be an express right too. In addition, prior to securing a written consent, the operator may require access via access land and to the intended site land itself to survey suitability of intended site land for the installation of ECA see the former section 37 of the Telecommunications Act 1984 now repealed. The repeal results in the need for a formal written consent even prior to exploratory works being carried out that may or may not result in rights being required in respect of the site. Perhaps there should be a mechanism for early resolution on this issue to permit this potential standalone right to be exercised in early course, subject to making good any damage caused.

We have experienced being held to ransom (over passing over a third party farm track to a land locked radio site where urgent maintenance was required) on account of the fact that the Code has no express compulsion; although we would construe this to be implied for such purpose. Further, whilst the court has discretion in respect of granting such a right by reference to paragraph 6 of the Code following a paragraph 5 application (see below re paragraph 6), given the urgency in such cases this is not the most practical solution and as such, we are aware of ransoms being offered for one off urgent access.

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.
C&W Response to Q 10.4 We consider that operators should be granted express ancillary rights to be able to operate the ECA at network sites and for it to be able to function. These could be of perhaps a non prescriptive nature more akin to the temporary rights provision in paragraph 6 (2) of the Code where the court can grant "... such temporary rights as appear to the court reasonably necessary for securing that, pending the determination of any proceedings…the service provided by the operator's system is maintained and the apparatus is properly adjusted and kept in repair" If in fairness to the Grantor these should be more prescriptive so that it is certain it can grant them the operator could set out what ancillary rights are required. There is a vast difference between a fibre optic cable contained in a duct running under land which is self contained (and expressly covered by paragraph 2 rights) and a network site where power and plant (may or may not come within the definition of ECA as it stands) is required for the ECA to function and to maintain (indeed provide in the first instance) the service. Whilst for e.g. in the case of power the electricity undertaker may have the rights to retain electricity apparatus on the site land, the operator requires the right to take such power supply direct from the supplier by its own arrangements; along the existing or designated route on the site land (and potentially the access land).

10.5 We provisionally propose that code rights should be technology neutral. Do consultees agree? Consultation Paper, Part 3, paragraph 3.18.
C&W Response to Q 10.5 Yes, the Code should be neutral in terms of the ECA being installed for e.g. if a fixed line operator installs within the same space as a mobile operator this should be neutral, but as can be seen above the Code could be construed as only expressly providing for ECA (subject to construction as to what that comprises) running from A to B or that on site land without any ancillary requirements, which ancillary requirements should now be fully addressed. As the land is affected only in terms of the use of space and injurious affection; upgrading of ECA on site land which does not impact on the space the subject of the rights or the remaining land holding should also be neutral and be permitted by the Code without the need for further consent. By example the addition of a cable within an existing underground duct and chamber route should not require additional rights, subject to the original agreement by which consent was granted, where payment of compensation

resulting from disturbance to the land would have already been received.

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.

C&W Response to Q 10.6

The majority of wayleaves (consents in writing) entered into by operators including their standard terms (as a starting point) contain obligations on their part for e.g. our standard form contains restrictions as to exercise of the rights so that they are exercised in a manner that does not cause undue disturbance and that reasonable notice is given (save in the case of emergency) where works need to be undertaken; they provide for adequate insurance, to keep the ECA in a safe condition, to comply with planning etc and to make good damage. Rights granted by way of leases will on the whole contain standard full repairing insuring and usual tenant's covenants etc. The Code could not cover a full set of covenants in the Landlord & Tenant forum, but operators are unlikely to object to obligations as to standards of exercise, maintenance and due process as to notice etc in the majority of forms of consent.

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.

C&W Response to Q 10.7

The definition is sufficient for point to point crossing of land and site ECA which are self contained, but beyond that protection is required for supporting apparatus.

In order to function correctly, a data centre or network site for e.g. would require to be supported by a large amount of plant including that to sustain the environment for e.g. air conditioning units, fire suppression, suspended ceilings/floors, risers through which cabling to and from the equipment is carried and power and emergency power supplies in the form of batteries and a generator. It could be argued that the relevant plant falls within paragraphs (a) and (d) of the definition of electronic communications apparatus, excluding the real property here the risers retained by the landowner. However, it has not been tested in case law and there is no certainty that plant supporting the transmitting equipment ("which is...... designed or adapted for use in connection with the provision of an electronic communications network") would be covered.

It may be that ancillary equipment (excluding ducts and chambers that should be included as ECA) necessary for the operation of the ECA should be covered by ancillary rights, rather than falling within the definition of ECA. Any reform should address this operational issue.

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.

C&W Response to Q 10.8

By example, we encounter different scenarios according to the nature of the rights required and the nature of the ECA to be installed and the environment in which it will be installed, as follows:-

Securing a building consent for service to a customer, can be difficult, time consuming and costly for operators where there is a hierarchy of interests in a multi occupied building, where the occupier (customer) has an internal demise only and it is necessary to pass over common parts. It is questionable as to whether Section 134 of the Communications Act 2003 works in respect of common areas outside of the demise. In practice the operator would tend to contract with the superior interest to avoid uncertainty over contractual obligations of its customer. Further, whilst it has become common practice for landlords to restrict the consent in writing to the purpose of serving only the particular customer, the operator would seek to ensure that where for e.g. the surface of the land is broken to reach the customer with duct work, that the duct work can remain post the occupier (customer's) term for other and/or future subscribers..

Where E.C.A is installed for network purposes, we would generally seek to contract with both the occupier and superior interests (freehold) to ensure that the network can remain in situ beyond any period of occupation and indeed such network would **not** generally serve the occupier and/or the superior interest in any event.

Network sites of a possessory nature, either leasehold or where a licence to exercise more complex rights is granted, where the operator is not contracting with the freehold owner would generally require the freehold owner's consent to the immediate landlord to be able to sub-demise/licence in any event, unless the immediate landlord holds on a long unrestricted lease of a sufficient term for the operator to obtain required security against cost of construction etc of the network site.

In our experience it is rare in the scenarios that we meet for paragraph 2 (3) (b) to apply or that we solely rely upon it.

