By Post and email (propertyandtrust@lawcommission.gsi.gov.uk)

Your Ref: Consultation Paper 205

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

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26 October 2012

Dear Sirs

The Electronic Communications Code – Consultation Response

I welcome the opportunity afforded by the above consultation to assist in addressing the difficulties arising out of the existing provisions of the Code which are explored in your consultation paper. The Law Commission is to be commended for the comprehensive and engaging analysis of this very complex area of the law.

This is a response, in his personal capacity, to the consultation on the reform of the Electronic Communications Code ("the Code"). It is based on my extensive experience dealing with disputes concerning telecommunications sites over a number of years. Please note that other solicitors from Pinsent Masons will also be responding to the consultation separately.

I set out my response in this letter by reference to the paragraph numbers of the consultation paper. As you can see, I have not responded to all of the questions in the consultation but have focused on the pivotal issues and areas in relation to which I have the most experience and expertise.

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?

Yes. Some of the crucial rights required by Code operators are set out at paragraph 2(1) of the Code and the provision should continue to do so.

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?**

It is not clear that the existing right in the Code to "alter" apparatus would allow an operator to substantially upgrade existing equipment. If the Code rights are to be "technology neutral" and 'future-proof', I would like to make a positive case for a right in favour of operators to *replace and upgrade* apparatus. It is only with such a right that the UK's telecommunications infrastructure can keep pace with new technology, greater capacity requirements and changes in frequency. I explore the right to upgrade in more detail at paragraph 3.78.

3.18 **Do consultees agree that code rights should be technology neutral?**

I agree that the revised Code should be technology neutral. I do not consider that separate regimes for different types of technology would be helpful. In addition, telecommunications technology is subject to evolutionary developments (such as 3G to 4G) and significant leaps which I cannot, at this stage, predict. I consider that it is important that the rights granted in the revised Code should not only cater for, but should encourage, these developments.

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

Please note my response at question 5.50.

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?**

The Code defines "electronic communications apparatus" as equipment designed or adapted for use in connection with "an electronic communications network". Section 32 of the Communications Act 2003 defined such a network to be a system for the transmission of signals including the apparatus and software used by "the person providing the system". This implies that, in any particular case, the apparatus is to serve one particular operator. However, the modern reality is that operators often collaborate to commission and operate sites for the purposes of multiple networks. Therefore, I recommend that the Code's definition of "electronic communications apparatus" be amended to refer to equipment used in connection with "one or more electronic communications network".

I am often involved in disputes where site providers threaten to interfere with the power supply to equipment. Operators tend to respond by taking, or threatening to take, injunctive proceedings. In the course of these disputes, the existence and scope of the protection afforded by the Code to the power supply cables serving the electronic communications apparatus is at issue. I consider that such a power cable would fall within the scope of "*any wire or cable . . . which is designed or adapted for use in connection with the provisions of an electronic communications network*". However, an amendment to Code (possibly to the definition of electronic communications apparatus) to clarify that electricity supply equipment consists part of the electronic communications apparatus, and is protected by the Code, would be welcome.

Otherwise, I consider that the broad definition of electronic communication apparatus assists in the technology neutrality of the Code.

3.40 **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.**

The 'priority provisions' of paragraph 2 of the Code, appear to me, to work reasonably well in relation to electronic communications apparatus installed for the benefit of the occupier.

However, in my experience, the abstruse manner in which paragraph 2(2) to 2(9) of the Code are expressed leads to unnecessary disagreement between operators and those with interests in the land. The comments of Mr Justice Lewison in *Geo Networks Ltd v The Bridgewater Canal Company Ltd* come to mind - he said that he considers that the Code "must rank as one of the least coherent and thought-through pieces of legislation on the statute book". I would suggest that the provisions of paragraph 2 are wholly redrafted in their entirety in order to clarify and simplify their operation.

I agree that the site provider should not be able to grant rights over the land which exceed his own interest. However, before entering into an agreement pursuant to paragraph 2 of the Code, the operator should be able to identify and then come to terms with the relevant site provider (or operate the provisions of paragraph 5 in relation to that interest). In this regard, paragraph 2 and/or 5 would benefit from a right for the operator to serve a notice requiring the recipient (who will usually be the occupier) to identify the extent of their interest in the land and, to the best of their knowledge, other owners of interests in the land within a particular period of time. Provisions similar to section 40 of the Landlord and Tenant Act 1954 may be suitable.

In the case of a mobile telephone mast, I do not agree that the occupier of the land upon which the mast and related equipment is to be installed is likely to want the supply of electronic communications services. It is more likely that the occupier is simply making the land available to the operator for the provision of services to the general public. The equipment serves the needs of the wider public, rather than merely those of the occupier of the land. Therefore, there is greater justification for freeholders and others with superior interests to be restrained by the rights granted by the occupier (such as their tenant) even where that occupier's interest comes to an end. I consider that the paragraph 21 (with some amendment) will provide appropriate machinery for the relevant authority to determine the matter by balancing the interests of the site provider who wishes to remove the equipment and the operator who wishes to retain it.

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 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 compensated by the sum that the Code Operator could be asked to pay under a revised code?
(3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how?

The Access Principle centres on whether a person is "denied access" to "an electronic communication network". In its current formulation, it effectively weighs against a Code operator that wishes to enter the market in a particular locality where network users already have access to one other network. This could have the effect of granting dominance to the operator of one particular network over others in that market.

Denial of access is still an issue in certain parts of the UK, particularly in rural locations. However, the Access Principle in its current form is an outdated and unhelpful concept in the modern telecommunications market in the UK. Telecommunications (as it exists today) is a fast-moving but mature market which is no longer about providing "an" electronic communications network but is more about providing consumers and businesses choices of high-quality, robust communications networks and innovative services. The Code should promote choices of resilient networks to end users using cutting-edge technology.

(1) However, the interests of the public and the operators must be balanced against the interests of those individuals with pre-existing rights to the land. Therefore, I consider that the relevant authority should always consider the public interest and prejudice to the landowner even where the landowner can be adequately compensated in money.

(2) Where the landowner cannot be adequately compensated in money for the dispensation with his/her agreement, I consider that the relevant authority should gravitate against the imposition of rights over the land to the operator. However, this does not mean that it should be impossible to dispense with the landowner's agreement. In any particular case, the wider public interest in granting the rights might outweigh the interests of the landowner who will receive some, but possibly inadequate, compensation.

(3) Therefore, I recommend that the Access Principle is replaced with a menu of factors that the relevant authority will take into account when determining whether Code rights should be imposed on a landowner. I consider that these factors should include:

(a) whether the end-users have access to an electronic communications network;

(b) whether they have choices of electronic communications networks;

(c) the quality of the electronic communication services made available to the

end-users;

(d) the improvements that the proposed installation will enable to those services;

(e) the nature of the locality;

(f) potential detriment to the integrity and resilience of the network if the rights are not granted;

(g) any firmed and settled plans that the objecting landowner may have to develop or occupy the land in question in a manner that is inconsistent with the installation / retention of the equipment; and

(h) any suitable alternative accommodation that the landowner has offered to make available to the operator.

In the event that the Law Commission would like to retain paragraph 5 in largely its current form, I consider that the simplest and most straight-forward solutions to the paragraph's immediate problems could be addressed as follows:

(i) the word "and" should replace "or" at the end of paragraph 5(3)(a) in order to resolve the possible non-compliance of the provision with Article 1 of the First Protocol of the ECHR by balancing private and public good; and

(ii) the words "and in determining the extent of the prejudice" should be deleted as they do not make sense (as acknowledged in the consultation paper).

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.**

I agree that this would be beneficial and just.

In addition, I would suggest that where the site provider benefits from easements or rights over neighbouring land, it should be entitled to share use of that easement or right with the operator or its supplier (such as an electricity supplier). Such use should not be considered to be overuse or abuse of that right / easement as long as that operator / supplier makes only reasonable use of that right and then only for the purposes of the rights granted under paragraph 2 of the code.

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

(1) As mentioned above, it is not clear that the existing right in the Code to "alter" apparatus necessarily allows an operator to substantially upgrade existing equipment. If the Code rights are to be 'future-proof' as possible, I would like to make a positive case for a right in favour of operators to *replace / upgrade* apparatus. It is only with such a right that the UK's telecommunications infrastructure can keep pace with new technology, greater capacity requirements and changes in frequencies.

However, an open-ended right to upgrade could result in (a) physical burdens on land / buildings which the parties may not have anticipated at the outset and (b) the agreement or imposition of higher licence fees / rents than might be payable for more restrictive contractual rights (for rights that the operator may not intend to use).

On balance, I consider that the Code should expressly provide that the operator may carry out upgrades (even where they are forbidden, or not envisage, by the agreement) but:

(i) the landowner may prevent the upgrade where the works, or the manner in which it is proposed that they will be carried out, are likely to leave the land / building unreasonably damage (i.e. in the extreme case of substantial increase the weight of equipment which would not be borne by the roof on which the equipment is situated);

(ii) the landowner may place reasonable conditions upon the performance of the upgrade works (i.e. in a good and workmanlike manner, in accordance with health & safety regulations etc);

(iii) where, under the agreement, the operator requires the landowner's consent, the landowner will not unreasonably withhold or delay that consent (akin to section 19(2) of the Landlord and Tenant Act 1927).

(iv) the parties may agree conditions in which the landowner's consent will be granted, but those conditions should be objectively reasonable.

(2) I consider that additional sums should only be payable where an upgrade leads to an increased burden on the land or building. Where there is no appreciable change in the use of the land from the site provider's perspective, no additional payment should be required. The relevant authority can determine the sums due where the parties are unable to agree whether a sum is payable and, if so, how much.

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 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.

(1) Operators face increasing regulatory, costs, environmental and commercial pressures to share equipment. Regulation 3(4) of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 states that operators "where practicable, shall share the use of electronic communications apparatus".

Over the last few years, Code Operators in the UK are increasing collaborating with one another to share infrastructure in order to reduce operating costs and the superfluity of sites. As a result, in my experience, the ability of landowners and occupiers to prevent Code Operators from sharing their equipment is currently one of the most significant causes of disputes in relation to telecommunications property.

(2) I consider that the provisions of the Code should actively encourage operators to share their sites. Therefore, where an agreement prohibits sharing occupation or possession, the Code should intervene to grant a statutory right to share. Where the agreement permits sharing but subject to conditions, those conditions should be reasonable. Where the landowner's consent is required, that consent should not to be unreasonably withheld or delayed. However, where existing apparatus is to be shared, it is difficult to envisage in what circumstances it would be reasonable for the site provider to object.

(3) I do not believe that sharing should be subject to payment of a price as this would act as a disincentive to sharing (which the Code should actively encourage).

3.88 **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.**

I do not find section 134 to be useful in enabling apparatus to be shared between two operators. Sections 134(1) and (3) legislate in relation to an occupier's choice of a telecoms operator and prevent its landlord or licensor from reasonably withholding consent to a departure from that prohibition or restriction. Sections 134(2) and (4) also concern things done inside a building occupied by the lessee in connection with the provision to the lessee of an electronic communications service. I would suggest that section 134 or the Code is amended to allow operators to share equipment with one another.

3.92 **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 collaboration of Code Operators, in the form of joint ventures, mergers or otherwise, has demonstrated that difficulties can arise from landowners preventing the assignment of agreements (such as leases and licences) which confer Code rights.

Where the agreement is a lease, there is a well-established body of case law and a statutory regime which, I consider, sufficiently regulates the conduct of operators and landowners. I refer, in particular, to the Landlord and Tenant Act 1988, sections 19(1) and 19(1A) of the Landlord and Tenant Act 1927 and section 144 of the Law of Property act 1925.

I recommend that a revised Code contain similar statutory provisions concerning the assignment of licences or other agreements which confer Code rights. This will deal with the inconsistent regulatory treatment of the assignment of telecoms leases and telecoms licences. No additional payments should be payable by the operator to the landowner or occupier when it assigns its agreement.

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

In my experience, unlawful interference with apparatus, and in particular its electricity supply, does occur occasionally. Typically, such interference is carried out on behalf of site providers who wish to apply illegitimate pressure to prompt operators to remove their telecommunications equipment from the land. I have acted for operators to persuade landowners to cease the interference by reference to the civil, and possible criminal, consequences of damage to equipment.

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

I consider that the remedies that are currently available to the parties in such disputes are sufficient to deal with the problems with unlawful interference.

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 Operators' networks at risk. Do consultees agree?**

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?**

The consultation paper has taken paragraph 20(1) to give a landlord (or his neighbour) the right to terminate a lease of a telecommunications site at any time on the basis of a proposed development. On this interpretation, a rolling development-based break right is effectively inserted into the lease (albeit subject to a notices procedure and, ultimately, court determination).

Where parties have agreed to the grant of rights for a fixed period of time without a right of early termination for either party, I do not believe that the revised Code should intervene to introduce such a right. The operator and the landowner negotiate the occupational document based on their respective plans for the site and, once it is agreed, are expected to comply with its terms. If a development in planned at some future date, the site provider is free, in negotiating the lease, to agree terms for a break right or "lift and shift" provisions. In my experience, landowners commonly do negotiate such provisions.

However, once the fixed term of the operator's lease or licence has expired, the site provider or adjacent landowner should be able to require the alteration or removal of the equipment to facilitate a development which the landowner genuinely intends, and is (but for the operator's equipment) able, to carry out. The reasonable costs of any relocation should be borne by the party seeking to impose the party requesting it, unless the relevant authority considers otherwise.

The vast majority of disputes concerning the alteration of apparatus are resolved through negotiations between the parties. They typically agree that telecommunications equipment is temporarily relocated on the site provider's land whilst the development works are carried out before the apparatus is reinstalled on the redeveloped / new building. Where the parties are unable to reach agree, there is a general reluctance amongst operators and site providers to use paragraph 20. This reluctance arises, in my experience, not from the terms of the provision itself but the cumbersome and time-consuming resolution process under the Code and in the county court.

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?**

Yes. I believe that it is crucial that the Code should limit the rights of landowners to remove electronic communications apparatus.

5.48 **We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully. Do consultees agree?**

Yes, subject to it being clear that local authorities are enforcing removal in their capacity as planning authorities and not as owners of land. I would recommend that operators are given a period of 28 days to either
(a) remove apparatus installed in alleged breach of planning; or
(b) make a court application for a declaration that the installation is not in breach.

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?**

In my experience, once the operator serves its counter-notice, it often does not serve a notice under paragraph 5. Instead, it commonly seeks to reach a negotiated resolution with the site provider and/or searches for alternative sites in the vicinity of the existing one. This is to be encouraged and I do not think that the parties should be rushed to court. If the site provider loses patience with this process, it should be at liberty to commence proceedings. Indeed, I believe that the onus should remain on the landowner desirous of the removal of the apparatus to commence proceedings seeking an order to that effect.

However, in order to avoid matters falling into abeyance or deadlock (as they often do), I suggest that the revised paragraph 21 specify a long-stop period of time (for instance, one year from the counter-notice). At the end of that period, if the operator has not serve a paragraph 5 notice or otherwise secured rights in relation to the site, the landowner may commence proceedings, but the costs of those proceedings (unless the court thinks otherwise), should be borne by the operator. This shift of the costs liability would, I believe, have the effect of forcing the operator, towards the end of the specified period, to either vacate the site as requested or serve a paragraph 5 notice in order to remain on it.

Site providers often serve notice under paragraph 21 of the Code in order to progress negotiations for the renewal of the occupational lease or licence, or to try to force a concession in those negotiations. Therefore, I would suggest that a new paragraph is introduced, akin to sections 25 and 26 of the Landlord and Tenant Act 1954, whereby either the site provider or the operator can serve notice on the other after the expiry of the existing telecommunications licence seeking to agree terms for a new licence. I envisage that the notice will give the parties 6 to 12 months (subject to agreed extensions) to come to terms or apply to the relevant authority to determine them. In relation to agreements by way of a lease within the Landlord and Tenant Act 1954, I would recommend that that Act continues to apply to the renewal of the tenancies.

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.**

Yes, I believe the code would benefit from such provisions. Paragraph 7(3) of the Code caters for the financial consequences of the retention of apparatus on land during the aforementioned period but only in the context of paragraph 5 proceedings (which, in practice, are rare).

I would suggest that the terms of an expired agreement (including payment of rent / licence fees but excluding the requirement to yield up) continue to apply until the code rights are terminated pursuant to paragraph 5, 20 or 21.

5.51 **We provisionally propose that Code Operators should be free to agree that 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 the consultees agree?**

Generally speaking, I believe that the parties should have freedom of contract. In addition, some potential site providers may be unwilling to make their land available for telecommunication installations because of the protection afforded by paragraph 21. They may be more willing to do so if the parties could contract out of paragraph 21. This may result in more sites becoming available to operators and a reduction in the licence fees or rents payable.

However, I still have serious reservations about a right to contract out and, on balance disagree with it. The landowner is usually in the strongest bargaining position in negotiating the terms of a telecoms lease – the operator needs to install equipment at that location but the landowner does not usually need the installation. The ability to contract out of paragraph 21 would most probably lead to a standard market practice where nearly all site providers will insist on contracting out and nearly all telecoms leases and licences will fall outside of paragraph 21. As a result, paragraph 21 could be rendered redundant.

6.35 **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 concerning or in other land, should be available to all persons bound by rights granted by an order conferring code rights. Do consultees agree?**

Yes. A single entitlement with clarity and simplicity in the determination of the compensation would be most welcome.

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' views on the practicability of this approach, and on its practical and economic impact.**

The existing provisions of the Code dealing with consideration are overly complex and cumbersome. As a result, operators and site providers are uncertain about the outcome of disputes concerning consideration and are reluctant to revert to the court to resolve disputes, even with the benefit of expert legal and valuation advice.

The application of compulsory purchase valuation principles is generally well understood by valuers and supported by a body of case law (at least in other contexts). The principles will provide controls on the level of payments to site providers and, as a result, promote the expansion of telecommunications infrastructure to the public benefit. In particular, operators will be incentivised to expand their networks to respond to changes in technology, market

demand and spread their services to rural areas where otherwise (based on market rentals) it may not be cost-effective to do so.

However, this valuation approach is likely to lead to significant reductions in the amounts payable to site providers for telecommunications sites. Landowners may, as a consequence, be less likely to make their sites voluntarily available for operators. The operators may, in turn, need to make more use of the paragraph 5 and this could have the effect of turning a telecommunications market which is, at this time, predominantly based on consensual market dealings into one based on the compulsory acquisition of rights. In addition, the approach does not benefit from the body of comparable evidence in the telecommunications context that valuers acting for operators and site providers have, over time, developed. Therefore, the initial implementation of a new method of determining consideration based on compulsory purchase valuation principles will be challenging.

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?**

I agree that the county court is not appropriate, in terms of expertise or resources, to resolve disputes under the code.

7.27 **We ask consultees' view on the suitability of forums for dispute resolution under a revised code.**

I agree that the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber of the First-tier Tribunal or visa versa) would be a more suitable forum. I am, however, concerned that the tribunal should be sufficiently resourced to deal with disputes in a timely and effective manner. The members of the tribunal should be appropriately experienced and trained experts to enable them to deal with such specialist telecommunications matters. This would require significant initial and ongoing investment.

The crucial issue for all parties is the inordinate amount of time which a dispute can take to determine (particularly if heard in the county court). It is important that the parties can resort to the tribunal with a legitimate expectation that the matter will be resolved within a matter of a few months. Of course, if the parties and the Tribunal wish, referrals can be stayed pending any ongoing negotiations or to undertake a mediation.

In addition, there may be cases that the Tribunal considers would be best dealt with by the Technology and Construction Court at the Royal Courts of Justice and so the Tribunal should have the option of transferring cases to it.