Difficulties subsist in identifying all interests that apply to certain land, particularly in the unregistered

land forum. The Code should provide for an expedited procedure should interests be identified at a later date and trespass be alleged. Where the ECA is crossing land or being sited on open land, we would like to see a procedure in place where, having used reasonable endeavours to identify the freehold owner and occupier, an operator could leave a 28 day notice on the land or notify via the local press and if no response is made within that period; then an operator should be permitted to exercise the rights to install apparatus etc in the terms of paragraph 2 of the Code with an expedited procedure for agreeing terms with any landowners that subsequently come forward-without treating the operator as being in trespass.

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.

C&W Response to Q 10.9

(1)/(2) As noted in the consultation limbs 5 (3) (a) and (b) stand alone such that if either (or both) is satisfied to outweigh the prejudice caused to the landowner the order shall be made. We consider that adequate compensation alone would be sufficient to satisfy any prejudice, but if it were not (although such circumstances are difficult to envisage given the heads of compensation/consideration under the Code including for injurious affection) that nevertheless the public interest could outweigh the prejudice; particularly in the context of ECA installed to provide local, regional, national or international network services. Therefore, the response to (1) & (2) is yes.

(3) As to the Access Principle, we consider that this does need to be up-dated to reflect the national importance of good quality, choice & competitiveness rather than access per se to any one network, where access is available, but if no order were made it would unreasonably deny access to the above characteristics/principles enjoyed by other areas; albeit to varying degrees. Further, the Access Principle takes no account of the fact that in a global economy where electronic communications are both vital and specialist (and a critical part of day to day running of social welfare or commerce services) that social welfare or commence may choose one or a number of global providers for economies of scale and security of service etc, the Access Principle does not cater for this in terms of the weighting of detriment

to welfare or commence.

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.

C&W Response to Q 10.10

Such right only binds for so long as the person giving consent is the occupier of the land unless the person with a superior interest agrees in writing to be bound. For the main part obstructions occur only on a temporary basis and it is therefore appropriate that the consent of the occupier only is obtained, as this will not affect the reversion. If the obstruction subsists beyond the occupation of the person giving consent or any successor to their interest, then the consent of the reversioner would be required at that point.

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.

C&W Response to Q 10.11

We are not aware that this causes problems to landowners, but our awareness only extends to agricultural land where the lines may be supported on the overhead power lines. In many cases the supporting towers fall within the same land ownership as that over which the lines pass (such that paragraph 10(c) is not satisfied) and as such in the majority of cases a wayleave/consent in writing has been sought in any event, even where E.C.A only flies over land rural, we consider this is necessary to be able to take access to the land to install and maintain in the event that the line is required to be temporarily deployed on the land over which it has been flown.

There may be historic lines in the town/city environment to which this paragraph applies, but given the current restrictions in the Regulations, it is not an issue we have come across.

We appreciate that if the DCMS consultation on the Code Regulations permits the use of new overhead lines for broadband roll out that paragraphs 10 and 17 would have more application. Given the restrictions on distance to buildings and height and the possible span without support and moreover the application of paragraph 16 and 17, we do not anticipate that the provision would impact landowners on the basis that an operator would require consent to enter the land or to exercise any of the paragraph 2 rights over it. However, for that reason we consider that paragraph 10 and 17 are inadequate.

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.
C&W Response to Q 10.12 Paragraph 17 (6) considerations for up-holding an objection are not in line with paragraph 5 principles for dispensing with consent; although the prejudice is then weighted against the paragraph 17 (6) (a)/(c) provisions, which may amount to the same considerations depending on the circumstances. The operator is at risk to exercise the paragraph 10 right without consent, as services could be interrupted and the initial cost outlay may be repeated. It is difficult to see how lines could be readily moved from 2 fixed points without also addressing those aforementioned conflicts. The wording in 17 (6) is awkward in as much as the word "not " in front of the word "satisfied" should be moved to after the word "will" in the final line of the paragraph. The timescale for the initial objection is too long compared with the 28 day period for other noticing/counter-noticing. The time period for application to the court is reasonable allowing time to negotiate, but ultimately being referred to court within 4 months if it cannot be resolved, on the basis that the apparatus is already installed

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.
C&W Response to Q 10.13 Given the inaccessibility of such ECA in theory and the possibility of noticing being on other private land not accessible to the landowner wishing to be notified – this might not be practicable- failure to do so should not be a criminal offence, but the time period for objection should not commence until notice is effectively given.

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

(1) to vegetation generally;

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

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

Consultation Paper, Part 3, paragraph 3.74.

Yes in all cases both directly overhanging/intruding whether on private land or the Street, subject to TPO's, protection of SSSI flora and fauna etc. The Code provides for good husbandry etc and as expenses are ultimately with the Operator if they exercise the power, they are not going to do so lightly. It is more difficult where trees and vegetation is contained within private land and blocks lines of sight. Rights to lop in order to prevent the obstruction of existing lines of sight should perhaps be given in this context to allow for trees etc above a certain height to be contained.

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.

C&W Response to Q 10.15

Yes, subject to the proviso below, this should be permitted. The right to alter and adjust within paragraph 2 (1) (a) goes some way but should perhaps be supplemented with "to replace and add to" provided that this does not increase the physical space occupied by the ECA for e.g. additional cables within duct space or antennas of similar or permitted dimensions to those they are replacing on radio sites, provided there is no overloading and subject to planning etc. The price for the space/antenna complement i.e. the extent of use/occupation of the land remains the same. The operator for e.g. in the mast forum has incurred the substantial cost of installation. Compared with any other landlord & tenant scenario, the situation is the same i.e. the operator will be paying a market rent for use of the bare land, but unlike any other landlord & tenant scenario beyond the restriction on the permitted user, landowner's also seek to fetter up-grading ECA that has no impact on it beyond the demised/licensed space for which it is receiving a rent.

Further, in terms of duct crossings, it has been our experience that certain landowners in perhaps privileged positions because of the nature of their land holdings have obtained what we would consider to be ransom value for, and haveoriented their own markets based on fibre counts, by seeking to charge per fibre crossing their land rather than for the physical space occupied by the ECA. Others have sought to apply this to rent reviews where the basis of the grant was the installation of a number of ducts. We can anticipate that if up-grades were prohibited ransoms may be applied to requests for up-grades where

there is no adverse affect upon the relevant land interest. Where there is an adverse affect on such interest i.e. it places additional burdens on the land because of increased physical space occupied and additional access required, then any revised Code (as the Code does now) would provide for further consent and the potential for additional consideration/compensation payments for the additional burden/rights.

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.

C&W Response to Q 10.16

(1) It has been our experience that it does cause delay whilst express consent (and in many cases further consideration/compensation payments for the use of the same space over which rights have been granted) is sought. It potentially avoids another operator requiring to install an additional route across the same landholding or an adjacent landholding.

We have heard arguments that landowner's are missing out on the ability to charge further rent/licence fee from mast sharing in a consolidated market. It should be noted in the first instance that the costs of installing a mast and bringing ducted cable routes and ancillary services to it are high. That the operator may have paid for a complement of aerials that are not fully being utilised, such that in the interests of all it would be sensible to share rather than duplicate the cost of installation and the need for further land and associated infrastructure. It is an economic reality that consolidation is taking place in what has been a recessionary period and at a time when the market has matured but also at a time when rural land values are rising. However, sharing should not be a factor by which to extract further/higher rentals that exceed the heads of valuation applied in other land transactions.

We are also aware of landowners that have sought to extract a ransom for operators to link network sites or radio sites by underground ECA routes such that they can either link sites into the operator's network or an operator who is sharing the use of the site can link the site to its network. The right to share duct networks would be an aid in preventing this happening.

(2) This would certainly benefit the customer and the industry. Bearing in mind that the landowner has the benefit of the contractual obligations of the original operator and could take a direct covenant from any sub-grantee.

(3) No payment should be made where this is neutral to the landowner i.e. the sharing does not have any adverse impact on its land interest as for the up-grading of apparatus as stated above. This is unlikely to require undue additional access as failure of a duct and/or maintenance etc. is likely to affect all parties sharing and remedial/maintenance access is therefore the same. Such works that would need to be undertaken would be on the shared route of the ECA and would be compensated for where disturbance has been caused.

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.

C&W Response to Q 10.17

We have referred to this above and any reform should clarify that the provisions against the prohibition or restriction extends beyond the premises to the holding of the person with the superior interest in the premises, such that the reasonableness test also applies to restrictions on rights over the common parts to allow the electronic communications services to reach the premises demised by the lease or as licensed for the period set out in section 134.

An up-dated Access Principle should be applied to section 134.

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.

C&W Response to Q 10.18

(1) If the view is that a consent (even though it does not contain prohibitions on assignment) is not assignable, then this does create great difficulty in practice for e.g. group company scenarios where operators have merged/been acquired but could not swiftly integrate because of the scale and volume of consents held by the operator acquired or merged. This also applies where parts of undertakings are sold to another operator to usefully deploy surplus/otherwise redundant ECA which is both an efficient economic and environmentally friendly approach.

(2) Yes, as the Grantor has the benefit of the original contracting party's covenants/obligations and

the benefit of the succeeding operator being bound by these as conditions of exercise. It may be that the burdens should also be expressly assignable, subject to parameters around sufficiency of substance of the assignee.

(3) This is not detrimental to the landowner or his interest and in the same way that a fine or premium would not in normal qualified consent situations be permitted in the landlord and tenant forum, it should not be required here.

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

Consultation Paper, Part 3, paragraph 3.94.

C&W Response to Q 10.19

Yes, we repeat verbatim below our response to question 10.4 above, so that the response is fully made here.

"We consider that operators should be granted express ancillary rights to be able to operate the ECA at network sites and for the ECA to function. These could be of perhaps a non prescriptive nature more akin to the temporary rights provision in paragraph 6 of the Code where the court can grant "... such temporary rights as appear to the court necessary for securing that pending the determination of any proceedings...the service provided by the operator's system is maintained and the apparatus is properly adjusted and kept in repair"

If in fairness to the Grantor these should be more prescriptive so that it is certain it can grant them the operator could set out what ancillary rights are required.

There is a vast difference between a fibre optic cable contained in a duct running under land which is self contained (and expressly covered by paragraph 2 rights) and a network site where power and plant (may or may not come within the definition of ECA as it stands) is required for the ECA to function and to maintain (indeed provide in the first instance) the service. Whilst for e.g. in the case of power the electricity undertaker may have the rights to retain electricity apparatus on the site land, the operator requires the right to take such power supply direct from the supplier by its own arrangements; along the existing or designated route on the site land (and potentially the access land)."

The bottom line is that Code operators should not be held to ransom for requiring additional services to make the ECA functional during the period for which the site is used for electronic communications purposes.

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.
C&W Response to Q 10.20 Yes, we repeat our response to question 10.3 above. We have not had experience of pure access issues re third party land in the multi-dwelling scenario as wayleaves negotiated with the landowner will usually cover such rights over the common parts and furthermore will require the right to install ECA through those parts, where possible.	

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.
C&W Response to Q 10.21 Given that all other terms would need to be agreed as the operator and as the core infrastructure may not be in place, the current provision seems to be ahead of itself. If the lack of agreement is the only issue preventing the access to the network, then it may be of limited application.	

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.
C&W Response to Q 10.22 We are not aware of potential subscribers/customers using this provision. We have only come across the threat to use. As costs and timing are not certain and should not be the operator's where a third party could put the operator to wasted expense, it is not likely to be invoked?	

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.

C&W Response to Q 10.23

(1) This divides into 3 categories (a) at the end of a contractual term where ongoing rights are uncertain and in cases where successors in title have not been notified of rights binding their land and/or (b) in inadvertent trespass cases where for e.g. soft verge confirmed to be within the public highway boundary is subsequently found to be private land and/or (c) during a wayleave term (quite often where the original grantor has sold on the land affected) in the development forum where we are aware of developers threatening to remove, alter or damage ECA in order for the development to proceed.

In general, the issue at the end of the term can be addressed by our response at 10.36 below that statutory continuance such as rights of holding over on the same terms as the expired agreement (akin to Landlord & Tenant Act rights) be granted to operators at the end of the contractual term.

(2) Without a specific statutory provision to prevent this and the need at the end of a contractual term to secure a court hearing date under paragraph 6 (having gone through the paragraph 5 notice /21 counter- noticing procedure) where no timescales are laid out such that immediate relief is available (akin to injunctive relief applying for breach of statutory right) the threat of interference is readily apparent.