I am aware that it has been suggested in some quarters that there should be separate forums for valuation disputes on the one hand and entitlement disputes on the other. I do not think such a split of forums would be helpful. It will increase cost and complexity and cause delay. It would be preferable for the tribunal to deal with both questions and, where possible, at the same hearing.

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?**

I consider that it may possibly be appropriate for operators to have the power to undertake installation works after the service of a paragraph 5 notice in relation to fixed line telecommunications equipment where the operator has no real alternative but to install the equipment at a particular location.

However, in relation to mobile telecommunications masts, the operator will often have alternatives to the site in question and so, in those circumstances, it does not appear appropriate to allow the operator to install equipment without the consent of the landowner or the relevant authority.

That said, it should be open to the parties (indeed they should be encouraged) to agree that the operator will install its equipment but for the terms of that occupation to be determined by the relevant authority in due course.

7.37 **We seek consultees' views as to how costs should be dealt with in cases under a revised code, and in particular their views on (1) costs to be paid by the operator unless the landowner's conduct has unnecessarily increased the costs incurred; or (2) that costs should be paid by the losing party.**

I do not consider that a requirement that operators generally pay the costs of proceedings would be suitable. A landowner would be less likely to engage in meaningful negotiations (except to create an appearance of reasonable conduct) in the knowledge that the operator will probably be liable for both the landowner's costs and its own.

I suggest that there should be general rule that the unsuccessful party pays the costs of the unsuccessful party, but that the relevant authority should determine the costs at the end of the hearing having regard to the conduct of the parties.

Where the landowner has refused to grant rights but, on the application of the operator, the tribunal grants those rights, the winning party is clear.

However, if the parties are in accord that the installation should take place but disagree on the terms (for instance, the rent / licence fees), it may be difficult to determine who (if anyone) is the losing party. The tribunal will need to assess on what points each side won and lost, set them off appropriately and come to a fair judgment on whether one party should contribute to the other party's costs and, if so, what proportion and amount. I anticipate that, in most cases, the tribunal would conclude that each side should bear its own costs.

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 of tenure provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease. Do consultees agree?**

I agree that some landowners find dealing with the two statutory regimes of the Code and the Landlord and Tenant Act 1954 confusing. There are also some real inconsistencies between the regimes which need to be addressed. Whilst your proposal to disapply the Act to

telecommunications leases is, therefore, superficially attractive, I do disagree with it and set out my reasoning here.

The landowner and the operator are free to agree a licence or a lease contracted out of the Act. In either case, the Act would not apply. Therefore, they have control over whether both statutory regimes will apply, or just the Code. If the parties enter into a lease which does not contract out of the Act, that choice should be respected.

In addition, the Act provides a tried and tested process for the renewal of telecommunications leases, supported by a strong body of case law. In my experience, operators and site providers are able to effectively use the Act to resolve disagreements regarding whether new leases should be granted and, if so, on what terms.

In any case, the issues between the Code and the Act can be addressed without disapplying the Act. I recommend that paragraph 21 is amended so that, where the lease is protected by the Act, the competent landlord is deemed to be entitled for the time being to require the removal of the operator's apparatus for the purposes of paragraph 21 (and may give notice to the operator under paragraph 21(1)) if the landlord has complies with section 25 of the Act. The reformed code can also provide that the Lands Chamber of the Upper Tribunal has the power to determine that the apparatus should be removed under both the Code and the Act.

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.**
Do consultees agree?

Rights pursuant paragraph 2 of the Code do not, in themselves, confer proprietary rights. However, those rights do, in general, bind successors in title. Therefore, I agree that the rights should be registrable on the Land Register. This is a failing of the current Code which the revised one should rectify.

I hope that response is helpful to the Law Commission for the purposes of your final report of recommendations to Parliament. I understand that you expect to prepare this in the spring of 2013.

If I can be of further assistance, or if you have any queries arising out of the above responses, please do not hesitate to contact me. I can be reached on [redacted] and at [redacted]

Yours faithfully

Dev Desai
Senior Associate
for Pinsent Masons LLP

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):**
Peel Holdings Land and Property (UK) Limited group of companies, their subsidiary companies (including The Bridgewater Canal Company Limited) of Peel Dome The Trafford Centre Manchester M17 8PL & other clients
If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
The matters that my client wishes to be treated as confidential are noted and explained in my covering letter. No such information is mentioned in these responses.
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

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

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

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

(3) to enter land to inspect any apparatus.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.16.

We agree that, in principle, these are the activities that should be potentially subject to the Code so that when the Code is invoked by an operator they become Code rights.

The only proviso at this point is that Code protection should only be available in respect of apparatus that is the apparatus of the specific Code operator seeking to rely on the rights given by the Code.

Paragraph 2(1) does require that an agreement has to be in writing to be covered by Code but there are many instances where Code operators rely upon the Code while in breach of this. It should be clear from the Code that if an agreement is not in writing or, if in writing, does not declare that the Code applies then it is not covered by the Code.

As it becomes important to know if an agreement is covered by Code rights, we suggest that for an agreement protected for the purposes of the present paragraph 2(1)(b) of the Code, it should:

- be in writing
- invoke the Code
- provide for its term
- provide for consideration, its payment and review
- include necessary conditions regarding access, maintenance, indemnities (which are especially important to canal and railway operators), sub-letting, assignment, sharing use of the apparatus and not to cause nuisance
- provide for rights to be subservient to statutory rights and operational requirements of operators of canals and railways
- require the parties to act with timeliness
- provide for disputes to be referred to arbitration.

A mast with its cabin is almost of necessity the subject of a commercial lease. A cable may usually be, according to circumstances, installed under an easement or subterranean lease. Please note that the term “wayleave” does not appear defined under any statute and that term may perhaps be avoided in any revised Code to aid clarity and understanding. In my experience most of the terms usually found in property leases can be found in easements or leases of rights for cables.

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.

As the proposal above affords protection for the installation, repair, maintenance and inspection of a Code operator's apparatus we do not think there are other powers that need to be brought into the Code and can see that it is practical to retain the powers proposed.

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 Code rights should be technology neutral.

In principle and especially in a market that sees such technological development, it is right that the legislation be technology neutral. It should be entirely a matter for the market which technologies are used by whom and where. A distinction developed now could prove problematic in future decades as technology and apparatus change.

The purpose of the Code is to support the public's access to a communications network weighed against and subject to the interests of those on whom apparatus may be imposed. The Code operator and the specific technology (like the individual Code operators) is merely an intermediary in this of no specific interest in themselves to the Code.

Leases – under which the landowner is excluded from site for a defined period – are fundamentally commercial in character with a relatively deep, textured and understood market for their rents and widely varying terms (albeit largely reflecting the developing drafting of operators' lawyers). As mentioned in response to question 10.3 most of the terms usually found in property leases can be found in easements or leases of rights for cables. Similarly, the landowner is excluded from the 'tube' of rights granted to a cable operator.

Wayleaves, which are also commonly met in the context of utilities with standard compulsory purchase powers, have in the countryside often been addressed under advised standard rates per length of run such as those issued by the NFU and CLA, sometimes in conjunction with specified operators in the same way that they have traditionally done for utilities cables (as was debated in decisions in *Brookwood Cemetery*). Some owners of long landholdings have agreed bulk rates for cables running along their land (as in the manner of the old electric telegraph lines). There is clearly more value and detail in such rights crossing more valuable land, but those will often be subject to confidentiality agreements.

I do not see when coming to consider the payment regime that the nature of the right taken needs to be overtly reflected in any different basis of payment.

That is a matter of judgement and my client's preference would be for the present "fair and reasonable" basis to apply throughout under the Code as it has been understood (so excluding ransom value but not following *Bocardo*). However, it is recognised there is a case for it to apply similarly to leases. In this, it is noted that super-fast broadband is, at least today, a matter

essentially for fibre optic cables rather than wireless 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.

In the same way that a tenant is expected to use the property rented in a tenant-like way, so operators should have obligations in respect of property rights held under the Code.

Given the statutory protection of the Code, it is right that these should include the obligation to liaise and negotiate with those with other interests in the land, especially the owner of the freehold. Experience suggests this does need statutory support rather than a mere Code of Practice. Official Codes of Practice have been seen to deliver little in the context of some utilities and operators' low levels of engagement with owners over renewals and do not suggest a promising starting point for a Code of Practice in this sector.

They should carry liability for the consequences of their apparatus and its use. In the case of my clients' canals, it is vital that Code Operators are obliged to comply with my clients' statutory obligations and operational requirements and any rights granted to operators should be subservient to those requirements and obligations. There will be further issues where my clients will require cooperation from the operators;

- in terms of the method of installation,
- complying with safety notes
- the siting of any apparatus,
- meeting my clients' costs in supervising that work,
- not interfering with my client's canal and associated facilities,
- safeguarding their own apparatus,
- indemnifying my clients against loss, damage and injury
- diverting their apparatus in the event that it interferes with the statutory function of my client or its operational requirements
- accepting that the operator is there at its own risk, with the canal company not being responsible for flooding or damage to the cable

Many of these matters will be dealt with under freedom oft but the above non-exhaustive list may give the Law Commission a better understanding of the reasonable requirements and concerns of a canal operator. I would submit that the Code should make the Code rights subservient to the statutory obligations and operational requirements of the canal operator.

It should be a matter for the Code Operators whether they use insurance or self insure, but the liability for loss and damage arising from their Code rights should be clear, especially in the case of works near canals. Where masts are concerned operators can in practice be concerned to impose a limit on their liability – a point which troubles some landowners who can see that this means they could then face claims in excess of that limit.

While an easy answer would be to require insurance for this, it may well be that it is best for the Code to impose full liability and leave it to the operator to demonstrate how it is doing it. Obtaining parent company guarantees may be one way forward, particularly if the operator has established a new subsidiary company to take on one particular project (eg FibreSpeed set up by Geo Networks to provide connection to North Wales). Where there are large portfolios of assets, it can often make sense to carry the risk internally rather than incur the overheads of insurance (self insuring). The main threat to that strategy is where an otherwise diverse portfolio faces a single universal risk for which the most obvious present candidate is a challenge on health grounds

That should include bonds to guarantee the funding for decommissioning apparatus. These have been talked of but it is not clear if operators actually do make any general provision for such work. This is standard practice for such projects as wind turbines.

As discussed below, under approaches to payment for Code rights, the privileges they bring make it hard to see that confidentiality agreements over payment rates are warranted. Excluding those where Code rights are invoked would much aid the transparency of the cable market in particular.

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

Consultation Paper, Part 3, paragraph 3.27.

The definition of apparatus must, of necessity, be general and based on purpose rather than its nature. The history of technological development and the unforeseeable nature of its future make any alternative foolish, unnecessarily storing up problems.

Even 30 years ago almost no one would have foreseen the mass use of mobile communications now taken for granted.

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 persons bound by Code rights should be the specific parties to the agreement, that is the specific operator (who is then protected by the Code rights) and the person(s) with the interest in the land capable of granting the agreement – not the person who happens to be the occupier. It cannot and should not run wider than that to burden those who have not consented or by paragraph 5 type action be deemed to have consented. In principle, the agreement should be with or include the owner.

The present provisions of paragraph 2(4) are woefully complex and in practice misleading since parties that may not be legally bound under 2(4), are for all practical purposes (and a acknowledged by the analysis in the Consultation Paper, treated as bound when it comes to the important issues of alteration and removal in paragraphs 20 and 21. This is entirely inequitable.

At various points the Consultation Paper appears to presume that the grant of Code rights is to the benefit of the occupier (or indeed the owner) of the property. While this may well be the case for a direct line or cable to a property, it is most specifically not the case for most masts and core cables – and, indeed, not where the telephone line to a house has to cross other land. The point of

the networks that form one of the basic concepts of the Code is that they do impose on people whom they do not directly benefit. Analytically, the issue of benefit to an occupier is best treated separately from and not confused with the imposition of Code rights.

It is reported that an occupier's agreement has on occasion been construed from it being shown that he had done no more than fill in an operator's application form. This may raise few, if any, problems where the occupier is the owner but can become very problematic where there are tenancies and licences in place. The risks of this are shown by the Consultation paper's own recognition that a weekly tenant would be the occupier.

In practice, the agreements covering such occupations will frequently exclude any power to grant the rights sought. Even agricultural tenancies with lifetime or long term security will conventionally exclude the right to grant easements and wayleaves or to sub-let. The occupier will not, just by being an occupier conventionally hold the interest (or all of it) in future development rights in the land that could be profoundly compromised by the effect of Paragraph 20 and 21. In the case of an agricultural tenancy, non-agricultural development is often a ground for a notice to quit while the tenant's erection of agricultural buildings which might involve Paragraph 20 or 21 is again conventionally subject to consent.

This suggests that paragraph 3.30 of the Consultation Paper is wrong to suggest that the focus of the application should be on the occupier. It cannot be sensible to waste time on a party who does not have capacity to grant the right nor right to focus on the person who may not be the one who could suffer most from the imposition.

This focus on the occupier appears to be a problem created in 1984. The original 1863 legislation required the consent of the owner, lessee and occupier. The 1982 Consultation Paper felt that should be amended because:

- difficulty in obtaining multiple consents and finding who the parties were – but this is done for compulsory purchase
- remote interests should not prevent someone from securing a service (the example was a property on a long lease)
- landlord had used this to harass tenants – there is other legislation to control this
- a further issue of applications to the court to require the landlord's consent

Even then, the Consultation Paper's conclusion was that where the occupier was a short term tenant, landlord's consent would still be needed (with legislation that it was not to be unreasonably refused). It would be for the operator to secure further consents if that was felt necessary to protect its commercial position.

We now have nearly 30 years' experience of the focus on the occupier and the apparently necessary consequential rule that even if an owner is not bound by an agreement he is bound by paragraphs 20 and 21. That outcome is one reason why owners, becoming aware of the impact of the Code are suspicious of it.

In essence, therefore, our conclusion is that the more practical answer is for anything other than a brief licence, the agreement should be with the owner and anyone else with a long term interest in the land i.e. the person or persons capable of granting the interest required. No one who cannot grant the right should be party to an imposed agreement for that right. If fair and reasonable value is not to be paid (see 10.44) then these requirements should include a mortgagee as well as a tenant with a secure interest where that interest endures after the grant.

Operators can carry out the same research that promoters of compulsory purchase schemes undertake to investigate ownership interests ahead of implementing their scheme. With a majority

of land being registered, this is a more practical option than it would have been in 1984.

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.

This is a fundamentally important question about what is sufficient to warrant imposing apparatus on private property. Given the sense that the public's interest in access to electronic communications means there should be a Code, it seems right that that should be a demonstrable and significant benefit. Lewison J followed this through in his decision in the first court hearing of *Bridgewater*:

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

Any re-working of the test for imposing an agreement should allow for the possibility that the landowner's (or other) concerns are capable of outweighing that public interest in access and might helpfully cast more illumination on when that might be.

It is a serious criticism of the present version of this Access Principle that it appears to be a test that an operator cannot fail. That largely arises from the requirement that satisfying either leg of the present test will suffice. Since we have so far neither met nor imagined any realistic circumstance in which the imposition could not be compensated for in financial terms, it appears impossible to fail since the second leg of benefit need never be tested.

This, together with there being payment for the rights, is perhaps a key to answering the question that can be raised under Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms. Case law suggests that courts look to weigh competing claims under the Convention and apply a sense of proportionality.

Thus, the Access test should address whether the gain in the public's access to electronic communications is sufficient to warrant the specific proposed imposition on private property and the people affected (who, as will be suggested, need not just be the affected owners). Where voluntary agreement is not forthcoming, that test should turn on whether the gain is demonstrably significant – especially were the payment to be based on a no-scheme assumption rather than today's fair and reasonable consideration.

The weight of that will vary according to the existing available provision and so be less in areas where there is already provision to good contemporary standards. Yet there are those people in "not spots" – where perhaps public access to **A** network would be in the public interest – and others in areas 'only covered by 4 rather than 5 operators – where the case is less demeonstable. The essential point is that the test should be so drafted that overriding private property rights needs particular justification so that Paragraph 5 powers should only be used as a last resort and not as standard practice where the parties might otherwise agree terms between themselves.

It is the public's access to electronic communications that matters, not the interests of any specific operators. It is the service that is or would be available to the public. Thus, it may well be that it is not an extra cable that is at stake (that may just be an operator's interest) but the services available through a cable. The Code's justification is that it is a charter for the public, not for any one operator.

The test has to remain a general one. By contrast to a world of landlines, access is no longer a simple question of being available or not being available. There are now issues of choice and quality to be taken into account, making the issue of access, when contested, one of judgement. That requires assessment of the evidence and then a requirement that, if the imposition is granted, the operator does then deliver the improvement in access that was claimed and which warranted the imposition.

It should be possible for the disputes forum to hold that an extra operator's service was not warranted if it found there was already good quality and choice that would not be markedly improved by the proposed apparatus. Does the gain from a fourth mobile operator warrant statutory imposition where it cannot be negotiated?

If the financial test is justified, then it should be a second further test to be met in addition, not as an alternative.

In conclusion, taking the specific questions in turn:

(1) The Tribunal should not be able to make the Order just because the prejudice to the landowner is capable of being compensated.

(2) This question probably concerns unusual circumstances we have not imagined. There seem to few things for which a payment cannot be assessed. If the payment due is large, that may lead an operator to review alternative situations. There may be ways in which the prejudice can be mitigated through the terms of the Order rather than by payment. Ultimately, if the prejudice cannot be made good by money or conditions, then it seems likely to be greater than the benefit at stake.

(3) As noted above, the present formulation is (and it seems right that it should be) wider than just the prejudice to the landowner. There may also be a prejudice to the public as well a benefit to the public, although the practical difficulty of involving the public in the parties' private dispute remains. It seems to need a simple expression weighing the benefit offered by the Order against the prejudice threatened by it. It is then a matter for the Tribunal to determine on the basis of the circumstances and evidence. Any more sophisticated formulation is likely to create more unforeseen problems than it may resolve, especially since so many of the issues may now be about quality and choice rather than the simple fact of service. The only proviso is that the Tribunal should consider whether terms or conditions should be imposed to mitigate the prejudice.

Payment of consideration does not weigh in this since it is a consequence of the agreement imposed by the order.

As a final observation, the tribunal should have complete discretion in this to avoid such situations as what appears to be a quirk of the present drafting that paragraph 5(3) requires the court to make an order if the test is met even if the operator no longer wants it. Analysis of this provision in particular cases suggests that where it can be shown that either of the tests are met the court *has* to award the order. Thus, if the prejudice is capable of being compensated the court has to award the order even if the operator changes its mind.

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.

At its most basic, the consent of an occupier should not bind anyone with a greater interest in the land than that occupier. Indeed, it may be that the practical occupier does not have any interest in the land.

As the consultation paper analyses, that may technically be the present position but the practical operation of the present paragraphs 20 and 21 is to bind superior interests to their potential considerable disadvantage. That should not happen.

Instead, it would be necessary to secure the agreement of the owner of the freehold (as well as any mortgagee).

In an agricultural context, tenants with security under the Agricultural Holdings Act 1986 and the Agricultural Tenancies Act 1995 are conventionally barred by their agreements from sub-letting while landlords reserve the sole right to grant easements and wayleaves. In either case, the tenant occupier granting such consent would be in breach of his tenancy agreement.

This part of the Consultation Paper considers neighbours from whom an ancillary right is sought since once they consent to an agreement they are then within the Code with all its consequences. The same points apply, that the agreement should be with the person owning a sufficient interest in the neighbouring land to grant the right sought and not just the occupier of that land.