(3) Citing the former section 46 (although not perfect in the sense that interference needs to be construed as an obstruction) had greatly assisted in halting threats to cut off power, cabling or to refuse access etc. A criminal sanction would be appropriate when such acts of interference/obstruction are knowingly/intentionally undertaken.

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.
C&W Response to Q 10.24 As discussed at 10.6 above. This is largely a matter of contract and enforcement of the terms of such contract, which we believe works in practice. Our policy, over the 28 years of using the Code, has been to treat with landowners in a fair and reasonable way preferably by negotiation and not to use Code powers in heavy handed way.	

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.
C&W Response to Q 10.25 Agreed- in the maintainable highway. However, it is our view that rights should be extended to private streets as for other utilities and that the definition of a street in paragraph 9 should be similar to that in the section 48 (1) of the New Roads and Street Works Act without a limitation of a street being required to be a public maintainable highway.	

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.
C&W Response to Q 10.26 We have had difficulties in agreeing terms that include rental payments in such instances, as the tidal waters foreshores and estuaries tend to be ransom strips because of their nature in connecting parcels of land under which the ECA are readily installed and because there is no certainty that consent will be given. We consider that this gives the Crown interests an unfair advantage and creates an anxiety around obtaining consent within required project timescales, over what is in many cases a relatively short distance of land interest, unlike that from mean low water springs to the 12 nautical miles limit. International cabling cannot be brought into the country without the use of the foreshore and many tidal river foreshores comprise a natural obstacle to underground and overhead ECA. There is a considerable difference in the distance for which an 'annual rent' should be valued for a cable installed for the linear distance of 12 nautical miles (or more) from that install within a tidal foreshore of perhaps no more than 100 metres or less. However, this difference is not reflected in the rental demands sought by the Crown	

interests, as defined in paragraph 26 of the Code.

As a result rents demanded for crossing short distances of Crown land, are disproportionally excessive.

We consider that for valuation purposes tidal lands & waters should be treated on the same basis as surrounding/adjacent land both in the marine and terrestrial environment. We appreciate that the Crown interests will need to act in accordance with good estate management principles, but we consider that if consent were not to be unreasonably withheld or delayed, such principles could be applied. Where their consent is delayed the operator should have the ability to refer the dispute to the Lands Tribunal for determination with prior access being granted before the determination is made.

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.

C&W Response to Q 10.27

(1) We consider that tidal waters and lands may have further considerations; but as the Code predated the 2009 legislation most of such considerations would be adequately covered by the further restrictions in the Marine and Coastal Access Act 2009. This together with the weighting of prejudice against the Access Principle should suffice to cover matters such as remedial works etc without need for a separate regime.

(2) Please see 1 above and our response to 10.26

(3) No. If however, this is maintained, there are construction issues with the Code whereby it seems paragraph 11 is not expressly subject to paragraph 2, but only paragraph 3. Therefore, it is arguable that the requirement under paragraph 11 to obtain consent pursuant to paragraph 26 does not provide for a default mechanism if the terms of such consent cannot be agreed and that the same process forum (as the parties can always call experts) and considerations should be applied to all tidal waters and lands as they are to land. At the very least the Crown should not be able to unreasonably withhold or delay their consent and the principles of the Crown Estate Acts which prevent ransom amounts being demanded should perhaps be expressly applied. The legislation that governs the management of the Duchy of Cornwall and the Duchy of Lancaster should be not be applied in such a manner that allows these Crown interests to determine the value of the right without the operator having leave for appeal through a tribunal.

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.

C&W Response to Q 10.28

1. Yes it is the maintainer/operator of the obstacle i.e. the person in control of the land and not the landowner that is affected here; although frequently they are synonymous. That maintainer/operator itself has statutory rights and has often acquired the land/exercised rights over it by reason of its statutory position; as the Geo case[1] set out it should not thereby further benefit by charging consideration to permit a crossing which does not affect the maintenance and operation of the linear obstacle.
2. More so since the Geo case, as there was uncertainty as to the extent of its application prior to that case and operators tended to obtain written consent for the grant of a right that was effectively already in place; to avoid the possibility of a ransom demand for the grant of the rights and against the possibility of the refusal of access etc.

In the event that paragraph 12 is maintained in its present form, there is however, an operational issue in as much as where an objection is made by the person in control of the linear obstacle, the process then grinds to a halt. , An expedited procedure is required.

Further, even if there is no response, operators cannot generally take access and commence works because of the possibility of causing damage or risk of endangering life for e.g. on railway crossings without the programming of the works and engineering supervision from the person in the control of the linear obstacles. There needs to be parameters around cooperation if an objection is not made or upheld, subject to recovery of reasonable and proper costs of supervision.

3. We consider that a civil sanction should apply unless works not in accordance with the regime deliberately/intentionally obstruct or interfere with the operation of the linear obstacle or are likely to do so on health and safety grounds. However, there has to be a realistic process to determine the procedure for the crossing of a linear obstacle that avoids the operator being forced into a position of anxiety.
4. Yes-on the whole more complex electronic communications infrastructure would sit in the land

[1] The Bridgewater Canal Company v Geo Networks Ltd CA 30th November 2010

outside of the linear obstacle interest.

5. Should follow the general regime in allowing other operators to share use of the duct.

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.

C&W Response to Q 10.29

Yes, however agreement should not be unreasonably withheld or delayed bearing in mind future requirements of the authority for the use of the conduit and/or safety requirements.

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.

C&W Response to Q 10.30

Yes, we agree with the provisional proposal. Although we consider that the present wording does not provide a clear alignment where CPO rights and rights pursuant to the New Roads & Street Works Act 1991 are exercised against the operator.

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

C&W Response to Q 10.31

Yes, we agree with the provisional proposal.

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.
C&W Response to Q 10.32	

Yes. However, operators find that landowners will seek to contract out of the terms applying to the diversion of apparatus, as they are able to do so and this is often conceded on the basis of anxiety for immediate network and customer servicing needs. Perhaps contracting out of paragraph 20 from an operator's perspective should only be permitted in so far as the alteration is required in the event of development or essential maintenance/repair in relation to a proposed improvement to the land. In such an event the landowner should seek in the first instance to require the apparatus to be diverted within its own landholding where possible and to work around the ECA where possible.