Utilities seeking to exercise compulsory purchase powers over land need to identify those whose interests they are acquiring so it should not be as problematic for operators to do this as seems to be implied while a proper regard for property rights makes it 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.

The 3 metre clearance above private land does raise a particular problem with modern farm machinery and the movement of such important plant as irrigation pipes. It is assumed that no operator would want in practice to install an overhead cable at such a low height in these circumstances but even along hedgerows it would interfere with current or potential field accesses.

It should be understood that access may not only been needed to the fields of the person consenting but also by anyone with a right of way, as to a house or a quarry, beyond the owner in question. That may, for example, mean removal, delivery, quarry, plant or forestry vehicles.

With the opportunity of the review it would seem sensible for this figure to be reviewed and increased. A more practical answer still might be to follow the template of Regulation 3(2) of the Electronic Communications Code (Conditions and Restrictions) Order 2003 and require that the height above ground shall be sufficient not to interfere with the use of the land as at the date of the installation (unless the owner and occupier give consent).

Under the present Code Paragraph 17 give a time limited opportunity to object on a range of grounds but if the installation is problematic on such a point it would be better for those points to have been taken into account before installing it. That requires agreement and notice.

At the Consultation Paper's paragraph 3.62 and footnote 49, it is noted that permitted development rights may often mean that affected owners will not be aware of the prospect of the apparatus before it is installed. A general point flowing from that is that the bias of policy is to broaden permitted development rights so making the development control system less applicable, whether as a basic means of notifying affected parties or balancing conflicting public interests.

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

Consultation Paper, Part 3, paragraph 3.68.

It does seem reasonable that anyone potentially affected by apparatus should have a opportunity to object (or indeed support) where a proposal is being reviewed by a forum considering the public interest, whether a planning committee or a dispute forum considering whether to impose an agreement on an owner. Where possible, it seems better that these arguments are considered before the operator goes to the expense of installing the equipment, especially if it proves that the objector has a good case.

It is not clear why this issue is, as now, limited to overhead apparatus.

Where the owner consents, then the matter is perhaps of necessity left to be dealt with under a paragraph 17 procedure.

Overflying by cables is an issue that is found as an impediment to subsequent development in other sectors using cables. An example of an electricity case is the Lands Tribunal decision in *Turris Investments Limited v CEGB* concerning the claim for the impact of a overflying cable on a development proposal for which it would sterilise ground. That example points to the problems where payment for the Code right is not based on an unconstrained market value but on a no-scheme world where that no-scheme world then changes.

A more recent problem (also noted in considering powers to cut vegetation) concerns wireless links across property, whether that of the landowner who is party to the agreement or of a third party who may be ignorant of the wireless link passing over his property. That wireless link will then commonly lead its operator to object to any development that may affect it. This is a particular point in the countryside where such development (whether a building, woodland, a wind turbine or other) is more identifiable than in an urban context. It has now become an issue for the subsequent location and viability of wind farms – a form of development little contemplated for the first two thirds of the period in which masts have been in wide use.

Since (by contrast to deep oil wells or aircraft passing over at 35,000 feet) such links can therefore have a significant effect on the use and value of property, it seems right to give active consideration to:

- ensuring that affected owners are notified ahead of the link being established
- enabling a paragraph 17 type action to be available. Depending of the final shape of the larger Code this should perhaps not limited to three months from installation but to a period from being reasonably expected to be aware of the over-sail (that might relate to someone who only became aware of a microwave link on an application to lop their tees) or of a development proposal.
- ensuring that full reasonable compensation is available, particularly where it limits a planning permission that has been obtained.

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.

Code operators should be required to identify publicly their interest in overhead apparatus benefitting from Code rights with a notice that is readable by those who might also be interested, and in particular those who might wish to exercise paragraph 17 rights or to know of whom to inquire on considering buying or leasing property.

There may be parallels to be drawn with notices regarding planning applications.

Perhaps the real sanction is that Code rights should not apply unless they do so identify themselves – that may be more important to a corporate commercial entity than a criminal record.

We suggest elsewhere in this response that there would be benefits from ensuring that underground apparatus was similarly identified.

However it may be done, it should be possible for this who need the information to be able to find it without undue inconvenience.

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

(1) to vegetation generally;

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

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

Consultation Paper, Part 3, paragraph 3.74.

It is reasonable that the right to lop should apply all vegetation rather than be subject to a decision as to what constitutes a tree, but subject to the present procedure where this interference with private land is sanctioned by a court and only on the ground that it is necessary to maintain a service to the public.

When considering this in respect of wireless links, such a power may affect people living within a vast swathe of land who have no previous idea that they are so affected; they could own an arboretum or SSSI for example. That raises obvious practical problems of identifying the relevant owners and making them aware of the prospective cutting with chance for them to make any necessary representations. That may actually suggest that there are no Code rights in such a wireless link unless established by agreement and that without such Code rights no lopping should take place.

A register of such wireless rights could be of wider assistance making it easier for purchasers, mortgagees, longer term tenancies and others to be aware of the burden this may form for the property. Since it may be difficult for it to be comprehensive, the approach might be to say that registration of a public register was essential for Code rights to apply to the link. .

We note that the Consultation Paper's paragraph 6.80 acknowledges that extending lopping provisions to private land would require a compensation provision.

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) The operator should have no rights beyond those in the agreement which specifies the rights that operator is granted. Any alternative implies having granted a larger bundle of rights than would usually be the case. It would be strange for an agreement for a 24 fibre cable to imply an ability to increase the number of fibres or for a mast to carry upgrade rights beyond the agreement. Any such right is likely to add to any level of mistrust between landowner and operator.

In this, it is noted that "upgrade" may be very hard to define in a way that left both parties clearly understanding what they could or could not do, unless it gave the operator carte blanche. If any such right is given it should only be for the operator holding the agreement to upgrade its apparatus on the site for its use.

If this matter is left for the parties to determine under freedom of contract would avoid the

apparently inevitable problems of definition now and in unknown future that would arise if the Code were to intervene in this respect.

(2) Upgrading of apparatus beyond that agreed should be the subject of further agreement for which fair and reasonable terms should be due. In principle, they could often be expected to be granted for a further payment but that necessarily implies an unconstrained market basis for payment of consideration, not a no-scheme special assumption basis for market value.

10.16 We ask consultees:

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

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

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

Consultation Paper, Part 3, paragraph 3.83.

(1) It is recognised that operators may desire freedom of action on other parties' property and outside the agreements with those parties and so may feel frustrated where they do not have full and unfettered commercial flexibility. However, such ambitions should, like those of anyone else, be limited by their legal agreements and their ability to negotiate with those landowners and we do not believe there are unreasonable difficulties. These issues should not be difficult in practice if operators liaised in a genuine spirit with landowners and with the recourse that operators do have to paragraph 5 powers. The fundamental assumption of agreement that has long underpinned the approach of the Code should exclude a cavalier carte blanche approach which is surely incompatible with being granted limited statutory privileges by their licences to be Code operators.

Where a facility is shared, it means the owner is likely to be dealing with more parties wanting access to the property subject to the rights. It multiplies the number of legal relationships. It can create confusion as to which operators are genuinely using and protected by Code rights (especially in today's world of joint operations between operators) with further implications for the exercise by the owner of his opportunities under the Code and the agreement. If sharing is to be imposed, these factors need recognition. That recognition might be hard to deliver if the Code took a no-scheme approach to payment.

(2) Code operators should not have a general right to share their apparatus. Contractual terms prohibiting or controlling it should stand so the landowner should rightly receive payment for any additional use later permitted.

This issue also arises with cables. An operator who has installed ducts (and usually sub-ducts within) may then consider granting rights to other operators – either allowing use of surplus fibres (if unused referred to as dark fibre ie not lit up by pulses of light) or through adding additional cables through the ducting. A landowner has difficulty monitoring this position and are reliant upon information supplied by the operator – which requires that rarely found thing – trust.

(3) Any sharing of apparatus beyond that agreed should be the subject of further agreement for which fair and reasonable terms should due. In principle, they could often be expected to be granted for a further payment but that necessarily implies an unconstrained market basis for payment of consideration, not a no-scheme special assumption basis for market value.

We comment on current experience as regards payments for site sharing in our response to Question 10.44. This seems really to have surfaced as a mast issue rather than a cable issue. In summary (and recognising the wide variety of clauses found in mast agreements), agreements have typically have accepted the prospect of site sharing (consent not to be unreasonably withheld) with an increase in the rent by a prescribed proportion of the income from the additional operator. Developments in operators' commercial practices appear to have rendered such clauses (in which landowners often set store) ineffective since the sharing may often now arise under master agreements between operators under which no mast specific payment is due or identifiable. As 30 per cent of nothing is nothing, the rent remains unchanged and the landowner may become jaundiced.

Yet, as noted above, he may well now be dealing with a more complex situation and more parties with the prospect of more notices to serve and negotiations as issues arise over renewal, alteration or renewal. In practice, it is of importance to landowners to know that they are dealing with only one operator benefits from Code rights in respect of the apparatus on their land, rather than several of them.

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 understand that s.134 offers a protection to a tenant whose lease restricts his choice of electronic communications provider by allowing him to ask for the landlord's consent to change supplier, which consent is not to be unreasonably withheld.

In so far as this concerns cable, it may be an issue of what services are available through the cable rather than the choice of cable provider.

We have no experience in dealing with issues under 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.

Consultation Paper, Part 3, paragraph 3.92.

(1) It is recognised that operators may desire freedom of action to deal in agreements regarding other parties' property and outside the agreements with those parties and so may feel frustrated where they do not have full and unfettered commercial flexibility. However, such ambitions should, like those of anyone else, be limited by their legal agreements and their ability to negotiate with those landowners and we do not believe there are unreasonable difficulties. These issues should not be difficult in practice if operators liaised in a genuine spirit with landowners. The fundamental assumption of agreement that has long underpinned the approach of the Code should exclude a cavalier carte blanche approach which is surely incompatible with being granted limited statutory privileges by their licences to be Code operators.

(2) Code operators should not have a general right to assign their agreements. Contractual terms prohibiting or controlling it should stand as the agreement is made between the two consenting parties and is subject to its terms.

Our clients have a strong and longstanding preference to know who their tenants are and so do not countenance assignment.

A change in the identity of a tenant is a point of proper concern to the landlord. It does not just concern the covenant for the rent but also the conduct of the relationship and possible negotiations. It should be open for the agreement in question to bar assignment completely, govern it on agreed terms or allow it, in each case with a commercial recognition of the status chosen in the financial relationship.

(3) Any assignment of an agreement beyond that agreed should be the subject of further agreement for which fair and reasonable terms should due. In principle, they could often be expected to be granted for a further payment. At the very least, it is standard commercial practice for the intending assignor to pay the landlord's full reasonable costs in reviewing and handling the matter proposed.

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

Consultation Paper, Part 3, paragraph 3.94.

The Code should not cover any further ancillary rights.

The parties are, of course, free to agree any other matters they can, but they should not be subject to Code 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.

While having little experience of this specific issue, the necessary place of an effective and proportionate disputes system is just as relevant where an operator finds an unreasonable or unresponsive landowner as where a landowner is dealing with an unreasonable or unresponsive operator.

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. There is a history over the years of such powers being used to require the Post Office and then BT to provide landlines to remote places. Where warranted that has happened though, now, the alternatives offered by mobile telephony have given other lower cost ways to answer the real issue in some cases. Perhaps the lesson from that is that the service demanded may not be the one that warrants use of the Code – alternatives may be more cost effective. Beyond that, we have no knowledge of Paragraph 8 being used, perhaps suggesting that the market is answering the issue and so such formal situations rarely arise (or perhaps not in the simple form that can be solved in this way). With a diversity of possible operators and technologies as well as practical circumstances, Paragraph 8 appears to deal with the balance between the demander and the operator from whom he chooses to demand the service. The request may not always be reasonable or made to the most appropriate operator. There is recourse for the demander to challenge the operator's reaction. The access principle addresses the balance between the operator and the intervening landowner and has been discussed 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.
See answer to question 10.21.

10.23 We ask consultees:

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

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

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

Consultation Paper, Part 3, paragraph 3.106.

We are not aware of any issues on this point and would need to see examples before commenting further. As described, the general law provides remedies for unlawful activity and breaches of agreement which are there to be applied by the courts to whoever is relevant.

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

Consultation Paper, Part 3, paragraph 3.107.

As reviewed briefly in our previous answer, the general law provides remedies for unlawful activity and breaches of agreement which are there to be applied by the courts to whoever is relevant.

Some of these issues can be addressed through the requirement to enter a franked 'Code agreement', as espoused in the answer to question 10.3.

Please also see our response to question 10.6, submitting that rights granted to Code Operators should be made subservient to the statutory responsibilities and operational requirements of operators of Linear Obstacles, which provisions must be enforceable as the relevant statutory undertaker with responsibility towards the operation and safety of canal or railway and those using those facilities.

The practical problem is one of ensuring a culture in which landowners do not need to take legal action to enforce their rights under the agreement and the Code and so the need for the design of the Code to ensure that operators, with their statutory privileges as licensed Code operators and typically large companies, are active in their engagement with landowners and occupiers.

There is very widespread reported experience of operators being unresponsive and dilatory on a range of issues, most obviously those surrounding any negotiation after the installation of the apparatus has been achieved. It can appear that, once they have secured that, they are confident in having effective possession under the Code and feel no need to engage.

It may also be that Code operators are reluctant carry the costs of effective negotiations with those from whom they hold rights. That would bode ill for any payment approach based on compulsory purchase principles.

As this has been an issue from long before the Code review it appears institutional rather than just

a market reaction to the Code review itself.

This may most frequently arise on renewal of agreements. As a very current example, there is a general frustration over the lack of response and activity by Cable and Wireless over the former Energis cables for which agreements are due for renewal with discussion of appropriate rates.

It is also reported on the end of mast lease agreements where operators usually manage to serve their counter-notice and then frequently take no further action until driven into the courts. Similar experiences are reported on rent reviews, where a response may only be achieved from an operator on the door of arbitration that perhaps need never have been reached.

This is a deeply unsatisfactory state of affairs which is seen by landowners to reveal the complacency of large companies with statutory privileges in disregarding the interests of the individual owners with whom they have a legal relationship.

The most obvious remedy is for the Code to require timeliness in responses and then for it to have an effective and appropriate dispute resolution mechanism that should of its own existence encourage better behaviour.

The operators may properly observe that it falls to all parties to be timely and we would agree. However, in doing so, we point to the substantial imbalance of power between the parties that is typical at this stage. On the one side, the operator is (with a few exceptions) almost always a large company and will have statutory protection for the rights it needs. On the other side are generally individual landowners with limited resources for whom the legal agreement presumed by the Code has terminated. It can often be felt that the operator has at that point already everything it needs and so has no need to respond to the owner. The owner's only significant moment of control was when granting the original agreement – hence the importance of the terms of that agreement not being further extended by the Code (such as has been canvassed in questions 10.15, 10.16, 10.18 and 10.19).

In the case of agreements that have expired, operators might be encouraged to respond in a more timely and effective way if the landlord could terminate their Code rights if the operator did not act after a specified period has elapsed after serving the counter-notice without further action. It is assumed that a threat to an operator's possession and apparatus will prompt sufficient self interest to behave properly.

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 long history of the law in this area has generally provided for the regime that is now encapsulated in paragraph 9 in sharp distinction from the main regime for private land.

My clients own and maintain stretches of highways through under-bridges and on top of bridges crossing their canals. These are not public highway. They have had two occasions where telecoms operators have installed cables in those highways without their specific consent. On one occasion the operator served notice on the local highways authority (that it thought and frustratingly continued to maintain for a period in excess of FIVE YEARS was responsible for the highway) and one who did not. It took much correspondence and the service of legal notices on each to resolve to get the operators to enter the necessary agreement.

Other issues here may most properly be commented on by the highways authorities as the direct managers of the publicly maintained highways affected by this. There are natural concerns about disruption of the highway by successive bodies with statutory authority or for an extended period with detrimental effects on both users of the highway and those householders, businesses and others taking access from the highway.

With no general background of difficulties here drawn to our attention, there are three specific points that should be raised:

- where apparatus is permanently installed above ground it should not interfere with the public's practical use of the highway to pass and re-pass
- while a highway may be publicly maintainable, the land affected by it may often still be privately owned with the owner (usually the adjoining landowner) still having rights in the sub-soil and quite possibly in the verges which may also affect the drainage of neighbouring land.
- that apparatus may then limit the ability of the neighbouring landowner (quite possibly the owner of the verge or sub-soil of the highway) to open an access onto the highway or to develop his land from the highway.

Although it would appear that the Paragraph 9 right to install and keep apparatus under, over, in, on, along or across a street is unqualified where the street or road is a highway maintainable at public expense, paragraph 9(2) would seem to require a written agreement under paragraph 2 or a court order under paragraph 5 for highways that are not maintainable at public expense. It is reported that this tends not to be followed by operators.

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.

My experience more generally concerns the landfalls for other cables and pipes, usually under other statutory regimes. However, I have one client who holds a Crown interest, who is as concerned as the others that the proper basis of payment should remain as "fair and reasonable". Again, they have experienced problems with operators of international undersea cables engaging on renewals and reviews.

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) With limited experience of the issues here, we have not so far understood any special reason for the Code to treat tidal waters differently from other property. The Government's 1982 Consultation Paper understood this issue, under the heading of "Sea and Seashore" as needed because of the possibility that apparatus might be a danger to navigation. Navigation issues were to be protected by the role of the Secretary of State. No additional reasons relevant to the 1980s were offered but further work may reveal more issues than we have so far taken into account in answering this question.

In practice, it could well be that, with the current concerns over conservation and the common existence of leisure interests, this offers a good example of cases where there may be more involved in judging the public interest side of the access principle, however finally defined, before weighing the outcome against the landowner's interest. Those issues are by no means limited to coasts and estuaries, but many delicate environments subject to important controls are in or adjacent to tidal zones and the Marine and Coastal Access Act 2010 specifically applies to such situations.

This is not only a direct question of public policy but also of the activity of landowners in tidal zones. An increasing area of ecologically important tidal land is owned by conservation bodies or managed for conservation purposes.

The growing network of ports, wharves and similar facilities may provide both the need for communications and problems for their installation (or perhaps more particularly their alteration).

There may be cases where the effect of the regime under the EU Habitats Directive could be that where apparatus was seen to damage an ecologically important site, compensating measures would be required beforehand, potentially affecting the landowner more widely – or even other landowners.

These factors (combined with the problems posed by preserving unnecessary special regimes) point to recognising all owners as equal and so bring tidal waters into the general regime for

private property.

(2) If there is not to be a separate tidal regime this question falls. If there is to be one, then it should as far as possible follow the principles of the general regime for private property. It offers an example of cases where the prejudice that could be caused by apparatus may not just be to the landowner but other public concerns as reviewed in our discussion above of the access principle. It is simplest if those are weighed together at the same time, perhaps rather than in sequence.

(3) While our instinct would be that all owners of tidal land should be treated equally, we do understand that this could require consideration of the Crown Estates Act. In noting that it could be that there is then other legislation, especially that governing ports and harbours that also need to be considered, whether general or specific ports such as the Port of London Act.

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 regime now headed “linear obstacles” generis dates from the days when the electric telegraph ran *along* railways, canals and tramroads and where there might have been quite practical operational reasons to take care over crossing them. The 1982 Consultation Paper reported a shift in railway operators’ interests from apparatus running along their property to concerns about apparatus crossing it. It is distinctive in not requiring agreement and in referring to arbitration with the disputes reference to the President of the Institution of Civil Engineers. It looks like a geological relic embedded in the strata of the Code as a special regime whose origin, ambit and function are no longer relevant.

The thinking in the 1982 Consultation Paper in carrying forward the substance of the previous regime here seems to have been to see crossing railways, canals and tramways as analogous to crossing highways in conjunction with a less strong presumption as to operators’ rights to place lines along them.

The “Linear Obstacle” provisions of the Code, of course, concern my clients greatly. However, they recognise the general consensus view that it may be simpler and ensure greater consistency throughout the Code for Linear Obstacles to fall under the general provisions of the Code provided that adequate safeguards in this respect are put in place.

The special regime is not about linear obstacles in general (the phrase is not used in the main body of the Code) and so not about the general problems operators might face with them. This regime is solely about railways, canals and tramways and there are issues of definition as to what constitutes each of those, particularly canals. Many canals (like the Manchester Ship Canal) are essentially

canalised rivers, yet rivers are not covered by the special regime. There are new "rivers" or cuts that have been created, such as that dug relatively recently at the Jubilee River near Maidenhead, which is termed a river but arguably should be treated as a canal. To treat Linear Obstacles under the general regime would avoid these potentially litigious issues. One could foresee, given the impact of the Court of Appeal's decision in *Geo* concerning payments, where a canal owner would prefer to argue that his "canal" was in fact a river with its inherent characteristics like those of the Manchester Ship Canal that it carries silt from its upper reaches, requires to be routinely and frequently dredged and its dredging removed along with large quantities of rubbish, which is not a normal function found necessary on true "canals". Conversely, one could foresee a telecoms operator arguing that a length of "river" was in fact a "canal" to gain the 'build-it-and-keep-it-for-free' protection afforded by the Court of Appeal's decision in *Geo*.

Other canals, like my client's Bridgewater Canal, which was the first to be built in the country between 1759 and 1776, was cut to follow the contours of the land (and has no locks throughout its length) rather than canalising an existing river. The Bridgewater Canal has many particular engineering concerns, not unlike other canals. Where coal workings around the Worsley area and salt extraction in Cheshire have caused subsidence of the surrounding land, the Bridgewater Canal has been raised onto an embankment to maintain its water level. A number of communication cables cross the Bridgewater Canal are located in these sections, requiring specific provision in the relevant Deeds of Grant. Where the Canal is in embankment the Bridgewater Canl was constructed with a clay "puddlestank" enveloping beneath and to either side of the Canal's cut to better safeguard against leakage of water from the Canal. In 1971, a 90 feet section of the embankment collapsed at Dunham Massey, near Lymm in Cheshire, causing extensive flooding and loss of water from a substantial length of the Canal. The cable now laid beneath the Bridgewater Canal, which was the subject of the *Bridgewater v Geo*, was located in an area of embankment only a few hundred metres away from the section lost in 1971.

My clients accept that there is no longer need for this "Linear Obstacle" regime for railways, canals and tramways, which should be able to fall to be considered under the general regime of the Code alongside other linear obstacles (such as highways, motorways and foreshore) PROVIDED THAT adequate provisions are put in place to safeguard the interests of the owners and controllers of such Linear Obstacles. We would propose that the following non-exhaustive list of provisions would be appropriate:

- provision for a "fair and reasonable" "consideration" to be assessed on a Market Value basis, in line with proposals under the general regime
- provision for payment of "compensation" to cover all costs incurred by canal operator in overseeing installation of cable and for all other losses suffered as a result of the carrying out of the work and for its retention (including for example increased costs of inspection and/or using the canal).
- provision for rights granted to telecom operators to be subservient to statutory rights and operational requirements of operators of canals and railways and for the rights to be terminated if found to interfere with such statutory rights and operational requirements, which provision may be currently found in Paragraph 23
- "lift and shift" provision
- provision for telecom operators to take any action or discontinue any action reasonably required by the canal operator in the interests of safety and wellbeing of the canal and its associated works
- provision for telecom operators not to interfere with or cause damage to the canal or its associated works
- provision for telecom operators to indemnify the owners of Linear Obstacles
- provision to require the telecom operator to act with timeliness

- provision for disputes including any relating to the initial or any later works of installation to be referred to an appropriate tribunal for determination.

We note that railways, canals and tramways are but three of the authorised statutory undertakers with powers under Paragraph 23 for the alteration or removal of apparatus.

(2) The lack of clarity of this regime is illustrated by the need of the parties in *Bridgewater v Geo* to resort to costly litigation and the successive decision and judgements in that case.

The lack of other litigation typifies the essentially commercial approach that all parties have long pursued to the establishment of agreements for installing communications apparatus without recourse to the Code. As detailed in the response to (1) above, it is anticipated that the understanding of this special regime given by the recent litigation will lead to new difficulties unless the Code is reviewed to provide for payment of "fair and reasonable" "consideration" for keeping the works in situ.

(3) If the regime is kept then but amended to provide for payment of "fair and reasonable" "consideration" for keeping the works in situ, my clients would accept that offences under the regime should be civil ones. There seems little concern about a company acquiring a criminal record in such a circumstance.

(4) These issues should be a matter for the agreements between the relevant parties and are discussed further under the separate paper on Financial Awards under the Code.

(5) Please see our response to point (1) 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.

We agree with the recommendation. If, as Geo Networks are currently understood to be doing, a cable is to be installed in a London sewer that should be on terms set by the sewerage authority. This is another area where the wider public interest and possible disruption of water, sewerage or electricity services can be a key issue.

Indeed, if a landowner originally granted rights to the owner of the conduit for that particular purpose, an appropriate release or modification of that covenant would be required. However, this would be a private matter for the undertaker and the owner to resolve and not one requiring intervention from the Code.

In essence, this applies the principle of agreement absolutely to these conduits without recourse to the tribunal or appeal (save perhaps as now possible under Regulation 3 of the 2011 Regulations. Along with the other terms of the agreement, the consideration would also be outside the Code's dispute provisions and simply be what the parties agree.

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 submit that the provisions of Paragraph 23 should remain and the present regime for statutory undertakers be carried forward in general but accept the proposal made at 4.38 that, if necessary, the undertaker's requirement be judged against the balance of interests, including any consequent effect on other parties.

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 agree in principle as detailed in our response to questions 10.28 and 10.30 above. In principle, we accept that there should be no more special regimes than are absolutely 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?

Consultation Paper, Part 5, paragraph 5.11.

In responding, we make the assumption that this question does not refer explicitly to works of alteration required to apparatus affecting Linear Obstacles but to the general Code. Our responses to 10.28 and elsewhere confirm our client's position in this regard.

While the legal form of the present provision may appear flexible (Consultation Paper 5.9), its practice is more onerous and cumbersome for landowners under the general regime. Operators, having established apparatus, are (perhaps understandably) reluctant to consider changing it to suit a third party with objectives not associated with the operator's business – this is disruption for them however important it may be for the landowner. The issue then turns on whether the change will not substantially interfere with the service provided by the operator's network. That is a technical issue of which it can be very hard and costly to achieve a competent independent assessment, either on its own or as a review of the case that the operator may present. As in any other issue, there is no reason to suppose that the operator's presentation is necessarily accurate or immune from critical review. That technical then may have to be argued before a tribunal.

However, the public's interest is not in the individual operator's network but rather in the availability of telecoms services.

That done, landowners feel in particular jeopardy over the provision for the applicant to reimburse the costs of the alteration or removal. Concern over this should not be about the principle as this is a variation of the agreement – and, as we argue through our response all variations may have a financial consequence which should then be recognised. It is rather about how that cost is in practice assessed and then reviewed for its reasonableness. (Elsewhere, landowners have found it very difficult to understand the rationale behind the costs that can be quoted for securing a power line giving access to the national grid whether for supplying renewable electricity or taking a high capacity supply.

In short, an apparently flexible and appropriate regime poses more difficulties on inspection, difficulties which it may only be worth tackling where high development is involved. Operators do, of course, have to engage in the process for it to move forward in any sensible way so inertia on this point is an additional frustration.

We consider the wording used in the recommendation needs review for it to be appropriate.

We see this as a straightforward balance between the specific Code operator and the landowner in the actual circumstances. It is not a general balance but a specific one and so should be drafted in the singular.

We do not see the need for the final phrase adding an additional protection for "the Operators' networks at risk". This is not only because it is in the plural but because:

- the individual operator's interest (so far as that matters) is already encapsulated in the main phrase
- the Code is not to protect the Code operator who is simply the intermediary for the public interest in access communications

- the public interest warranting Code protection is in the matter of general access and not necessarily the commercial concerns of the individual operator's specific network.

Accordingly and without, we think, doing violence to the intended principle, we suggest that the final phases of the recommendation here should read:

> "… on terms that balance the interests of the public's access to communications services with those with interests in the land ."

We believe that such wording would be more true to the basic principles of and justification for the Code the purpose of which is not, in the final analysis, to protect individual operators but the service to the public.

In considering the implementation of this in the context of the present Code, we believe there should be a unified regime covering paragraphs 20 and 21 which currently offer a dual regime with different recourse and consequent confusion.

Since removal may more often be sought as a means to attract the operator's interest in renewing the agreement, we have, sadly, to return to the recurrent theme of the difficulties of getting operators to respond to landowners' needs in this area. Accordingly, we suggest an additional sentence to the recommendation:

> "That procedure should be one that prompts timely and effective action by both operator and landowner."

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 operation of paragraph 20 has been found problematic. Lay reading is obscured by its use of the word "alteration" to include moving and removing apparatus – applied by paragraph 1(2).

On matters of more substance:

- the alteration has to be shown to be "necessary" not just "desirable" for paragraph 20 to apply. "Necessary" could be read to be a very strong test.
- the burden is on the applicant to show that the alteration "will not substantially interfere with any service which is or is likely to be provided using the operator's network"- an apparently tall order for a party not involved in communications operations and likely in many cases to require great cost. It could be argued that this is the wrong way round and so for the operator to show the detriment or perhaps more usefully the balance between different options.
- the default presumption is that a successful applicant will reimburse the operator for its costs of alteration. These may not only be large but are in practice hard to predict (they are reported to differ widely between cases) or, afterwards, to cross-check for reasonableness.
- the uncertain interaction between this power and the fixed term of any agreement as it may not remove the powers of the operator to re-impose itself on the site after the development but within the agreement. There seems to be no clarity as the status of the rights given to the tenant by the tenancy on the equipment being removed from the site. Have they ended as if the agreement has now been frustrated or repudiated? Is it still bound by the obligations of the agreement? Can it return once the reason for removal has occurred?
- this is compounded by the problems of interpreting the interaction of paragraph 20 operating "notwithstanding the terms of any agreement binding on" the landlord and paragraph 27 which says the Code is "without prejudice to the rights and liabilities arising under any agreement to which the operator is a party", saving only paragraphs 8(5), 21 and 27(1).

Paragraph 20(3) seems awkwardly worded in that the operator "shall … only" make the required alteration if the court requires it.

In the court's consideration of terms for such an order it may include modifications only if they are agreed by the applicant.

The payment to the operator is to be for its expenses (not its loss) in making the alteration though these are not qualified by the need for them to be reasonable.

While not tested and in contrast to paragraph 21, the Code has no provisions which preclude contracting out of paragraph 20.

The implication of the points is that, in practice, paragraph 20 rights are only available where the greatest value is at stake. In more ordinary circumstances, the requirements of this procedure are simply too demanding for it to be useful.

Reviewed overall, it is not clear why there needs to be the two regimes for removal of apparatus offered by paragraphs 20 and 21. It might be simpler if Paragraph 20 powers, however defined, applied to genuine alteration of apparatus, with a separate paragraph 21 type provision applying to its removal as that paragraph is the root of the operator's security of tenure and so would link in with renewal issues.

Some issues could be handled by an equivalent to a simple "lift and shift" provision or compensation in lieu where any planning permission is refused

It may be that particular provision is needed where a building on which there is apparatus needs redeveloping or, alternatively, repairing (eg re-roofing of a building upon which an antennae is installed) that would require the apparatus's permanent or temporary removal.

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 landowner may be given some recourse to alter apparatus if this provision was retained. Agreements are usually prepared by the operator and often fail to include a "lift and shift" provision. Retention of this provision might allow those owners so affected to improve their properties, which a better drafted agreement might (such as one prepared by a more knowledgeable solicitor acting for an owner, well experienced in telecoms matters). Our concern would be that if operators were able to contract out of the provision they would do so as a standard matter of routine.

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.

In principle, this regime should simply be part of the replacement for paragraph 20. It would be one test for the design of that replacement that it met such owners' needs, although with regard to alterations in respect of a Linear Obstacle those provisions should in principle and in practice be capable of continuing to mirror the provisions of Paragraph 14. If that revised Paragraph 20 regime cannot accommodate the practical concerns of railways, canals and tramways, it may not be fit for other affected owners seeking alterations.

We note that railways, canals and tramways also have powers as statutory undertakers under Paragraph 23.

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.

As with our response to question 10.32, we make the assumption that this question does not refer explicitly to works of removal of apparatus affecting Linear Obstacles but to the general Code. Our responses above in 10.35 confirm our client's position in this regard.

Present confusion may be avoided by dealing with removal solely under Paragraph 21 and not in a dual regime under Paragraph 20.

The issues here – in what the Consultation Paper appropriately calls "security - are intimately linked with the question of the renewal of agreements and the problems landowners find in dealing with operators over this. As such this is also inter-related with our response to Question 10.58 regarding the interaction with Part 2 of the Landlord and Tenant Act 1954 in England and Wales.

While the public's need warranting some such protection is understood, the accumulation of experience suggests that any Code right for an operator to retain apparatus on land after the agreement protected by the Code has expired should not be an absolute right, but a qualified one which may lapse if the Code operator does not join with the landowner in settling a new agreement or taking paragraph 5 action to require a new agreement in a timely and practical way.

Paragraph 21 of the Code restricts the ability which the landowner would otherwise have under statute and common law to require the removal of any apparatus installed on his property. This is the root of the Code's entirely individual regime for providing operators with security of tenure as this restriction applies even where the contractual agreement has expired and the parties cannot contract out of it. In practice, this means that operators are secure on the site and that has the undesirable effect of diminishing their incentive to negotiate new terms with the landowner on the expiry of an agreement.

If a landowner seeks to have apparatus removed from his site after the lease has been terminated, he must serve a notice on the operator. The operator then has 28 days to serve a counter-notice setting out the steps that it intends to take to secure a right to keep the apparatus in situ and, having stated that intention, it seems that the operator need then do very little save set out the proposed terms for a new agreement. The only action then open to a landlord who wishes to follow his action through (even if both parties intend there to be a new agreement) is to obtain a court order

to enforce his notice to remove. The court can enforce the order if the operator is found to be "unreasonably dilatory" in taking steps to secure the right to keep the apparatus on site, but there is no definition of what that means. In practice, it can take many months or even years to progress negotiations on a new lease.

Since this is an undesirable state of affairs, we propose that the Code should specify a limited period in which operators must take the steps set out in their counter-notice for it to be effective. Elsewhere in the Code, the period of 28 days is allowed for a landlord to accept terms under paragraph 5 and for a counter-notice objecting to tree lopping under paragraph 19, as well as for the service of the counter-notice in paragraph 21 itself. We suggest that 28 days would also be a suitable period for operators to begin to take the steps set out in their counter-notice and any delay beyond this could be considered to be "unreasonably dilatory" by the courts.

We strongly recommend that delays of more than 28 days by operators in starting to take the steps set out in their counter-notice under paragraph 21 should be evidence that the operator is being "unreasonably dilatory" and that the onus of proof that any delay is reasonable then shift from the landowner to the operator. Requiring payments to be back-dated might also encourage operators to be more active.

Interaction with the 1954 Act

For England and Wales, the conflicting regime of Part 2 of the Landlord and Tenant Act 1954 allows a landlord to resist the renewal of a tenancy where, among other grounds, the property is needed for his own occupation or for development (ground (g)). If the tenant opposes this, then under s.64 of the 1954 Act the tenancy continues on an interim basis until three months after the final decision. That is taken to mean that a landlord can only serve a paragraph 21 notice at that point. While the Courts may allow the landlord a "reasonable time" for ground (g), it is far from clear that the time often needed for the Code's procedures to operate falls within this. That makes it perhaps logically impossible for the landlord to mount a successful argument under the 1954 Act that the land is needed for development if the apparatus (and the operator's security) is the obstacle to the development.

In the present circumstances, the natural answer for a landlord is to move as best as he can to court action under the Code, whatever the other issues or options. There should be a better answer.

The alternative route offered by paragraph 20 has, as shown above, so many limitations that it may not really be regarded as available in many situations.

Where parties are amenable to a new agreement, there is no mechanism (as there is in the Landlord and Tenant Act 1954) for a landowner to apply to the disputes forum for the determination of the terms that should apply.

Either one regime or the other should be disapplied for the one to be effective.

Since the practical answer to the interaction between the two regimes is for the agreement to have been contracted out from Part 2 of the 1954 Act, this points again to the proposal (which we support) that that tenancies franked as subject to the Code are excluded from Part 2.

Since not only practical logic but experience suggests that, with this statutory background, operators can serve their counter notices under paragraph 21 and then take no action, having enough to do elsewhere and confident that their interests are protected. There is no countervailing force against this bias to inertia. This is unsatisfactory in both operational and contractual terms

and is essentially an artefact of the present drafting of the Code.

In a normal contractual relationship, an operator would have an incentive to take matters in hand before the agreement expires to protect its interest. However, where an agreement is under the Code, the protection afforded by the provisions of Paragraph 5 is a stimulus to procrastination.

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

Thus, the provisions of Paragraph 21 should make it clear that the operator is liable for exemplary damages to the landowner if it fails to progress matters timeously. Requiring payments to be back-dated might also encourage operators to be more active.

Finally, in considering the list of those who could seek removal set out in 5.26, it seems unreasonable for the fourth category – landowners on whose land apparatus has been installed by mistake – to be bound by the Code at all. That apparatus will not have been properly installed under an agreement or an order but by ineptitude and is a trespass which should not of itself be protected by the Code and so should simply be subject to the ordinary remedies for trespass.

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.

With little practical experience of the issue at stake here, we suspect this recommendation is right, in part because of the larger and other public interests that may be involved (including compliance with the planning system) for which the development control system is one forum.

With the developing skein of environmental regulations governing the use of land, it may be that this is not just a right for planning authorities but other bodies with relevant statutory powers. The discussion of tidal waters has flagged such concerns.

In essence, Code operators should not be immune from such enforcement action just because they are Code operators, particularly if that operator were in breach of the terms of its licence.

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 practical terms, it must usually be for the landowner to act to seek removal of Code operator's apparatus. In a straightforward position, it is hard to see how a Code operator should have that imposed on it.

The exception to that is where (as perhaps in a situation where there is site sharing) the Code operator may be the landlord or licensor of another Code operator whose apparatus it wishes to have removed. In that context, the dominant Code operator could rely on the onus of the landowner.

If a Code operator wishes to remove its own apparatus during the course of an agreement that is subject to the agreement and any necessary landowner's consent. If it wishes to remove apparatus on the end of an agreement, that it is freedom (and possibly its obligation under the agreement).

There are, of course, particular problems for a landowner where an operator leaves but does not remove its apparatus or fails financially.

Interaction with Renewal - However, this issue which might ordinarily be expected only to arise where an operator had ceased operations on the expiry of the agreement has, in practice, become necessarily conflated with the problems landowners face in securing the renewal of agreements for continuing operations, the procedure needs a strong regime to encourage operators to engage with owners.

As proposed above, we suggest that, working on the basis of the present regime, the operator have 28 days from its paragraph 21 counter notice to take the steps outlined on pain of being found "unreasonably dilatory" in which case the landowner can then go to the tribunal for a determination and enforcement of the terms of the agreement.

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

Consultation Paper, Part 5, paragraph 5.50.