From a landowner's perspective, we consider if it grants an occupational interest as with other occupational interests; particularly one granted with the protection of the Landlord & Tenant Act that it should not have the benefit of paragraph 20 during the contractual term; unless it negotiates for a redevelopment break clause and in the case of a lease protected by the Landlord & Tenant Act is able to prove the redevelopment grounds.

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.
C&W Response to Q 10.33	

See response to 10.32. It does strike a balance when it is used. Quite often the balance is skewed in favour of the landowner by contractual provisions which effectively contract out of the terms applied to the timing and cost of the alterations rather than to paragraph 20 per se. Operators tend to readily agree to a contractual lift and shift clause where they know that it is feasible to divert and there are safeguards in place for continuity of service in the meantime. Where due to the size and technicalities of the network located at a particular site, an operator knows that it cannot remove as a whole to permit an alteration, the parties ought to be able to agree contractual terms for e.g. the right to shift cables serving the core elements only, this should be allowed to be negotiated.

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.

C&W Response to Q 10.34

Where the operator does not hold rights in another forum during the contractual term the principle (if not the exact provisions) of paragraph 20 as a starting point should be maintained and this mirrors what happens in practice. We do consider though that parties ought to be able to contract out of paragraph 20 during the contractual term in any event, but that this should absolutely be the case (albeit indirect via the Landlord and Tenant Act 1954) within the security of tenure forum because of the nature of the network sites that are likely to have been negotiated to fall within such protection. Considerations such as the substantial cost of setting up these sites the types of interests they will serve (from the emergency services, public/governmental services as well as commercial) and the substantial task and expense of migrating such sites within the period contracted for would mean that operators would need to acquire all its interests as freehold if the network model upon which the site is set up could be destroyed within a potentially short term period.

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.

C&W Response to Q 10.35

We have not experienced adverse issues in practice. A revised Access Principle needs to be applied.

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.

C&W Response to Q 10.36

Yes, we agree with provisional proposal if this were not part of the Code it is our view from our experience that operators would be held to ransom at the end of contractual arrangements - having invested in the cost of installation, maintenance, operation and improvements all to provide a continuity of an essential service- which is not easily portable compared with many businesses, the right to remain is essential.

This would also apply where formal consent has not been properly conferred and the grantor is willing to confer such consent, but if it were not for such protection within the Code would otherwise name their price.

We consider that the Code should go further than merely preventing removal. It needs to provide for the

statutory continuity of similar rights to the contractual arrangement or those contained in paragraph 2. It should allow for the possession and occupation of network sites (where the device for conferring the rights also grants rights of possession/occupation) and security and protection to the ECA and the services post the expiry of contractual arrangements. Our view is that where a written agreement is in place that the Code should allow for statutory holding over on those terms (akin to the Landlord & Tenant Act 1954) including provision for interim rent (upwards or downwards), pending renewal by agreement or through a paragraph 21 and/or paragraph 5 application. Of course in some cases the device used will be a business lease and the Operator will have in addition to its Code rights, as the legislation stands (see comments against the provisional proposal to take this away below) the benefit of security of tenure under the Landlord & Tenant Act (where the lease has not been contracted out of such security) and the entire demise is occupied for the purposes of the operator's business.

Where no written agreement is in place rights akin to paragraph 2 could be applied or paragraph 6 could be maintained for this purpose, subject to the process providing for immediate relief akin to expedited/interlocutory relief, if the landowner is threatening the services or refusing access.

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.

C&W Response to Q 10.37

Yes, subject to the rights of the operator to obtain retrospective planning consent and the usual enforcement/appeal procedures being carried through-before removal is sought

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.

C&W Response to Q 10.38

Yes, as paragraph 21 gives the landowner the means of setting the time-table. In reality the effect of paragraphs 5 & 6 of the Code means that the operator applies for new rights in any event and it is the operator who is required to take steps required to obtain the necessary rights in a non- dilatory manner. A time-table could be set for the application for new rights in the absence of agreement to be made by the operator, but this would need to allow sufficient time for negotiation to grant the rights by agreement-so that resorting to the court/Lands Tribunal is not the first resort. This would need to be subject to the rider that applications under paragraph 6 (if this is to be the only means of securing the temporary rights

required to maintain service going forward) should be dealt with on an interlocutory basis and an appropriate forum should be in place to deal with such applications.

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.

C&W Response to Q 10.39

As we set out above, we consider that there should be a statutory holding over on the terms of the expired written agreement where there is one, until the request for new/temporary rights has been dealt with. This could include a provision for an interim rent (upwards/downwards) or where an annual rent/sum is not paid further compensation for the temporary period to be paid.

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.

C&W Response to Q 10.40

We do not agree. From our experience the starting point for many landowners will be to seek to contract out by express provision or via an indemnity for exercising paragraph 21 rights to remain. We have been able to avoid the argument on contracting out of paragraph 21 only by reason that the statute prevents this. If it were permitted, anxiety to serve a particular customer or to bridge a gap in a network route, would favour the landowner at the time the agreement was entered into without full consideration being given to what would happen at the end of the contractual arrangement. We do not consider it appropriate that continuity of service should be affected by a landowner's whim or will, such that the operator could potentially be more disadvantaged when already on a site or land than it would be if it were coming to the site or land afresh. Also as the Code stands an operator may in any event pursue new rights pursuant to paragraph 5, so it would seem senseless to permit removal only for the rights to be sought again. Agreement to contract out may be seen as diminishing the weighting of the factors the operator would seek to put forward under paragraph 5.

Contracting out in this forum would not take due account of the investment and complexity in setting up the infrastructure at a particular site/land, which (unlike many businesses excepting goodwill) cannot be seamlessly replicated at an alternative site/land, without a long and costly migration period, if the ECA and infrastructure that service it are still required to provide live services. Where the ECA/infrastructure are not still required to provide service the operator would not seek to invoke the Code to protect itself in any event. Contracting out may not take account of the preservation of emergency services and the like during any period over which paragraph 5 rights were sought followed by an application for temporary

rights pursuant to paragraph 6 to resolve the need for the services for customer and network purposes in the interim.