In this context, it is not quite clear what is meant by the date Code rights expired? Is it when the operator ceases to use the apparatus rather than when the Code agreement expires? If the former, then abandoned equipment is indeed a problem and there should be power to require its removal and to enforce some form of mesne profits in the interim.

More generally (and depending on what is meant by expiry of Code rights), we return to the practical interaction between Paragraph 21 and renewal of agreements which needs reform.

The model of the Landlord and Tenant Act 1954 could suggest the ability to seek an order to set an interim rent or payment once an agreement has expired. That might be supplemented by penalties where the operator can be shown to be unreasonably dilatory.

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 endorse freedom of contract on this. As contracting out of security is possible outside the Code (statutory for leases and with no restriction for easements, wayleaves and licences), it is hard to see why that it cannot be voluntarily done within the Code.

That would also apply to a voluntary agreement that Code security would not apply in only specified circumstances which need not just be limited to development. That is freedom of contract. The term "development" therefore would require definition.

We would go further and see no reason why, on finding appropriate circumstances, a tribunal

considering a Paragraph 5 application might not be able at its discretion to contract out of this security provision. It seems unreasonable to fetter the freedom of the tribunal given the range of circumstances that may come before it. If the tribunal could not do this, it would limit the ability of parties to agree this but, for whatever reason, seek the approval of the tribunal for such an arrangement. This would fit with the direction of travel seen with the 1954 Act.

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.

Such revised provisions for alteration or removal should apply to all agreements under the Code whether made before or after the new Code is applied.

Where apparatus was installed outside the Code regime, it should not be protected by the Code until the Code is applied to it whether because the installer becomes licensed under the Code or because conditional criteria for the Code to apply (such as Paragraph 2's requirement for a written agreement or the various other points suggested in this response) are satisfied.

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 understand the Consultation Paper to recognise "compensation" as recompense for loss as opposed to "consideration" as a price. Thus, this question is understood to be about the various current provisions (and possible future provisions) for compensation as distinct from the consideration addressed in questions 10.44 and 10.45. We hope the two have not been conflated in this question.

We are not really clear what is intended by the Consultation Paper's 6.33's proposal for a *single* entitlement for compensation and so find it difficult at this point to comment with precision. We wonder if this has been an undue reading across from the main compulsory purchase regime with its conventional emphasis on one-off payments rather than agreements for continuing relationships with rent (consideration being one of the hallmarks of a tenancy) and other periodic payments. In this context, any assumption of a full and final settlement accompanying the grant of the right would be a misunderstanding of how this sector operates.

With that uncertainty, we have to oppose a single entitlement thinking that compensation events could arise on a continuing basis.

As the Consultation Paper shows there are various potential claimants and various potential heads of claim which may arise at various times in relation to the installation of the apparatus. It does not seem right that claiming in one capacity at one time under one head should absolutely preclude later potentially justifiable claims for other losses.

If the proposal is simply saying that a claimant should make all claims available to him at one time as part of one claim rather than potentially submitting multiple claims that may be sensible and potentially avoid the risks of double counting. If that is to preclude other and later claims which could not be established at that earlier date or the cause for which had not arisen at that date then that seems wrong. Even so such an approach may require some practical care over any time limits that may be imposed.

This becomes the more critical if the Consultation Paper's proposal on consideration essentially opens up a compulsory world in which all those points, currently hidden in price, are then to be claimed by landowners and occupiers.

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.

While strongly proposing that Code rights should not affect those who are not directly bound by them, insofar as they do then a payment regime should be available to them. As this question is again understood to be about compensation, all loss or damage arising from a Code operator's actions as a Code operator should be the potential subject of a claim.

Again not intending to imply any easy, ready or sensible analogy with compulsory purchase, an equivalent to a Part I claim for those affected but who do not lose land should, in principle be available. The logic that drove the enactment of Part I of the Land Compensation Act 1973 could apply to communications apparatus but would obviously have to be proven by claimants. As mentioned under the response to question 10.14, this may be very relevant where a line of sight arises between masts and clearance of that route could cause unforeseen problems for many intervening landowners. They would not be bound trough agreement by Code rights but could be subject to them, despite not having any electronic communications apparatus on their land, just a wide band of line of sight, within which the microwave link passes between masts.

In practice, those affected owners should have the right to object to the line of sight and require it be relocated if practical to a more suitable location, if appropriate. The currently drafted Code would not so allow.

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.

Please see our attached answer to this question on the assessment of payment for consideration in which we reject the proposal outlined for a no-scheme market value basis, rather preferring to retain the historic understanding of "consideration" on a "fair and reasonable" basis – essentially, the value that would be expected in the market between the landowner and the operator when both are willing to effect the transaction in their circumstances, but excluding ransom value.

We do not see that the analysis derived from the recent decision in the non-Code case of *Bocardo* applies to the Code as currently drafted.

If that or the special assumption of a no-scheme approach (particularly one as broadly defined as is proposed) were applied it would be radically disruptive of an existing established system covering 50,000 masts and hundreds of thousands of miles of cable that has successfully delivered successive major communications revolutions. The consequence would be for landowners no longer to see apparatus as a benefit but rather as an unwanted imposition. We do not see that the operators are actually prepared psychologically or in staff terms to handle the work associated with a move from a market basis to what would essentially be a compulsory purchase regime. The present regime with its essentially commercial approach has seen little litigation; the proposal could lead to more complexity, conflict and dispute.

As noted at points through this response, importing such an unreal assumption into what is

necessarily a continuing relationship between the operator and landowner is then disruptive of sensible answers to the issues that then arise between them. The reality of looking for the value of the agreement in the market place maintains the logical fabric.

As the market has always been demand-led, the initial level of consideration was largely set by7 the operators offering those sums to secure their rights. A market developed around those initial prices. Now that those operators have by and large secured sufficient rights for their immediate purposes, they are looking to reduce their costs through merging with other operating companies and also engineering a reduction in the level of rents payable. Operators' agents have been sending letters out to often unrepresented landowners threatening that if they do not agree to a certain reduction in rent they will terminate the rights and decommission the site. This is not how the market should work. We consider this to be an abuse of the power conferred on these telecom operators through their licence.

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 do not believe that statutory uplifts as an attempt to ameliorate the consequences of moving to a no-scheme valuation are likely to be effective. The sheer difference in values that the proposal is foreseen to create is such that the multipliers or uplifts would have to be very substantial to have any real world effect. The consequence of using the very large multipliers that would be needed would be to create considerable variations out of small differences. It is far better to stay with the present basis and, as necessary, make arrangements for inhibitions to its operation to be tackled.

These issues are discussed further in our detailed answer to 10.44.

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

Do consultees agree?

Consultation Paper, Part 6, paragraph 6.78.

We agree that the same fair and reasonable consideration basis regime that we propose should be applied equally to "linear obstacles". That is the logical consequence of bringing railways, canals and tramways into the generality of the code.

The provisions that would need to be addressed in any revised Code to safeguard the operators and owners of those Linear Obstacle some include:

- an agreement should be in writing (see response to question 10.3), formally invoking the Code
- provide for rights to be subservient to statutory rights and operational requirements of operators of canals and railways accepting that the operator's apparatus is installed at its own risk
- provision to permit diversion of an operator's apparatus or termination of its rights in the event that it interferes with the statutory function of my client or its operational requirements, which provision is currently found in Paragraph 23 of the Code
- a statutory "lift and shift" provision
- include an obligation on Code operators to properly indemnify owners against loss, damage and injury and not interfere with or cause damage to the canal, railway or associated

facilities
- provide for an appropriate property based tribunal to determine any dispute, particularly relating to the initial installation works balancing the relative weight to be ascribed to any genuine engineering concerns
- require the parties to act with timeliness
- provide for a "fair and reasonable" "consideration" to be paid for those rights including the right to keep the apparatus installed (which the Court of Appeal curiously and I suggest wrongly ruled was inappropriate in Geo) on a proper Market Value basis in line with proposals under the general regime
- provision for payment of "compensation" to cover all costs incurred by canal operator in overseeing installation of cable and for all other losses suffered as a result of the carrying out of the work and for its retention (including for example increased costs of inspection and/or using the canal).
- apply equally to all forms of technology
- The agreement should be capable of being excluded from any security provisions proposed under any revised Code.

In any event, we share the views of the Consultation Paper in its paragraph 6.77 on the logical oddities left by the Court of Appeal's decision in *Geo Networks v Bridgewater* and express disappointment that the Court of Appeal did not take the opportunity to clarify their understanding of the term "consideration" under Paragraph 13(2)(e)(i) of the Code.

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 proposal should only be relevant where the payment made for the Code rights was (as in the example sued by the Consultation Paper at this point) a capital one which is relatively rare. Overwhelmingly, the payments for Code rights are annual periodic payments, whether as rent or payment for easements and wayleaves. BT does seek to commute these payments (especially low value ones) into a single capital payment

While (following the logic of that example) it may well be right for the proposed facility to exist it can be observed that, in principle, the original grantor would have received his payment under his agreement and the burden of the Code rights would then have been reflected in any subsequent transaction in the property. It may be the new holder of that interest in the land who is the person who should first be considered.

It appears that all this works much more easily where the original payment made is on the current commercial basis rather than the proposed one.

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 strongly agree with this. The County Court (Sheriff Court in Scotland) is an inappropriate forum. We noted that enormous efforts had to be made in our capital city to ensure that *LIDI* was heard properly. Full account should be taken of Judge Hague's trenchant remarks on his role and the problem of the county court having jurisdiction in that first case under the 1984 Code to reach a court:

> "Presumably Parliament thought that cases under the Code would be relatively straightforward and could be accommodated in the normal county court listings without difficulty. The hearing before me extended over seven full days. The papers are contained in eight lever arch files, some of them quite bulky. As well as considering the several reports from each expert and hearing their oral evidence, I have read statements from seven other persons and four of them also gave oral evidence. Counsel made their submissions to me with economy, but their written outline submissions together covered 60 pages. Further, the valuation issues which I have considered are of the kind which are familiar to the Lands Tribunal, but not to most county court judges."

Few County Courts could have delivered the quality and thoroughness of judgement in such a case as he delivered in *LIDI*.

The scale of litigation is also illustrated by the application for a costs capping order in *Petursson v Hutchinson 3G* in which Hutchinson expected its overall costs to be over £250,000. The evident danger with such a forum as the County Court is that (as in *Cabletel v Brookwood Cemetery* and *Geo Networks v Bridgewater*) parties are then likely to feel compelled to appeal. It is known that Bridgewater then wished for leave to appeal to the Supreme Court and understood that the costs of that case may have been in the region of £500,000.

That this is not a new concern is supported by out understanding that when the Communications Bill was making its way through Parliament in 2003, efforts were made to persuade the then DTI to transfer jurisdiction for Code matters to the Lands Tribunal. However, as the Bill was running to a very tight timetable the government's reaction was there was no prospect of securing agreement to additional provisions while there had been so little use of the existing provisions that there was not enough evidence to prove that it did not work satisfactorily. Not only are there now signs of more cases as all markets are under greater pressure but there now seems general support for this change.

The variety of tribunals invoked at various parts of the Code simply reflects its conflation of several much older regimes in 1984 and earlier. That removes the need to perceive any unifying logic to procedures that have also over the years also included juries and the Railways and Canals Commission.

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 disputes forum has to be effective, appropriate, proportionate and accessible. Experience of agricultural law shows that an appreciation of what may well be determined by an available forum (generally arbitration) leads parties to arrive at their answer by agreement. That is a very important role and indeed may be one measure of a disputes procedure – that it is sufficiently accessible and understood that it is not used. The behavioural issues in this sector are such that this is a fundamentally important consideration in putting the Code onto a sound basis for the future.

The discussion has not only to consider the grant of Code rights but also the settlement of disputes under Code agreements.

We do not believe that the courts with their associated costs, however appropriate, efficient and effective some (such as the Technology Court) may be, are proportionate to the quantum generally found in Code disputes. Their costs and procedure would make justice inaccessible to most cases, perhaps especially those where better behaviour needs to be encouraged very strongly.

However, rights in land are important, especially where they are to be imposed upon by statute. That leads us to the view that the body that is both available and appropriate, best meeting the tests, is what was the Lands Tribunal (with its continuing equivalents in Scotland and Northern Ireland).

It is an existing forum with substantial property and valuation skills. While some commending it have done so because it is the disputes forum for the main compulsory purchase regime, it carries many other responsibilities, including market value assessments for taxation and the issues and valuations involved when restrictive covenants are challenged. The Law Commission's report Easements, Covenants and Profits a Prendre has noted the Lands Tribunal's expertise.

The Lands Tribunal is suited to hearing such substantial cases over valuation issues and rights in land as can arise under the Code.

It operates with a variety of procedures according to the needs of the case in hand and the wishes of the parties and so simplified and written procedures are available as well as a hearing.

It carries the confidence of the property world.

The changes to the Tribunal in England and Wales lead to the question of the right level – First Tier or Upper Chamber. The real answer is for the Tribunal to ensure that it has the necessary pool of skilled members. The level may then matter less. It is noted that the First Tier (Lands Chamber) may not have powers to award costs.

Disputes under Code agreements should, by default, go to arbitration (unless the agreement expressly provides otherwise). Where the agreement makes no provision or the arbitrator cannot be agreed, either party should be able to require the President of any one of a range of professional

bodies (on the model of the arbitral appointments referees under the Arbitration (Scotland) Act 2010) to appoint or nominate an arbitrator.

In considering the options offered in the consultation paper, arbitration seems much more widely understood as a basis than references to the party walls procedure which appears to mimic unnecessarily the probable process of those cases that would reach a dispute. Ordinarily, landowner and operator would each have advisers who should be negotiating with each other to achieve a settlement. Where necessary an arbitrator can then be appointed. That does not need the imposition of the formal structure of the Party Walls Act 1996.

There may be a case that arbitration might also be used for renewal of agreements in the same way that lease renewals under the Landlord and Tenant legislation can be referred to PACT, the Professional Arbitration on Court Terms facility offered by the RICS.

Such forums may allow greater expedition in determining cases. This is particularly important for operators anxious to meet commercial imperatives.

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. It is very important for the credibility of the regime that the twin issues of the grant of rights and the payment for them (and indeed the other terms of the grant such as those relating to development) remain dealt with together. Operators can (perhaps understandably) lose interest in further discussions once they have achieved their commercial objective of installing their apparatus

The two issues must not be separated.

We acknowledge that the Consultation Paper rightly rejects at its 7.29 the model of the Water Industry Act's s.159(4) procedure but do not believe the proposed two stage process suggested in 7.30 offers adequate assurance to those affected.

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

Consultation Paper, Part 7, paragraph 7.32.

With a straightforward mechanism and a positive approach by the parties, simple commerciality should see an appropriate resolution of issues over the settling the terms of an agreement for the installation of apparatus.

Issues arising thereafter do need a more formal structure of risks or sanctions to stimulate a party who would otherwise be unreasonably dilatory.

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

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

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

Consultation Paper, Part 7, paragraph 7.37

All reasonable costs incurred by the landowner in connection with the acquisition of the right from him should always be met in full by the operator as the acquirer imposing itself on the landowner.

Beyond those acquisition costs, the costs of disputes should generally follow the event as part of an appropriate regime to influence behaviour.

In saying that, we note that the First Tier (Lands Chamber) may not have the general power to award costs and acknowledge that that might remedy a potential landowners' (or indeed a very small operator's) concern as to costs that a major opponent might be willing to assume in a case with the deterrent effect that could have on an individual. Such an approach could be mitigated by a practice of disallowing unnecessary costs.

The costs incurred by a landowner under any revised Paragraph 5 or Paragraph 12 procedure of the Code should be borne by the operator, particularly where this affects the interests of the owner of a Linear Obstacle as he would at that stage be dealing with principles of installation as well as any consideration and compensation that may flow from any installation.

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.

Developing the thinking in answering the previous question, it may be reasonable for the first Paragraph 5 type reference to be deemed to be part of the acquisition costs with the usual judicial approach to costs applying thereafter. That too might require some means for the operator to have costs taxed.

10.54 We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.52.

We agree entirely that notice procedures under the Code should be consistent and with standard rules as to their service. Again, it is a measure of the Code's composite history that there is such a variety today. Such a change would be a great improvement for users of the operation of the Code.

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 on the forms of notices available to operators. We agree is unrealistic to require landowners to use standard forms of notice. However, their notices must be clear as to their intent for them to be effective. We believe that with the widespread ignorance of the Code and around 60% of all landowners being unrepresented by agents, an accurate summary document of the effects of the Code could be usefully served on the landowners affected, including advising them that they could engage an agent to act on their behalf whose fees would be met by the Code operator.

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.
All communications by operators should be certified as in plain English and accompanied by a relevant information pack. Landowners should be clearly told that the notice could have significant consequences for their property and their use of it so it they may wish to act swiftly to take such advice as they choose before responding.

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.
With the great variety of rights created by the agreements that can be governed by the Code, we doubt that standard agreements are desirable. However, we believe that the Code could usefully provide a checklist of points that should be reviewed when the dispute forum is considering the terms on which an agreement is to be imposed. They would then in turn influence parties drafting agreements but that could be done more directly by requiring consideration of the points. More generally, it appears helpful for there to be default requirements for an agreement that allows the installation of equipment (current para 2(1)(b)) as it is this that is most likely to create a continuing relationship between the operator and the landowner affecting the land. We suggest that to be an agreement protected for the purposes of the present paragraph 2(1)(b) of the Code, the agreement should: - be in writing - invoke the Code - provide for its term - provide for consideration, its payment and review - include necessary conditions regarding access, maintenance, sub-letting, assignment and

sharing use of the apparatus
- provide for disputes to be referred to arbitration.

Where an agreement is so imposed, it is for the dispute forum to determine the terms and conditions for its order. It is suggested that they should, as a minimum, include provisions on the following terms:

- a fixed term for the agreement (the electricity industry has 15 year terms for its Necessary Wayleaves but it would be for the tribunal to determine the term according to the case)
- during that term, protecting the tenant's interests in the equipment installed including access for maintenance
- recognition of liability for issues arsing from the apparatus and its use, potentially including insurance for this
- the consideration for the agreement, whether rent for tenancy and the payment for a wayleave or other arrangement
- provision for review of that consideration at regular intervals (and, in the absence of other agreement, the default presumption to be on a market value basis)
- recourse to dispute resolution
- a break clause in the operator's favour if the site becomes impossible to operate for technical reasons but not other.
- assignment of the lease (and, in the absence of agreement, prohibiting it)
- sub-letting and site sharing. The arrangements between operators for this now frequently bypass those envisaged by the drafting of most mast leases and so many landowners perceive no benefit where more than one operator now share a single mast.

It is suggested these be viewed as standard rather than mandatory so as to allow the court direction as to the circumstances before it in varying the use of the above headings or supplementing them.

INTERACTION WITH OTHER REGIMES

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

Do consultees agree?

Consultation Paper, Part 8, paragraph 8.22.

There is a major practical problem over the renewal of Code agreements which does not seem to be touched in any of the other questions. The issues of the interaction of Code procedures with Part 2 of the 1954 Act in England and Wales are but a part of that problem.

We agree that where an agreement clearly invokes Code security, it should be automatically excluded from Part 2 of the Landlord and Tenant Act 1954. That would simplify the security regime and the procedures for the parties but these still then need further reform.

One of the greatest areas of confusion about agreements under the Code is the interaction with the provisions of the Landlord and Tenant Act 1954 giving the contestable right to renew business leases in England and Wales – there is no equivalent legislation in Scotland. Where this applies there are then two structures for the tenant's security of tenure and so two mechanisms for renewal: one for the Code agreement and another for the lease with the result that:

- where the parties have contracted out of the right to renew, the Code operator can still impose itself again on the landowner
- the operator can apply for renewal even if Code powers have lapsed
- most commonly, the operator has both mechanisms and even if the court were to award vacant possession under the 1954 Act, the operator can use Code powers to remain under a new agreement.