In the event of a redevelopment at the end of the term, paragraph 7 of the Code sets out heads of recovery which provide for ensuring that there is adequate compensation of any loss incurred by the conferring of a right and acts to set the balance between the operator seeking to remain/migrate in an orderly fashion and the interest seeking to develop. Often, it is simply a question of timing and a requirement on the part of the operator to secure temporary rights to allow for an orderly migration, without the threat of physical damage to the ECA or claims for ransom payments.

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.

C&W Response to Q 10.41
This would very much depend on the revisions to the Code adequately protecting the operator's security in its existing infrastructure/ECA installed, on the basis that Code rights as existing at the date hereof would be available to be invoked at the end of any contractual arrangement.

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.

C&W Response to Q 10.42
We agree in terms of all interests immediately affected. However, we believe there should be a wait and see principle applied in respect of reversionary interests in as much as diminution in value of the land interest of the reversioner where the land is currently occupied by the person conferring the right may never occur and at least not until the land is vested in the reversioner and the rights are exercised against it. It may be that the operator has no further use for the ECA and removes it and the right accordingly falls away prior to such vesting.

In reality Code operators tend to obtain the express consent of many reversionary interests for lengths of terms beyond that vested in the occupier and to agree terms accordingly, to ensure for long term security

and access over common parts. This is also the case where the ECA are not directly serving the occupier. Therefore, it is more apparent than real that an interest could be affected without the holder agreeing terms.

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.

C&W Response to Q 10.43

The Occupier can only bind the land for the period of its occupation and therefore the statutory right will come to an end when the reversion vests. In our view it is at the point when the reversion vests and not before that compensation should be determined –otherwise Code operators could potentially be paying to an interest that may never either be bound or affected by the presence of its ECA. Compensation will be considered under any application to retain the ECA at the relevant time.

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.

C&W Response to Q 10.44

Yes we agree with the arguments put forward for proper valuation of the compensation as equivalence based on the value of the land prior to securing the rights and the diminution if any in value after securing the rights. It is an understandable and well trodden valuation path for determining diminution. We also agree that in terms of any head of compensation claim that comprises " the value of the right" that there should be no special purchase element. However, we are not certain as to how the value of the right would be determined if the other heads of compensation i.e. disturbance and diminution did not already include for this element. We are in favour of a formula that is less likely to lead to the horse trade that was apparent in the Mercury[2] case based on a compromise of each party's subjective starting points and higher values than may be assessed based on what is proposed.

However, the emphasis of consideration under the Code is unhelpful and suggests a value over and above

[2] Mercury Communications Ltd v. London and India Dock Investments Ltd (1995)

what is simply a head of compensation under legislation for other utilities. If the results are the same and there is equivalence this is not an issue, but it may be better to use equivalence of wording to ensure for this.

The fact that there is an additional compensation element of 'consideration' (definition of which is subjective) does also raise the question as to whether the heads of compensation under the Code could be equivalent to or exceed the cost of acquiring the land. It is a fact that in the agricultural environment wayleave payments can exceed the equivalent per square metre of land market value.

The determination of rental value for urban commercial property suitable for conversion into telecommunications use is determined by the market for similar properties to let within the area prior to alteration for telecommunications purposes, where open market rent comparables is applied as between willing grantor/grantee at arms-length negotiations ignoring the special value to the operator.

We consider that where purpose built sites are constructed by an operator on bare land that the value of the rent should be determined on the basis of a ground rent assessment on an equivalence basis. Particularly in the radio mast environment where an unacceptable practice has evolved, to pay a percentage of site sharing income for the right to site share which would not be paid for sub-letting in any other land forum except where less than the market rent is paid in the first instance.

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.

C&W Response to Q 10.45

We do not view this as a necessary or a balanced approach, for e.g. landowners benefit from the infrastructure laid on their business park and in their multi –tenant buildings to bring service to their tenants at the operator's cost. Therefore based on equivalence, no compensation based on loss is payable and neither should any sum be payable by way of value of the right because this is outweighed by the benefit.

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.

C&W Response to Q 10.46
No – we consider that any monetary sums should be compensatory only for the reasons argued by Geo case. The land on which the linear obstacle is sited has often been acquired by statutory rights and control rather than ownership is the issue here. The presence and crossing of a linear obstacle already presents a costly installation to an operator. The protections in the Code are for non–interference with the operation of the undertaking of the person in control of the linear obstacle; it is not intended to create a windfall situation, where intrusion by the operator is next to zero or at worst minimal.

However, if consideration were to be paid for the grant of the rights as opposed to the carrying out of the works, (as is presently the law) then we consider that this would be negligible for crossing (with minimal intrusion) the width of the land on which the linear obstacle is present. Accordingly, the cost of negotiating away an objection based on the amount of consideration is prohibitive. We consider that the grounds for objection should be more prescriptive.

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.

C&W Response to Q 10.47

Yes, there should be a part refund if consideration is paid for the term of the agreement at the date of completion of the agreement for the exercise of a right for a period of time and that period is curtailed.

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.

C&W Response to Q 10.48
Yes we agree with this provisional proposal. The issues that arose for the court outside of its expertise and the length of time it took to process the reported cases under the present regime, indicates that this is not the appropriate forum.

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

C&W Response to Q 10.49

(1)We agree that the Lands Tribunal is a more suitable forum to determine issues pertaining to the existing and a revised Code, which largely relate to valuation matters and legal expertise on terms binding land, subject to resolving practical issues of volume of cases etc.

(2) There are alternative mechanisms by way of e.g. the party wall Act etc. as a process by which this might be dealt with. The importance is time and costs and the willingness of the grantor to engage in this process and accept the decision provided. We would suggest that any such procedure is only invoked in the case of a dispute that is not resolved, whereupon either party should first notify the other party of its intention to invoke before proceeding to incur costs, which should be considered in the light of the final offers made by each party.

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.