While easements and wayleaves are outside the 1954 Act, the practical operation of the Code poses its own problems. Members report difficulties in practice in securing new agreements for them (and reviewing their terms) as Code operators, having served their counter-notice, then often do nothing, appearing simply to rely on the possession they have. Only court action with its costs can break this inertia.

Whether for leases or other interests, there is an important practical difference here compared with the original grant of the right. The operator wishing to stay has its equipment installed, operational and earning money. The one key incentive given by the power to deny access no longer exists and the operator has no urgent or practical reason to co-operate, liaise or negotiate with the owner or bring the issues that may exist to any dispute forum if it does not want to. All too often that appears to be the case.

With an agreement for a fixed term, perhaps the most obvious resolution to this is to provide a single mechanism to apply on the expiry of an agreement under the Code. For it to work, that mechanism must, in this instance, be available to either party so that the operator cannot simply let the issue lie, knowing the equipment is in place. It may often be in the landowner's interest to ensure that a fresh agreement on current terms is put in place when faced with inertia by the operator. That mechanism would otherwise be a repetition of the initial process by which the agreement was granted.

Logically, this means disapplying Part 2 of the 1954 Act from agreements under the Code so that a common regime applies to all Code agreements, wherever they are in the United Kingdom. If the renewal is really to be seen for what it is, as the grant of a new lease albeit for equipment already

in situ, then the grounds given to the landlord by the 1954 Act for resisting renewal are not necessarily appropriate – and have not been suggested as relevant to the consideration of the original grant. Were the landowner to argue against renewal, he would make his case on the arguments that were pertinent to him, whether they were listed under the 1954 Act or not.

The corollary of this is that as the agreement is expected to be for a fixed term, the agreement comes to an end unless renewed. Under basic land law, the equipment (unless perhaps if over-sailing) is likely as a fixture to belong to the land and so if left become the landowner's on the expiry of the agreement. This is recognised by the present Code and, of itself, this could become a powerful driver for the operator to promote a new agreement, but it might well be sensible for the Code to protect the operator's interest in the equipment once action had been taken by either party, but make that subject to the process of renewal going forward.

In this context, we note that the Necessary Wayleave procedure in the electricity sector appears to work quite well and offers a possible model for a solution. There, the apparatus must be removed unless the operator applies for a wayleave within a timetable. That gives the operator an incentive to act. If the owner does not object to the grant of a necessary wayleave, the next step is an application to the Tribunal to fix the payment terms. The only practical problem found with it (which can, of course, be avoided here) is that the payment is not then back-dated.

It is a logical consequence of this proposal that if an agreement is not adequately expressed in terms of being covered by the Code then Part 2 of the 1954 Act would then apply in England and Wales – as a default regime – and Code procedures do not. That makes it very important that the test for the application of the Code is clear in practice.

Excluding Part 2 of the 1954 Act from Code agreements would give a common regime for security for all Code agreements across the United Kingdom.

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 have not understood why Code rights that would be registered but for the Code, are not required to be registered and so support the proposal here so that the existence of those agreements is then evident to all interested in the property. The legal uncertainty analysed in this part of the Consultation Paper as to the true status of rights that have not been registered when they otherwise should be needs resolving.

We are not clear that the hybrid situation outlined as a result in the Consultation Paper's 8.32 is necessarily the right answer. Where a Code right that should in future be registered is not registered, then it should only bind the party to the agreement and not anyone else not on notice. It is the Code operator's obligation to register leases of more than seven years and easements and failure that should carry a sanction (perhaps after an initial transitional period of grace). The alternative is that registration will be required but there will be no reason to do it and it may, in practice, be largely overlooked – possibly the least satisfactory outcome.

We understand the position in Scotland to be sufficiently similar for the same answer to apply.

The main exception is that if Scottish leases of 20 years or less do not need to be registered that would mean most mast leases would not be registered when they would be in England and Wales but that would be consistent with each jurisdiction's registration regime.

We are conscious that issues can arise where the registration is inaccurate and provision should be made for rectification.

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us:

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

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

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

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

Consultation Paper, Part 9, paragraph 9.14.

We are aware that Code operators have failed but have no knowledge that these funds that are supposed to exist do exist, are adequate or have ever been called on. We note the reference in footnote 12 to the Consultation Paper's 9.11 tone case of enforcement action by Ofcom.

In practice, operators resist requests for reinstatement bonds from landowners and have been successful in doing so even though they are usual in wind farm agreements.

Noting the wording of (2) of the Paper's 9.8 out concern is to ensure that a defaulting operator does not leave a landowner with an expensive liability. It is understood that it will cost between £15,000 to £20,000 to remove a redundant mast or a cable. Until it is removed, the apparatus may attract empty rates. As noted elsewhere in our response, cables can cause other problems. We are anxious to understand that Regulation 16(10) does actually cover that situation.

Code operators should be required to demonstrate that sufficient funds are available and ring-fenced to at least to ensure the decommissioning and removal of the apparatus.

Again, the point should be made that to an extent such issues can be reflected in the unencumbered market price for an agreement but are quite expressly not covered in the special assumption of a no-scheme world is applied to that valuation.

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.

Planning – The issues discussed in the light of Regulation 3(1|) touch on the issue of the weighing of the possible wider prejudice where an operator wishes to install apparatus.

Depth of Underground Installation – Regulation 3(2) is important in a agricultural context both for the landowner to retain freedom of operations and as a matter of practicality for the operator.

ELECTRONIC COMMUNICATIONS CODE REVIEW

RESPONSE ON BEHALF OF THE PEEL HOLDINGS LAND AND PROPERTY (UK) LIMITED GROUP OF COMPANIES AND OTHERS

FINANCIAL AWARDS UNDER THE CODE

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The following response is provided to the question posed under paragraphs 10.44 and 10.46 of the Law Commission's Consultation Paper on the Review of the Electronic Communications Code. My clients principally through their subsidiary companies, The Manchester Ship Canal Company Limited and The Bridgewater Canal Company Limited, are owners of canals, defined under the Code as "Linear Obstacles".

My response to the question at paragraph 10.28 of the Consultation Paper sets out the conditions that I suggest require to be fulfilled to achieve a satisfactory level of consistency and fairness between owners of Linear Obstacles and other land to enable that distinction to be removed and to safeguard the interests of the owners of Linear Obstacles. These conditions apply equally to the response given to question 10.46 in agreeing with the Law Commission's proposal to remove the distinction in the basis of consideration when apparatus is sited across a Linear Obstacle. For clarity I set out below those provisos that a revised Code would need to address:

- Provide for an agreement should be in writing (see response to question 10.3), formally invoking the Code
- Provide for rights to be subservient to statutory rights and operational requirements of operators of canals and railways accepting that the operator's apparatus is installed at its own risk
- Provide for diversion of an operator's apparatus or termination of its rights to be permitted in the event that it interferes with the statutory function of my client or its operational requirements, which provision is currently found in Paragraph 23 of the Code
- Provide for a statutory "lift and shift" provision
- Include an obligation on Code operators to properly indemnify owners against loss, damage and injury and not interfere with or cause damage to the canal, railway or associated facilities
- Provide for an appropriate property based tribunal to determine any dispute, particularly relating to the initial installation works balancing the relative weight to be ascribed to any genuine engineering concerns
- Require the parties to act with timeliness
- Provide for a "fair and reasonable" "consideration" to be paid for those rights including the right to keep the apparatus installed (which the Court of Appeal curiously and I suggest wrongly ruled was inappropriate in Geo) on a proper Market Value basis in line with proposals under the general regime
- Provide for payment of "compensation" to cover all costs incurred by canal operator in overseeing installation of cable and for all other losses suffered as a result of the carrying out of the work and for its retention (including for example increased costs of inspection and/or using the canal).
- Apply equally to all forms of technology
- Provide for an agreement to be capable of being excluded from any security provisions proposed under any revised Code.

Once reviewed, the Code should aim to have greater simplicity, consistency throughout its provisions and embodying the principles of a fair and reasonable approach espoused throughout the existing Code. The fundamental and longstanding principle of the Code is and should be that Code Rights are presumed to be given by agreement. This principle has run throughout the history of the Telegraph Acts, since the first in 1892, which preceded the existing Code. Indeed it is understood that infrastructure used for semaphore

purposes in the 18th Century, later embodied into the Admiralty (Signal Stations) Act of 1815, all relied on agreement.

Under a regime based on the principle of agreement it follows that payment should be assessed on the basis of value in the marketplace, either by way of an annual value (as is more usually agreed for telecommunications apparatus) or capital value (perhaps more appropriate only for smaller works of relatively lower value, as was the case under *Brookwood*). Market Value is the valuation reached in consequence of an agreement on willing terms and is what the Code's present requirement for "fair and reasonable" term implies. The Law Commission will be fully conversant with the definition of Market Value and the parallel Market Rental Value as defined under the RICS Red Book and also under the European Valuation Standards 2012. Those definitions assume a hypothetical buyer, not the actual purchaser. That person is motivated but not compelled to buy. The buyer is neither overeager nor determined to buy at any price. However, the buyer is also the one who purchases against the backdrop of the realities of the current market with all its current expectations, rather than on an imaginary or hypothetical market which would be unable to be demonstrated or anticipated to exist. Similarly, the willing seller is motivated to sell at market terms for the best price obtainable in the open market after proper marketing, whatever that price might be. The factual circumstances of the actual owner are not part of this as the willing seller is a hypothetical owner. In *Walton v IRC [1996]* the Judge noted that "the willing buyer 'reflects reality in that he embodies whatever was actually the demand for that property at the relevant time' (see *IRC v Grey [1994]* STC 360, 372 per Hoffmann LJ)". Accordingly it is appropriate to have regard to the nature of the demand for the rights being acquired, "but he is not required to exclude the principal bidder from his market, because that principal wants "[the house] more than anyone else and will there give more for it" (*IRC v Clay*).

Further assistance is gained from the inheritance tax case of "Walton" and also the compulsory purchase case simply referred to as "the Indian case".

This "fair and reasonable" basis of valuation was embodied in the leading case of *Mercury v LIDI [1993]* by Judge Hague, who I believe formerly sat on the Lands Tribunal, so was well placed to make such a judgement. Under *LIDI* ransom value arising from any profit share was excluded specifically from the valuation, which principle was furthered under *Brookwood* to exclude all ransom value, including that with which most valuers are conversant arising from the *Stokes v Cambridge* case. The definition of Market Value requires no further assumptions beyond those in its definition, which excludes the possibility of either party acting under duress as they would be willing parties acting knowledgeably, prudently and without compulsion.

Such an understanding of market value recognises the real parties to the agreement and it would be wrong to either import special assumptions to reduce value below what is fair for the agreement in the circumstances or to include scheme specific ransom value that would increase the value above what is fair for the agreement in the circumstances. This is what the established case law and practice for Code agreements has done in interpreting the requirements of paragraph 7(1)(a) and "consideration".

The meaning of "consideration" was considered under *LIDI* and *Brookwood* and it is now accepted practice that it means a market value excluding any ransom element as far as the Code is concerned. The term "compensation" (paragraph 7(1)(b) and paragraph 13(2)(e)(i)) are both taken to mean recompense for loss as opposed to "consideration", which is a price. Sadly, the decision in *Geo v Bridgewater* did not take the opportunity to review what "consideration" might be in relation to Linear Obstacles under paragraph 13(2)(e)(ii). Both parties in *Brookwood* followed the approach under *LIDI* (including the distinction between "consideration" and "compensation") and comments by the Court of Appeal added to the exclusion of ransom value, the exclusion of other elements of value in comparable transactions which reflect the concession by the grantee of "a high value for pragmatic reasons" such as time constraints, the expense or uncertainty of litigation or the small size of the works and any payment.

Judge Hague in *LIDI* held that the principle of compulsory purchase did not apply under the Code not only because it had not been incorporated but because the principles to be used were those derived from the express use of the phrases "given willingly" and "fair and reasonable".

As mentioned previously, the history to the Code is not one of compulsory purchase but rather one of agreement. Therefore it would seem wholly inappropriate if one were to adopt any definition of value that

had its roots in the compulsory purchase legislation. During preparation for my clients' Court of Appeal Hearing in *Geo v Bridgewater*, my clients anticipated that Geo might seek to read across the Supreme Court decision in *Star v Bocardo [2010]* in relation to the Linear Obstacle provisions in the Code. For this reason they took legal opinion on the matter from Jonathan Small QC and Oliver Radley-Gardner (both Falcon Chambers). In the event, that argument was not run by Geo at the Court of Appeal Hearing. However, it is worth reflecting upon their opinion that Counsel did *"not believe that the majority's reasoning and the decision in Bocardo taken by itself should affect our clients' prospects in the Court of Appeal."*

Counsel went on as follows. *"Essentially Bocardo decided that, on the true construction of the relevant statutory provision under consideration compulsory purchase principles applied to the statutory right to drill for oil. However, we do not consider that the same reasoning is applicable to the relevant parts of the Code, and that Bocardo requires a departure from the decision of HHJ Haque QC in Mercury Communications Ltd; Further Bocardo, having adopted compulsory purchase principles, applied the Pointe Gourde principle which demands that one ignores any value attributable to the compulsory scheme itself; if compulsory purchase principles do apply in our clients' case, we believe that they will only come into play at the next stage of the arbitration. However, we doubt that the Pointe Gourde principle applies having regard to the common nature of the wayleave in question and... the ready availability of comparable evidence to establish a going rate for such rights"*.

The full reasons for their opinion are set out in the attached annex to this paper.

Whatever the view of *Bocardo,* the Consultation Paper proposes a no-scheme Market Value basis for payment which appears to bear some similarities to compulsory purchase. This is very different from both the law and practice that has developed since the first Telegraph Act was published in 1892, which was operated on the basis of agreement and of Market Value. Indeed, the only references to the Land Compensation Act 1961 in the Code appear under Paragraphs 4 and 16 and not under those parts relating to financial awards under Paragraphs 7 and 13 of the Code (please see reference in annexed Opinion on *Bocardo*). If the Law Commission accepts that it would be inappropriate to import compulsory purchase principles into the valuation of telecoms rights under the Code, the obvious and understandable definitions of "consideration" and "compensation" become increasingly more understandable and more appropriate for incorporation into any revised Code.

I fear that there has been a good deal of muddled thinking by endeavouring to read across compulsory purchase legislation and transport it into the Code. Under the Land Compensation Act 1961 the basic rules of valuations and assumptions all lead to the assessment of payment that is referred to only as "compensation". Within that term value is ascribed for any land taken for the purposes of the statutory acquirer. This is at distinct variance to the provisions of the Code whereunder the value of any land taken or rights granted would fall within the definition of "consideration" (i.e. the price), leaving only matters where losses incurred by the owner or those others affected by the rights granted to be awarded as recompense under the term "compensation". Retaining this distinction between "consideration" and "compensation" (mentioned under paragraphs 7(1) and (13)(2)(e) of the Code, as further refined under the *LIDI* and *Brookwood* judgements) will only serve to aid greater understanding by all parties, with "consideration" being assessed in accordance with normal Market Value principles.

Indeed, as a member of the RICS Telecoms Forum, I have seen a recent draft response from the RICS to the Law Commission's question at paragraph 10.44 that includes the following remarkable sentence, which seems to me to exemplify the muddle into which thinking can descend if one fails to use the accepted definitions of "consideration" and "compensation".

> *"We do not agree that the removal of the expressed term "consideration" would necessarily result in little or no compensation being payable for the grant of the right."*

Should the basis for assessment of value change to anything other than its present Market Value, there would be a sea-change in attitudes of landowners, who would see it to their disadvantage, as well as a general destabilisation of the existing agreements and the likelihood of the operators seeking to renegotiate future rights against the backdrop of any revised Code.

Landlords would withdraw their properties from the market of those available for telecoms use as a consequence of expecting that the rents received from other existing sites would be greatly reduced on renewal and, as a further consequence, would seek to resist renewal of those existing sites themselves.

Starkly, rents for a 15 metre mobile mast are typically between £5,000 and £7,000 per annum under the existing Code. Under compulsory purchase principles the "no-scheme" rental value would reduce to perhaps as little as £2 per annum for the corner of an agricultural field. Similar effects could be expected to be seen in the cables market. For example, my clients who have up until the *Geo v Bridgewater* decision received income from its telecoms interests in excess of £800,000 per annum would be likely to see a very significant reduction to less than half that sum post *Geo v. Bridgewater* and it could be expected to diminish further to a comparatively insignificant sum if rights were to be valued on a compulsory purchase basis. Cables with a previous agreed Market Value of £10 to £12 per metre per annum or more for canal crossings could be reduced to as little as 40p per metre per annum, which would be similar to the rates recommended for agreement by the CLA and NFU. Under those circumstances my clients simply would not entertain the notion of willingly leasing rights for an operator to install cables through their properties. Similarly it would be difficult to imagine what might be the alternative rental value for a mast site on certain buildings, such as a grain store or church tower and one could see payments dwindling to almost nothing in such cases.

I doubt that the telecommunications operators would be sufficiently well staffed to deal with the likely deluge of work needed to secure and renew rights, to handle the more complex compensation claims and to deal with more formal disputes that inevitably would arise from any shift to a compulsory purchase basis, leaving aside the problems associated with the attendant delay and risk.

Furthermore, the reduction in payments would also affect those who have invested in the reversions to the masts. Landowners have managed to raise capital by selling the freehold in their mast sites to companies such as WIG and Shere, as well as to pension funds, and that value has been assessed on the future income payable for the mast based on the present basis of assessment under the Code.

Carrying the present approach forward would have the benefit of maintaining the developing thread of Case Law rather than opening the way to new litigation. It would also avoid the unwanted and somewhat perverse affects of any change that might lead operators to consider the large scale repudiation of the present agreements, relying on any new Code powers to seek fresh agreements on terms that landowners would see as adverse. This, too, would lead to further litigation.

Whilst the market for telecoms cables may offer fewer opportunities to seek competitive bids that may be available for mast sites, there has been a vast number of transactions in rights for cables of all sorts. Rights in mast sites and cables have always been demand led. Apart from a few exceptional sites, such as the existence of a large existing structure such as a mill, chimney or water tower in an otherwise flat area or a site within a wholly owned but very popular area such as an airport where mobile services are required, there is really no point in an owner marketing a site for telecoms use unless it already has been identified by one or more of the operators as a suitable location for their apparatus.

There are problems, however, in obtaining appropriate comparable evidence for cables and then analysing them, although, with the Code Review, there is now an opportunity to address these problems. The market for cable rights exists but is obscured and made opaque by standard agreements on payment rates and also the prevalence of confidentiality agreements being required by operators for anything more specialist. The NFU and CLA recommend standard rates for cables over farmland as an assistance to their individual members and some owners of long linear landholdings may agree "bulk arrangements" with operators to lay cables along their land, which may reflect their own circumstances but not necessarily those of smaller owners. Indeed, Judge Mance in *Brookwood* advised that "*industrial rates for core or fibre optic cabling with an origin in agricultural negotiations were not, on the evidence, a sound starting point. Across-the-board rates, regardless of location, size, use and importance seem to me the antithesis of the fair and reasonable rate required to be fixed under the code".*

These factors have the combined effect of creating a general imbalance of knowledge between the parties, especially where more significant cables were at issue, to the usual disadvantage of landowners since operators know the details of the full range of agreements to which they are party.