C&W Response to Q 10.50

Yes, we agree with the provisional proposal and for an expedited procedure to apply to commence proceedings pursuant to paragraph 5 to reach this early stage. We consider that a revised code will not be effective in providing a balanced approach to compensation for the rights sought by the operator unless there is the ability in the code to allow for rights to be granted in a sensible time period that allows for service to be provided to prevent time becoming a means by which grantors can extract ransom. In this respect we consider there should be the means by which works can commence where agreement cannot be reached with a grantor within 28 working days of the grantor being in possession of an application for consent from an operator. Without this proviso in a revised code we consider any means stated in the code to determine value of the rights sought will become a lottery due to anxiety on the principle of the weakest link in the chain.

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.
C&W Response to Q 10.51 If any revised Code does not provide for statutory holding over, clear expedited procedures should be available for applications pursuant to paragraph 6 for e.g. if access were denied or the operation of the ECA were at threat. We also consider that there should be a time limit on which grantors have to respond to applications made by operators that seek to install ECA on the grantor's land to provide service to the grantor's tenants or for network purposes beyond the grantor's interest.

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
C&W Response to Q 10.52 (1)/(2) We have some sympathy with costs being with the operator as a starting point. However, our experience of disputes has been largely related to those over valuation; where we have produced quite extensive valuation justification, but are still being asked for ransom value. We believe that in cases of disputes over valuation that if the Grantor does not settle and consequently loses on the point that costs incurred post the operator's best and final offer (this could even involve a payment in to court) should be awarded against the grantor.

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.
C&W Response to Q 10.53 Please see our response to 10.52 above, it has been our experience that most other issues can be resolved by negotiation. We are not aware of any cases where the grantor has argued that the prejudice to his interest cannot be compensated for in money's worth or that the Access Principle does not outweigh that prejudice. If the dispute were of a technical nature for e.g. as to the position/route of the ECA, there is still scope for the grantor to unnecessarily increase the costs or to act in a vexatious manner that requires the operator to commence the proceedings for e.g. under paragraph 5 in the first instance, because of for e.g. a refusal to engage. Therefore, it is difficult to set hard and fast rules on costs. If they are to be with the operator then, there do need to be carve-outs beyond unnecessarily increasing the costs.

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.

C&W Response to Q 10.54

Yes. It has been our experience that many letters from grantors bringing contractual arrangements to an end and otherwise, could be construed as a Code Notice pursuant to paragraph 21 (2); even where this is not the intention. We have been advised to serve paragraph 21 (3) counter-notices without prejudice to the contention that a paragraph 21 notice is not valid on many occasions. As the issue has not been legally tested we have also taken a belt and braces approach where the letter (purporting to be or potentially could be construed as a Code notice) has been sent through the first class post; although we construe that paragraph 24 applies to notices served by all persons and not just the operator.

Whilst the Law Commission considers that there should not be a prescribed form for the person serving notice on the operator, perhaps there ought to be a requirement that any such notice refers to the relevant paragraph of the Code or indeed simply that such notice is intended to be served pursuant to the Code; to prevent both parties acting inadvertently. Would it not be better to have absolute clarity?

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.

C&W Response to Q 10.55

The principles work however, the OFCOM approved forms could be improved, for technical errors only for e.g. a paragraph 21 notice is to set out the steps the operator proposes to take to secure the rights, we consider that it is arguable that the approved form does not adequately provide for this. In terms of the mode of and provisions applying to noticing the notes on the form refers to paragraph 2A instead of 24 (2A). We question whether OFCOM should continue to draft these notices. If they are to continue there should be a consultation process on the wording of notices and the means by which the notices can be amended (a right of appeal) where they are found not to work in practice.

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.

C&W Response to Q 10.56

We are not aware of landowners having difficulty with lack of information. It is our aim to provide the grantor with as much information that is required to explain the physical content of any scheme of works that is required to be undertaken on their land or in their building. This would include the submission of drawings, photographs, code of practice method statements, site surveys and on-site meeting.

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.

C&W Response to Q 10.57

We believe that operators would not object to this as it follows current practice. However, this would generally be a starting point only, as the type of agreement varies according to the sophistication of the site and the land. As we have previously noted, there is a huge difference between the purposes and types of ECA for which rights are conferred; ranging from a simple wayleave to cross land with ductwork and cables to network sites for e.g. radio mast, data centre or network site which require supporting services and occupational type rights.

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.

C&W Response to Q 10.58

No- as we have a dichotomy of interests here one rule does not fit all. The Code is the only means that provides security against removal of the ECA. For many sites to effectively function,. in addition, ancillary accommodation and ancillary rights will be required, if the grant is by way of a business tenancy, as the best means for both parties to agree appropriate terms; including an open market rental for the occupation of the building or part, as a network facility, then statutory rights available to other business tenants should not be removed in respect of an operator carrying on its general business.

We agree that part 2 of the Landlord and Tenant Act 1954 should not apply in the pure wayleaves forum i.e ECA crossing land without affecting its use for other purposes and as such this should obviate the need to contract out in respect of wayleaves in the customer building context, which is a growing practice.

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.

C&W Response to Q 10.59

Agreed. However, a difficulty arises in respect of easements because once registered or noted for example in the case of a common equipment area lease of less than 7 years- with cabling rights to serve tenants through risers in the building, the status of those cabling rights as an overriding interest is lost. Such rights are already protected by paragraph 2 (7) of Code.

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.

C&W Response to Q 10.60

(1) It is our understanding that funds have never been called upon and even at the height of network roll-out where it was perceived that streets might be broken up and left open for local authorities to pick up the burden, this did not happen in practice. The obligations of the one operator that became insolvent were readily assumed by another.
(2) It has caused unnecessary cost burden and resource, which is only benefitting the providers of the security.
(3)/(4) From the factual position it is considered that the risk is more apparent than real and the need for security is not justified against the weight of the burden of providing it.

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.

C&W Response to Q 10.61

We agree that the relaxation of the restrictions on the deployment of overhead lines may assist with broad band roll out to the countryside, provided that such relaxation does not carry with it further regulation and delay.

We are not aware of any significant difficulties at this time with the operation of or compliance with the Code Regulations in general.

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

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

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

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

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

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

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

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

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

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

Tel: 020 3334 0200 / Fax: 020 3334 0201

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

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

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

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

Your details

Name:
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Email address:
[redacted]
Postal address:
Network Rail King's Place 90 York Way London N1 9AG
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):
Network Rail
If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

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

10.4	Do consultees consider that code rights should be extended to include further rights, or that the scope of code rights should be reduced? Consultation Paper, Part 3, paragraph 3.17.

10.5	We provisionally propose that code rights should be technology neutral. Do consultees agree? Consultation Paper, Part 3, paragraph 3.18.

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

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

10.8	We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.

10.9	We ask consultees for their views on the appropriate test for dispensing with the need for a landowner's or occupier's agreement to the grant of code rights. In particular, consultees are asked to tell us: (1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought without also weighing the public benefit of the order against the prejudice to the landowner? (2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code? (3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how? Consultation Paper, Part 3, paragraph 3.53.

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

10.11	We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused. Consultation Paper, Part 3, paragraph 3.67.

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

10.13	Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence. Consultation Paper, Part 3, paragraph 3.69.

10.14	Do consultees consider that the current right for Code Operators to require trees to be lopped, by giving notice to the occupier of land, should be extended: (1) to vegetation generally; (2) to trees or vegetation wherever that interference takes place; and/or (3) to cases where the interference is with a wireless signal rather than with tangible apparatus? Consultation Paper, Part 3, paragraph 3.74.

10.15	We ask consultees: (1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and (2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus. Consultation Paper, Part 3, paragraph 3.78.

10.16	We ask consultees: (1) whether the ability of landowners and occupiers to prevent Code Operators from sharing their apparatus causes difficulties in practice; (2) whether Code Operators should benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and/or (3) whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus. Consultation Paper, Part 3, paragraph 3.83.

10.17	We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate. Consultation Paper, Part 3, paragraph 3.88.

10.18	We ask consultees: (1) whether the ability of landowners and occupiers to prevent Code Operators from assigning the benefit of agreements that confer code rights causes difficulties in practice; (2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and (3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement. Consultation Paper, Part 3, paragraph 3.92.

10.19	We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code. Consultation Paper, Part 3, paragraph 3.94.

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

10.21	Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.

10.22	Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.

10.23	We ask consultees: (1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers; (2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and (3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights. Consultation Paper, Part 3, paragraph 3.106.

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

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

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

10.26	We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests. Consultation Paper, Part 4, paragraph 4.20.

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.

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

Network Rail ("NR") is keen to keep the existing special regime for the following reasons:

- **NR is in a different position from most landowners in that it has a statutory duty to keep the railway running efficiently and safely and is not, therefore, purely concerned with the preservation of its own interests.**
- **For safety reasons, there needs to be strict control over entry on to railway land.**
- **Any works requiring unplanned closure of the railway could involve NR in paying substantial fines to train operators for disruption to their services. As NR is partly publicly funded, this would not be in the tax payer's interest. Also, NR's relationship with its stakeholders would be damaged by an inability to control activities on the railway.**
- **The special regime is not unfair to operators and need not cause them undue delay in carrying out works. It simply requires them to give NR 28 days' notice of planned activities which will be well within their capabilities. This gives NR the opportunity to negotiate modifications to the works, if considered necessary, and the safety net of being able to refer issues to arbitration if negotiations fail.**

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

The regime is used by us, but we do not have the exact data to hand. If you would still like this, please let us know and we can carry out some further research.

(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?

NR considers that it is very important that the criminal sanction is kept as a deterrent to unauthorised works on the railway, the consequences of which could be severe as set out above.

(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)?

This would be for operators to answer but NR is not aware that the limit causes any problems. If it were proposed to extend the rights to equipment other than a line and ancillary apparatus, NR would need to consider whether any additional safeguards were required for the protection of the railway.

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

We are generally satisfied with the current regime.

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.

NR considers it essential that paragraph 23 is retained. NR must be able to carry out repairs, maintenance, upgrading and improvements to the railway as these are required.

10.31 We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code.

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.43

ALTERATIONS AND SECURITY

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

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

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

10.35	We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code? Consultation Paper, Part 5, paragraph 5.18.

10.36	We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.

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

10.38	We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.

10.39	We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus. Consultation Paper, Part 5, paragraph 5.50.

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

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

FINANCIAL AWARDS UNDER THE CODE

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

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

Do consultees agree?

Consultation Paper, Part 6, paragraph 6.35.

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

Consultation Paper, Part 6, paragraph 6.36.

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

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

Consultation Paper, Part 6, paragraph 6.73.

10.45	Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable). Consultation Paper, Part 6, paragraph 6.74.

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

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

TOWARDS A BETTER PROCEDURE

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

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

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

10.51	We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.

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

10.53	We also ask consultees whether different rules for costs are needed depending upon the type of dispute. Consultation Paper, Part 7, paragraph 7.38.

10.54	We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service. Do consultees agree? Consultation Paper, Part 7, paragraph 7.52.

10.55	Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how? Consultation Paper, Part 7, paragraph 7.53.

10.56	Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided? Consultation Paper, Part 7, paragraph 7.54.

10.57	We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.

INTERACTION WITH OTHER REGIMES

10.58 We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease.

Do consultees agree?

Consultation Paper, Part 8, paragraph 8.22.

NR agrees that having two regimes potentially applying to the same set of circumstances is confusing, and that the Code affords adequate protection to operators for the purposes of their business. NR agrees to the proposal that the 1954 Act should not apply to leases.

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

Do consultees agree?

Consultation Paper, Part 8, paragraph 8.33.

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.

Your Reference:
Our Reference: SEC/gen

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Web: www.pla.co.uk

26 October 2012

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

Dear Sir

By email and post

Consultation Paper on The Electronic Communications Code

It has come to our attention that the Telecommunications industry is seeking major changes to the current Code of Practice. As the statutory body responsible for the safety of navigation within the Thames area, we are concerned that the proposed changes could compromise our statutory duty to underwrite navigational safety. Apart from the onerous obligations placed upon us as landowner, there is the risk that increasing the amounts of electronic equipment using our sites could jeopardise the performance of our own radars and other aids to navigation. Thus in the absence of more detailed information and any specific savings for the PLA we must formally object to the current proposals.

We shall be alerting the Department for Transport to our concerns but if, in the meantime, you wish to discuss those concerns, please contact

Yours faithfully

Secretary to the Board and General Counsel