From my own experience I found that sufficient comparables do exist to allow a sufficient analysis of the value of rights, and similarly it is noted that both under *LIDI* and *Brookwood* the courts found that they *"had ample material before him"* (to quote the Judge in *Brookwood*). However, some other valuable comparables may only be forced into the light using discovery procedures available with litigation or arbitration. For this reason I would advocate the preclusion of any confidentiality clauses in agreements under any revised Code procedure, as this would enable greater disclosure of information particularly for cables and would aid transparency. This is particularly important with cables which, by their very nature, are usually underground and hidden from sight, unlike masts. Those masts are not only physically visible but also shown on public websites and their apparatus carries the name of the operator, making it easier to secure possible comparables and understand the local context. In this connection it may be helpful to consider the publication of a public register of the route of these cables. These plans clearly already exist in order to be able to provide service plans for developers.

The use of a statutory privilege (such as that confirmed on licensed telecoms operators), should carry with it an obligation to make the market less opaque. The marketplace operates on the basis of there being adequate comparable information on which to base an assessment.

When the Energis network was set up during the early 1990's, many landowners' agents agreed rates with Energis's representatives at a higher level than the rates recommended by the NFU and the CLA. These rates became the accepted going market rate and served as a template for rights for other operators' fibre optic cables installed later, adjusted for such circumstances the number of fibres in the cable.

There are usually two types of cable that are installed under the code; fibre optic cables (such as those laid in *LIDI*) or copper cables (often pre-existing from earlier Post Office days, such as the one I suspect featured in *Brookwood*). The decision in *Brookwood* distinguished between "main core" cables and "local service" cables, although smaller service cables now tend to be optical fibre, particularly given the increase in price of copper that might be realised if copper cables are stolen. In considering the underlying issue of function, the County Court's Judge in *Brookwood* commented that the suggestion *"that a local cable is as valuable as a fibre optical cable serving many thousands or even millions is contrary to common sense".*

These cases were decided on the basis of comparable evidence. In *Brookwood* the Court of Appeal said that this process "*should make adjustments as necessary for any element of the value of comparables that are being driven by time constraints, the expense or uncertainty of litigation or (I might add) the small size of the works and of any payment".*

Similarly to mast rents, there are many issues affecting the value of a cable such as those listed below:

- The extent to which an operator may be able to use other means of access to the intended destination of the cable, including the free use of the public highway.
- The interests of other relevant landowners.
- The number of fibres or ducts to be installed and who may use them.
- Whether the use of the cable can be shared with others or whether the rights are assignable.
- The impact of the cable on the current and future use of the land.
- Whether the cable is able to be "lifted and shifted".

Again, in my experience, it is likely that any cable agreement with an operator will cover most if not all of the terms that have commonly found in a lease including payment of rent, interest and rates, rent review provisions, obligations as to the execution of any works, safeguarding of apparatus, indemnities, insurance, alienation (sharing, subletting or assignment of rights), user provision, restriction on the number of fibres and/or ducts and, importantly from my clients' point of view, provisions relating to the operator complying with my clients' safety procedures, statutory function and other operational requirements, ultimately giving rise to my clients having the ability to terminate the arrangements.

These agreements more take the form of a grant of a subterranean lease of rights but, just as with a mast, are equally capable, and arguably more so, of compromising a future development opportunity where the land affected is in an urban or urban-fringe location.

As commented elsewhere in this response, problems will exist for my clients as with other landowners in securing the active engagement of operators in negotiations over the renewal of agreements that have expired and the terms and payments for any continuing rights.

ELECTRONIC COMMUNICATIONS CODE REVIEW

RESPONSE ON BEHALF OF THE PEEL HOLDINGS LAND AND PROPERTY (UK) LIMITED GROUP OF COMPANIES

FINANCIAL AWARDS UNDER THE CODE

ANNEX: EXTRACTS FROM OPINION ON *BOCARDO*

Extract from Opinion on the relevance of *Star v Bocardo* on "consideration" and "compensation" payable under the Electronic Communications Code provided by [redacted] and [redacted] of [redacted]

1. Bocardo's land, the Oxted Estate, sits at the apex of an oil field in Palmers Wood Oil Field. Star Energy's predecessors had drilled diagonally from their land, under the Oxted Estate, to the apex of the oil field. This was done without Bocardo's knowledge or consent. It was also done without those predecessors invoking their statutory rights to do so under either the Mines (Working Facilities and Support) Act 1966 ("the 1966 Act") or the Pipelines Act 1962. Instead, they simply trespassed. It was common ground that there was not "one iota" of interference with Bocardo's land, and that the only value lay in the right to drill itself. From the outset, Bocardo accepted that their entitlement for damages for trespass was to be determined against the background of what compensation they would have obtained under section 8(2).

2. There were therefore two questions before the Supreme Court: (1) was there in fact a trespass in this case (the liability point), which involved ascertaining how far below land ownership extended, and, if there was, (2) what was the proper measure of damages (the quantum point). We are not interested in the liability point (where it was resolved that there has been a trespass). What concerns us is the quantum point.

3. The competing positions on the quantum point were as follows. Bocardo conceded that the quantum was to be assessed under section 8(2). They then argued that their land was the key to unlocking the full value of the oil field. Without access to the apex of the field, not all of the oil could be extracted. There was no comparable evidence to establish what such a right was worth in the open market. Therefore, Bocardo argued, one had to engage in a hypothetical negotiation, though this was against the background for the statutory provisions which Star Energy (or their predecessors in this case) could have invoked to extract the oil lawfully. This hypothetical negotiation was, they submitted, on the basis (absent comparable evidence) that one had to assess what share of the profits Star Energy (which Bocardo called "the spoils") could be secured by Bocardo in that negotiation. There was nothing inconsistent between this basis of damages assessment and the strict wording of section 8(2). This, they submitted, was nothing more than a statutory recognition of the "user" or "wayleave" method of assessment of damages.

4. Star Energy, however, pointed out that oil was nationalised by the Petroleum (Production) Act 1934 ("the 1934 Act"). From the date of that Act coming into force, the owners of the Oxted Estate ceased to be the owners of the oil beneath it. It could only be extracted by licensed operators authorised to do so by the Secretary of State, on behalf of the Crown. Under the 1966 Act (replacing an earlier enactment) it was provided that, if an operator asked a landowner for permission to drill, and the

landowner unreasonably refused his consent, then the matter could be referred to the Secretary of State who could refer the matter to the Courts.

5. Section 8(2) of the 1966 Act then provides that:

> *"The compensation or consideration in respect of any right ... shall be assessed by the Court on the basis of what would be fair and reasonable between a willing grantor and a willing grantee".*

6. This section, Bocardo noted, did not refer to any compulsory purchase provisions, and, therefore, the principles of compulsory purchase did not apply. However, Star Energy argued that (a) this was a case of compulsory purchase and (b) if compulsory purchase principles did apply, this deprived Bocardo of its bargaining position to demand a share of the "spoils" for consent, on *Pointe Gourde* grounds.

7. The Supreme Court therefore had to decide those two issues. As to (a), it was argued by Star Energy that compulsory purchase principles did in fact apply, and, most importantly, that those principles included the *Pointe Gourde* principle, which requires that on valuation of any right to be acquired compulsorily by statute, any uplift in compensation had to disregard any value attributable to the statutory scheme. This is sometimes also called the "value to owner" principle, or the "no scheme" principle. In other words, a valley as such is worth £x an acre. However, assume that the valley is to be compulsorily acquired as it is ideally placed as a location for a reservoir with hydroelectric dam. As such, its value becomes £100x. The landowner can (one would think obviously) not take advantage of the fact of compulsory acquisition to enable him to demand the latter amount.

8. The quantum issue in Bocardo was therefore whether, as a matter of statutory interpretation, the 1996 Act should have read into it compulsory purchase valuation principles (including *Pointe Gourde*) or not. Lord Brown (giving the majority judgement on the issue of quantum, with Lord Collins and Lord Walker concurring) decided that compulsory purchase principles did apply in this case: see at [71] – [72], and that in principle *Pointe Gourde* was also relevant to the question of compensation. The scheme as a whole, which depended on oil being expropriated without compensation in 1934, would be undermined if landowners could obtain value by the "back door" through ransom or key value. Furthermore, in addition to the general scheme nationalising oil, Parliament had explicitly provided that a 10% uplift should be paid to the landowner to reflect the fact that his loss was occasioned by "compulsory" purchase. This indicated that Parliament did not intend the wayleave/user measure to operate. Lord Collins agreed with him (at [99] – [100]; [104]).

9. If *Pointe Gourde* could apply, did it apply in that case (issue (b))? The majority said yes. Section 8(2) had to be read against the background of the relevant Acts, which amounted, when applied to a given case, to a scheme conferring the "right of exploitation of the petroleum licence in the specified area". Without that right, there would be no need to drill, and hence there would be no value (except a nominal value). The majority pointed out that even if there had been some sort of "key value" before the nationalisation of oil (which Bocardo (or its predecessor) would have owned prior to nationalisation), the 1934 Act extinguished that key value by expropriating the oil. This is the main point of difference between the majority and the minority in *Bocardo* or *Pointe Gourde*, the latter taking the view that *Pointe Gourde* was irrelevant on the basis that the oil field pre-dated the scheme

and so there was always a potentially valuable right to drill, irrespective of any compulsory acquisition powers.

The key issues

10. How might the operator in our case argue that *Bocardo* assists it on the appeal? It seems to us that the potential effect of *Bocardo* is serious. The Appellant may seek to demonstrate that compulsory purchase principles should apply to paragraphs 12 and 13 of the Code and further build on that and demonstrate that the *Pointe Gourde* rule applies to the valuation under paragraph 13(2)(e)(ii) of the Code. If the Appellant succeeds then he may be able to demonstrate, before the arbitrator, that the consideration amounts to nil or almost nil once one subtracts the value attached to the operators' compulsory right to put cables under the canal.

11. It will be recalled that paragraph 13(2)(e) empowers the arbitrator to determine (i) compensation for "loss or damage sustained ... in consequence of the carrying out of the works" and (ii) "consideration payable ... for the right to carry out the works".

12. It appears to us that the key issues arising from *Bocardo* are as follows:

    (1) Do compulsory purchase principles apply to paragraph 13 of the Code? If not, *Point Grande* simply does not ever arise.
    (2) If they do, is there a "scheme" in the *Pointe Grande* sense?

Issue One: do compulsory purchase principles apply to "consideration" under paragraphs 12 and 13 of the Code?

13. The first issue appears to us to have been squarely addressed by the decision of HHJ Hague QC in *Mercury Communications Ltd v London & India Dock Investments Ltd (1993)* 69 P & CR 135. In that case, the operator, Mercury, argued that compulsory purchase provisions, and specifically *Ponte Grande*, should be read into the Code, in that case into paragraph 7(1)(a). That argument was rejected by HHJ Hague, accepting three arguments put forward by counsel for the landowner (see at pp. 154 – 155). These were, first, that there is reference to the Land Compensation Act 1961 in other parts of the Code (being paragraphs 4 and 16), but not in paragraph 7 (nor does it in our paragraphs, 12 and 13), which omission must have been intentional. Secondly, previous legislation, namely the Telegraph Act 1963, s.6 (which also related to canals), expressly referred to the Land Clauses Consolidation Act 1845, when the Code in the relevant provision, paragraph 7, did not (and does not in our paragraphs 12 and 13). Thirdly, a contrast was also drawn between the Code and other legislation allowing for the acquisition of rights by public utility companies, where the relevant compulsory purchase legislation is referred to. He therefore expressly rejected the application of *Pointe Gourde* to the Code (at 156).

14. It seems to us that the question is, did the reasoning of the majority in *Bocardo* overrule *Mercury?* We do not consider that this is the case. This is for two reasons.

15. The first reason is that in order for *Bocardo* to have any effect, it must be possible to construe paragraphs 12 and 13 of the Code as importing compulsory purchase valuation principles. There was

no room to do so in the 1966 Act in *Bocardo,* and this reading was also consistent with the statutory scheme (founded, as it was, on the state expropriation of oil fields).

16. The Code is materially different in terms of how it is drafted. Under the Code provision is made for the compulsory purchase valuation principles to be imported in some paragraphs, but not others (ours included). We consider that this point, accepted in *Mercury,* remains an important point of construction unaffected by *Bocardo.* It would run against the grain of the Code to read compulsory purchase valuation principles into paragraphs which do not mention them, when other paragraphs deliberately do.

17. There is, of course, truth that there is an element of compulsion under the Code. It is, in our view, not enough merely to point out that the Code gives operators the right to compel certain rights to be granted. That does not mean that this is an instance of "compulsory purchase" in the technical sense, less still that the valuation principles underpinning compulsory purchase apply. That point is brought out in *St Leger-Davey v Secretary of State for the Environmental and Orange PCS Ltd* [2004] EWHC 512, paras 26 & 27.

18. Further, Mance LJ was prepared, in *Cabletel (Surrey and Hampshire) Ltd v Brookwood Cemetery Ltd* [2002] EWCA Civ 720, to proceed on the basis of the common ground of the parties that paragraph 7 was not subject to principles of compulsory purchase, though he did point out the issue was not argued before him. Insofar as there is authority, it is in line with our argument, and not that of GEO Networks.

19. It therefore seems to us that *Bocardo* would only have a potential impact on our case were it possible to read compulsory purchase valuation principles into our paragraphs of the Code. If the reasons in *Mercury* still hold good, then it is not possible to do so. As we noted above, the essential reasoning of HHJ Hague QC in *Mercury* pertaining to the Code is not open to question after *Bocardo*.

20. We consider that we also have a second potential argument open to us. It seems plain from *Bocardo* that a distinction was being drawn in their Lordships' judgements between the concepts of "consideration" and "compensation" under section 8(2). It appears to have been thought that "consideration" had no bearing on the case before their Lordships, and was designed for some other category of right which the scheme might authorise, such as the right to search for, dig up and take away minerals (see, for example, Lord Hope at [38] and Lord Brown at [71]). It may be that it was unnecessary for *Bocardo* to argue that "consideration" ought to be paid given that they were seeking damages on a wayleave rather than a loss basis, however this is not clear from the judgements.

21. Be that as it may, at [71] Lord Brown had the following to say about the difference between "consideration" and "compensation" (emphasis added):

> *"Quite why the 1923 Act (and, in turn, the 1966 Act) do not incorporate the statutory rules contained in the general land compensation legislation is unclear, but it may be because the 1923 Act (and the 1966 Act) provide not only (as is directly relevant here) for "compensation" for rights over land to win minerals not in the landowner's ownership, but also for "consideration", for example for the working of coal whereby the property in the mineral passes*

> *from the grantor to the grantee and so calls for a valuation of that property right on an ordinary commercial basis."*

22. It will be noted that his Lordship expressly stated that, if what is being assessed is "consideration", then a valuation on an ordinary commercial basis, and not on a compulsory purchase basis, is in order.

24. A distinction had been made between compensation and consideration in paragraph 7 of the Code. Paragraph 7 is the part of the Code where the Court fixes the financial terms for the right to install apparatus under paragraph 5. The terms of paragraph 7(1) are close to but by no means exactly the same as the terms of paragraph 13(2)(e). Nevertheless consideration for the agreement is separated from compensation for loss and damage in two separate sub-paragraphs, as with paragraph 13.

25. There is, however, further support for the compensation/consideration distinction. At paragraph [11] of *Cabletel*, Mance LJ (commenting on the reports of one of the parties' experts and accepting what was common ground between counsel before them, as to which see [6] of that judgement) stated as follows:

> *"I would say at the outset that the latter's report suffered from the apparent problem that it was headed "compensation" and that it failed to distinguish between paragraph (1)(a) and (b) of the code, or to draw the distinction made in Mercury (and accepted as common ground before us) between the principles governing compensation for compulsory purchase and those governing terms fixed under paragraph 7 (1)(a)."*

26. Although it was common ground, and hence not argued, between the parties in *Cabletel*, Mance LJ does appear to have accepted that there was a difference in principle between compensation and consideration, and that compulsory purchase principles were a matter for the former and not the latter.

27. In both paragraph 7 and 13 of the Code consideration and compensation are separated out by two separate sub-paragraphs each, apparently, directed to different things. One of each or both may be payable, depending on the circumstances. We are of the view that the specific description of two different types of financial provision read together with the absence of any reference to compulsory purchase principles (in contrast with other provisions of the Code) suggest that the words should be construed without reference to such principles, as with the case before Lewison J.

Issue Two: Is there a "scheme" for* Pointe Gourde *purposes?

28. Assume that we are wrong about both of the above. Could it be argued that there is a scheme within the meaning of *Pointe Gourde*?

29. One could of course draw parallels with the *Bocardo* scheme, which was "the exploitation of the petroleum licence in the specified area" (at [82]). It was for the implementation of that scheme that the right was granted. If there were no such scheme – if for example oil could not be extracted lawfully at all – the right would be totally valueless. No one would want or need it.

30. It could be said by analogy that there is a scheme under the Code, which is that licensed operators, (and only licensed operators) have the right to run cables under canals. If that is so, then one could argue that, as no-one else has any such entitlement, then it would follow that any value to be attached to such a right is unique to the providers of electronic communications.

31. However, we do not believe that the *Bocardo* scheme is a good analogy in this particular case. It is clear that the Supreme Court considered by a majority that the oil itself would have no value without the right to drill. Therefore, it was the scheme itself (conferring the right to drill) which had real value, which value fell to be discounted under *Pointe Gourde* principles.

32. We doubt that this is the case here. There is no exclusive asset in the nature of the oil which confers value on the right to run a cable under a canal. The right to run a cable or other conduit is intrinsically valuable, and does not have "reflective" value merely as an adjunct to some more valuable asset which is in the gift of a public law body by statute. Furthermore, the right to run a cable under a canal is not a right confined to a statutory operator under the Code, but is potentially exercisable by any private person wishing to negotiate for such a right. The right to run a cable, pipe of other conduit under the canal might also be of value to a developer seeking to connect his development to the mains electricity or mains sewer. In other words it is a right of no particular peculiarity.

33. It is at this point we find the key distinction between our clients' case and *Bocardo. Bocardo* concerned remote drilling activity which did not affect the Oxted Estate "one iota". The drilling was to access valuable oil reserves but it was a one-off and the value of the drilling could only be referable to the compulsory right to drill; accordingly that value fell to be disregarded. Not so in our clients' case. The laying of the cables under the canal and indeed the granting of other easements and wayleaves is not a one-off. We assume that it is commonplace and would be, irrespective of the Code and any other statutory provision. We assume that there is no "pot of gold" at the end of GEO Network's line making the right peculiarly valuable. For all these reasons – and in stark contrast with the facts of *Bocardo* – there is comparable evidence to assess a "going rate" for this sort of wayleave. In other words the right has value in itself irrespective of whatever particular reason any one operator may have to lay the cables. To say that one subtracts any value attributable to the right at all by virtue of the compulsory nature of paragraph 12 would render paragraph 13(2)(e)(ii) a dead letter.

34. Thus, even if *Pointe Gourde* were to apply in principle because paragraphs 12 and 13, and the consideration provisions therein contained, are subject to compulsory purchase principles, we consider that there is still a good argument that, in fact, there is no relevant "scheme", which, if disregarded, would render the right to run a cable under a canal valueless.

35. In terms of the Appeal, *Bocardo* does not, in our opinion, affect the correct interpretation of paragraphs 12 and 13 of the Code.

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.
N/A	

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.
N/A	

10.5	We provisionally propose that code rights should be technology neutral. Do consultees agree? Consultation Paper, Part 3, paragraph 3.18.
N/A	

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.
N/A	

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.
N/A	

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.
N/A	

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.
N/A

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.
N/A

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.
Subject to the trees being either protected by Tree Preservation Order (TPO) or the land being within a conservation area. Powers of protection under the Town and Country Planning Act 1990 (as amended) should not be affected.

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.

N/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.

1) Yes. Acceptable in the interest of visual amenity
2) Yes. (as above) and to reduce visual clutter
3) N/A

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.

Further provisions having regard to comments in 10:16.

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) N/A
2) Yes
3) N/A

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.

N/A

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.
N/A	

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.
N/A	

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.
N/A

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.
Support subject to any conflict with Planning legislation under the Town and Counctry (General Permitted Development) Order 1995 (as amended) Reference to 'change of use is made at Para 5.3 of the document. It needs to be explained what this change of use involves. Where a land use change of use takes place this may require planning permission

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.
N/A

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.
N/A

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

10.36 We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.	
No. We are concerned where this may impact on the Local Authority's ability to maintain control of its housing stock. In addition we are also concerned about the increasing incidences of non – working apparatus (phone boxes) being installed in the public highway as a ' Trojan horse' whilst taking advantage of advertisement entitelements.	

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, 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.
N/A	

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.
N/A	

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.
N/A	

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.
N/A	

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.
N/A	

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.
N/A	

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.
N/A	

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.	
N/A	

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.	
N/A	

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.
N/A	

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.
N/A	

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.
N/A	

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

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
N/A	

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.
N/A	

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.
N/A	

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.
N/A	

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.
N/A	

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.
N/A	

INTERACTION WITH OTHER REGIMES

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

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.	
N/A	

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.
N/A

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

Additional comment

The London Borough of Hackney are concerned that some Electronic Communications Code Operators are abusing their rights under the Town and Country (General Permitted Development) Order 1995 (as amended). In addition our concerns are also in connection with an abuse of Class 16 of the Town and Country Planning (Control of Advertisements) Regulations 2007.

In this respect we draw your attention to the erection of telephone boxes which do not contain working apparatus but contain an advertisement display. For clarity we are not concerned with apparatus which has been vandalised or there has been a general failure of the machinery (and is awaiting maintenance/replacement/ repair). This is specifically to phone boxes which have non functioning apparatus and have not been connected. Such boxes have been discovered in our area as they remain non-functioning with no apparent interest in their being made functional despite the relevant bodies being made aware of the issue. This has not prevented the phone boxes being subject to replacement

advertisements over considerable periods. Council Member has drawn this to the attention of relevant bodies (Ofcom/ BT).

There seems to be no appropriate legislative safeguards against this practice as the phones which are non-functioning are reported as in the process of being made functional (and only require connection). The Council states that through its investigations those phone boxes have not been made functional and further argue that the sole purpose of these boxes are for the display of advertisements.

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:
N Milne Esq
Email address:
Postal address:
[redacted]
Telephone number:
[redacted]
Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):
TDC Aberdeen 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.

I accept the need for the Code and these rights

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.

I consider that the code rights should definitely not be extended. I believe that there is a good argument that they should be curtailed and that it should be better balanced to address the interests of landowners such as ourselves.

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

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

I agree although 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.
I consider that operators should have an obligation to point out the provisions of the Code when entering into an agreement; in particular the implications of paragraph 21. I was unaware that the Code could override the lease entered into over my property.	

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.
I 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 Code 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.

I 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 for free 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.

I believe the Code should relate to the individual operator and not be widened so as to enable operators to assign to joint venture companies involving several networks.

It is unreasonable for the regulatory authority, Ofcom, to grant permission to operators to assign licences etc without considering the effect of their actions on existing agreements [redacted].

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.
I 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 (as appears to be the case on my property). The only recourse for a landowner is the Courts and this is expensive. In effect, landowners are unfairly affected by the grant of such compulsory rights to an operator without any balancing mechanism. In revising the Code 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.
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 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.
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.
The current Code provisions are unfairly biased toward operators, particularly given the fact that operators having served a paragraph 21 notice protecting their interests tend to do nothing to obtain a new agreement. We served notice to remove [redacted] and have had no contact from them since that date. During such time I am unable to exercise my normal property rights over the site.

10.37 We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully. Do consultees agree? Consultation Paper, Part 5, paragraph 5.48.
It is unreasonable for an operator in breach of an agreement, its licence or planning legislation to have the ability to 'trump' a notice 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 failing which the Code should no longer apply leaving the landowner to take action to remove unfettered by the complications of the Code.

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. It is unreasonable for operators to enjoy revenue form my property when effectively trespassing

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.
I agree. The current provisions of Paragraph 21 are of such concern that I would not have freely entered r into an agreement with telecoms operators had I known the impact.

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. If I were only being offered compensation I would not enter into any telecoms agreement.

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 and 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.
If only compensation were available I would not be prepared to enter into any telecoms agreement to site equipment on my land.

10.45 Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable). Consultation Paper, Part 6, paragraph 6.74.
This is a valuation question best addressed to experts in this field. I would expect to get the going value as I would for any other tenanted property.

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.
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.

I 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 seems the obvious forum for a question of law and valuation.

Arbitration should be available 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.

This would be inappropriate where the landowner was disputing the right to install equipment or the terms.

My problem is that having served notice [redacted] a third party [redacted] has served a counter notice to remain on site. They say that they are authorised by Ofcom.

The Code must enable me to protect my property interests

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 delay in reaching agreement in my case is entirely due to 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
Where an agreement is imposed it is entirely reasonable that the operator pay costs (as any acquiring authority would do 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.
I see no reason for this.

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 and I believe 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.
I 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	

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.

I have concerns regarding the failure of operators to make contingent liability for removal of redundant equipment. [redacted] It is unreasonable to expect the landowner to pick up costs of some [redacted] for reinstatement and rates bills of circa [redacted] in respect of this site.

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:
South West Water Limited
Email address:
Postal address:
Peninsula House Rydon Lane Exeter EX2 7HR
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):**
As above
If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

10.3 We provisionally propose that code rights should include rights for Code Operators: (1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus; (2) to keep electronic communications apparatus installed on, under or over that land; and (3) to enter land to inspect any apparatus. Do consultees agree? Consultation Paper, Part 3, paragraph 3.16.
We are in a unique position as a statutory sewerage and water undertaker and do not agree that blanket rights as suggested in 10.3 should be included without consideration being taken into account by the Code Operator as to the use of the Landowner's site. Priority for the revised code is that the specific use of the Landowner's site should be taken into account. Statutory undertaker's rights and obligations need to take priority must not be hampered by the rights of Code Operator's. In practice the Code Rights have not been enforced by virtue of a court order but have been incorporated into an Agreement agreed between the parties acting reasonably. Our view is that this undermines why these rights have to be entrenched within Statute. The rationale of the Code Rights pre-supposes that the public have a right to access mobile phone coverage, by virtue of the "Access Principle", thus making the Code Operators akin to that of a statutory undertaker .As a consequence, and to balance such power, such undertaker must adhere to a statute backed Code of Practice overseen and adjudicated by the regulating authority. We would wish to see similar such balance included.

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.
As above

10.5	We provisionally propose that code rights should be technology neutral. Do consultees agree? Consultation Paper, Part 3, paragraph 3.18.
Agreed. In our view if the Code rights related to product specific technology then this would limit the affect of the Code in the future as technology changes and have a restrictive affect.	

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.
Agreed. If general rights are to be generated then the Code Operator must comply with the Landowner's regulations. For example, as a statutory water and sewage undertaker, some sites are unique and require compliance with security conditions. It may be also be necessary from a health and Safety point of view that in order to use the right to lay cabling, for example, the Code Operator must comply with specific Health and Safety Regulations of the Land owner.	

10.7	We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it? Consultation Paper, Part 3, paragraph 3.27.
The current definition is broad enough to include the broad scope of equipment. We do not really share a view either way on this.	

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.
Our view is that it should be the Landowner who enters into any agreement with the Code Operator rather than an Occupier. In practical terms, it is the Landowner who is left to obtain vacant possession with the Code Operator and this should override the principle that the occupier is inconvenienced. Even if the occupier's tenancy expires by virtue of Agricultural legislation for example, for the reasons outlined later, there is still the problem that the Landowner must ultimately incur the costs of obtaining a court order to obtain vacant possession under the Code.

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.
In our view, agreement on reasonable market terms can be met in practice between parties acting reasonably on market terms. Therefore, parties should have the ability to contract out of the Code. However, our view is that any test should be clear and transparent. Arguably the Access Principle may be less applicable in today's current market as the network is mature and the focus of Code Operators is placed on upgrading existing Sites rather than acquiring new ones. Our view is that when weighing up the balance, a tribunal should place greater emphasis on the prejudice to the Landowner. In taking into account of the public benefit, the tribunal should also consider the public interest of a statutory water and sewerage undertaker. Our view is that the Access Principle does require amendment as the positive onus should shift on the Code Operator to have in place the mechanism and technology to upgrade on existing Sites and pay consideration to the Landowner accordingly rather than have Access to new Sites in order to weaken a Landowner's bargaining position.

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.
Whilst we have not experienced this in practice. We would object to this in principle as ultimately, an occupier should not have the ability to do this and it bind a freeholder as a consequence.

10.11 We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused. Consultation Paper, Part 3, paragraph 3.67.
We have not experienced any problems with this in practice as our agreements deal with this scenario but would query whether this right is still necessary in light of the technology being modernised to accommodate the move towards wireless.

10.12 Consultees are asked to tell us their views about the right to object to overhead apparatus. Consultation Paper, Part 3, paragraph 3.68.
It is expensive and time consuming for a Landowner to go to court to enforce an objection. Also the test applied of whether it is “material” to the Landowner is more onerous to the Landowner to establish. In practice however, we find that the terms within any Agreement would overtake the Code.

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.
Yes as this would concur with the severity of the failure to do so; namely injury to others. If this obligation were not in place, then all the responsibility would be on the Landowner in accordance with their statutory obligations as Landowner.

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 to all of the above, in so far as the extensions of this right outlined in (1) (2) and (3) place priority with the Code Operator. The Landowner's only way of objecting is via the court route, which is expensive and time consuming.

Consideration needs to be given to site specific requirements of the Landowner where screening by vegetation is required for a Sewage Treatment Works for example. For this reason, Code Operator rights should not be extended "as of right".

10.15 We ask consultees:

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

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

Consultation Paper, Part 3, paragraph 3.78.

(1) No. There should not be an absolute right to upgrade as for example Landowners could have their own equipment in situ.
(2) Any upgrade should be with the Landowner's consent and then part of that process should be a structured additional payment which is clearly defined. As discussed owing to the lack of comparables, a structured amount could be agreed as to the amount payable for an upgrade. Again, in practice, this would be agreed between parties within an 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.

(1) Yes. In practice Landowners have very little (if any) ability to prevent site sharing. Our view is that Site sharing should be similar to other leasehold scenarios where a sub-tenant takes subject to the Headlease
(2) No. The Code Operators should not benefit from a right to share. Landowner's should have the ability to be able to control who is using their land. Ultimately, our view is that any contractual term governing this, was entered into between parties and demonstrates the the parties intentions and arguably this should override the Code.
(3) Yes. It is a competitive telecommunications market. Our view is if the Landowner has a Site that is useful and attractive to more than one Code Operator then why should the

Landowner not receive any financial benefit for allowing this.

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

Consultation Paper, Part 3, paragraph 3.88.

Our view is that agreement would stipulate that sharing of any apparatus will be with the Landowner's consent, so in practice the agreements negotiated would override this anyway.

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) In practice this could present difficulties as often the Code Operators merge and amalgamate with other Code Operators so that they do not have to technically "assign" the rights
(2) No. In so much as the Landowner is able, the Landowner must have the ability to control who is using their land. Also from our perspective, we need to have the ability to object to a Code Operator if it is in the best interests of our statutory position as a sewerage and water undertaker.
(3) Assignment should be with the Landowner's consent and extra payment should be made to the Landowner.

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 any ancillary rights are necessary.

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, we do not see a need for this.

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 so far as we are 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.

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 agreement would override the Code and if Code Operators were in breach of their obligations then the usual forfeiture provisions would apply.

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.

Our view is that the applications of "relevant conduit" should be extended to include operational sites of a statutory water and sewerage undertakers. For example if the Code prevents the doing of anything inside a water main then it should be within the water undertaker's discretion as to whether that should extend to a water treatment works for example.

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. The current clause stipulates that the alteration or removal is to be at the undertaker's expense and to the Code Operator's satisfaction. Our view, if it is owing to our statutory reasons why apparatus needs to be removed or altered then it needs to be to the standard of the undertaker who requires the change, especially if they are to pay for it. The principles behind Paragraph 23 in its current form suggest a priority of the Code Operator's responsibilities to the public over the interests of the public in requiring Water or Sewerage.

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
Our view is that as outlined so far, there is a need for a special regime to be amended to deal with the specific requirements of statutory undertakers.

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.
It is agreed that a clear procedure using prescribed forms would deal with removal of apparatus at the end of the term. Our view is that alterations can be dealt with within a written agreement between parties with the Landlord's consent. The current court procedure is lengthy and having prescribed forms would be in all parties' best interests.

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.
In our view it does not strike the right balance. The reliance upon court orders causes delay for all concerned. Alteration clauses could adequately be dealt with by virtue of the Lease and with the Landowner's consent. Parties negotiating an agreement in a commercial situation should be able to contract out of the alterations regime in the revised code.

10.34 We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code. Do consultees agree? Consultation Paper, Part 5, paragraph 5.13.
As above in 10.33

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.
In our view, priority must be placed with the Landowner of the canal for have full control over alterations to the Canal.

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.
In our view, this is not practicable. Overall, in the revised code the onus needs to be with the Operator to undertake positive action to retain the apparatus on Site rather than the Landowner have to enforce positive action to have the equipment removed. It would be preferable if the parties have the ability to contract out of the Code.

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.
In principle, we would 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.
As outlined in 10.36 above our view is that the onus should shift to the Code Operator's to seek to renew another lease and keep the equipment on Site. Our view is that a proposed procedure could be making it more similar to the prescribed form of notice within the Landlord and Tenant Act of 1954. Obligating the Operator to apply for the equipment to be retained and the Landowner being able to rely on specified grounds for requiring vacant possession. The first instance for the decision does not have to be a court but can be agreed between the parties in different scenarios.

10.39 We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus. Consultation Paper, Part 5, paragraph 5.50.
Our view is that terms of the Lease should continue pending removal of the Apparatus.

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.
In our view this is agreed but should also be extended to allow for no security of tenure if the land is required for the purposes of our statutory sewerage and water undertaking. This is agreed in practice, when negotiating any agreement, our view is that again the Code can be contracted out of or alternatively the Code should mirror 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.
In our view this is agreed that the Code needs to apply retrospectively to avoid any ambiguity.	

FINANCIAL AWARDS UNDER THE CODE

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

10.42 We provisionally propose that a single entitlement to compensation for loss or damage sustained by the exercise of rights conferred under the Code, including the diminution in value of the claimant's interest in the land concerned or in other land, should be available to all persons bound by the rights granted by an order conferring code rights. Do consultees agree? Consultation Paper, Part 6, paragraph 6.35.
Agreed but subject to whether the revised Code is changed as to who is bound by Code Rights. Our view is that the Landowner rather than the occupier should only be bound as they have to enforce removal.

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.
As above

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.
Our view, in principle, is that this is not agreed as Schedule 5 of the Land Compensation Act 1961 means that the "Schemes" are disregarded within the valuation process. This would potentially devalue each Site and create a steer towards a nominal amount of compensation that does not reflect the reality of the Code Operator's profit from the Site. In any event, this legislation has been revised to take account of planning sought by a Landowner in the Planning and Compensation Act 1991. In practice, we have found that new agreements or the renewal of existing ones are agreed between parties without recourse to the courts. This then casts doubt over why the Code Operator's right to Code Rights remain if they are not being utilised in practice. Secondly, it

highlights that legislation should reflect the practice that an agreement between parties should override and contract out of the Code.

Our concern is that if this principle of valuation is used then there would be little incentive for the Code Operator to negotiate on a level playing field with any Landowner. The incentive would be for the Code Operators to use the route within the courts and enforce their Code Rights and the mechanism of renewal that would create a lower amount for the Landowner.

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.

Please see our general view on this topic within 10.44

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.

As above

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.
Our view is this appears fair in principle.

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.

In our view this is agreed. This can present lengthy delays and when a Landowner has a high volume of sites, is not a viable option of good economic sense.

However, our view is that the Revised Code could be contracted out of between the parties.

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.

Our view is that this is suitable as it would be speedier but again, the majority of issues could be drafted and agreed in a form of agreement or by a member of the RICS.

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

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.31.

Our view is that code rights can be agreed between parties in an agreement. Rights for the Operator to retain Apparatus could be triggered by service of the prescribed form upon the Landowner in a similar approach to the Landlord and Tenant Act 1954 Part II. Disputes over either would be resolved as the parties have agreed within the agreement.

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
(1) Would be the preferred option.

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.
Agreed, our view is that the forms should be similar to those found in the Landlord and Tenant Act 1954 Part II.

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.
As indicated within our response, our experience to date has shown that agreements have been negotiated between parties. We would not necessarily concur that “standardisation” of terms is appropriate but that a form of agreement negotiated between the parties should have the ability to override the revised code.

INTERACTION WITH OTHER REGIMES

10.58 We provisionally propose that where a Code Operator has vested in it a lease of land for the installation and/or use of apparatus the removal of which is subject to the security provisions of a revised code, Part 2 of the Landlord and Tenant Act 1954 shall not apply to the lease. Do consultees agree? Consultation Paper, Part 8, paragraph 8.22.
Our view is that the way in which the two pieces of legislation conflict is far from satisfactory but when discussing the procedures of prescribed forms as service of notices to either renew or terminate lease then in our view, the 1954 Landlord and Tenant Act 1954 uses a model that could be closely adopted within the revised code.

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.
Our view is that the leases should be capable of being registered at the Land Registry.

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 not had dealings with this in practice

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.
Our view is that the regulation by Ofcom should mirror that of other statutory undertakers however, we have not had any reason for recourse within the Regulations in practice.

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:
Mobile Operators Association (MOA)
Email address:
[redacted]
Postal address:
Russell Square House 10-12 Russell Square London WC1B 5EE
Telephone number:
[redacted]
Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):
The MOA represents the four UK mobile network operators on radio frequency, health and safety and related town planning issues associated with the use of mobile phone technology. The network operators are Everything Everywhere Limited, Hutchison 3G UK Limited, Vodafone Limited and Telefónica UK Limited. All care of the above address.
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 and suggest that code rights should be extended (please see response to 10.4 below) in the interests of clarity and ensuring that Code Operators have the necessary range of rights to provide the expected level of service from their 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.

We consider that the existing code rights should include an express right to *operate* electronic communications apparatus and essential rights to upgrade, refresh, renew and enhance such apparatus on a technology and frequency neutral basis.

We also suggest that a new Code should provide rights for Code Operators (on not less than 14 days' notice) to access land in order to survey for the purpose of ascertaining the nature and suitability of the land and/or buildings. We would hope that such rights would be given by agreement with landowners (with suitable compensation being made in respect of any damage caused) but, in the absence of agreement, there should be a mechanism for obtaining such rights, as the refusal by a landowner to permit access to survey a rooftop or greenfield land may mean that the sites best suited to providing coverage are off limits. In such situations the Code Operator's only current option is to pursue an order for the complete range of code rights under paragraph 5 of the Code, whereas only limited access and survey rights are required.

We also suggest that a new Code could create a sustainable environment which encourages and facilitates sharing as detailed in our main paper at section 5.2.

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 apparatus, or classes of apparatus, 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.

We consider that the landowner and all people with a superior or inferior interest in the land (including new purchasers) should be bound, irrespective of who grants the code rights. Holders of superior interests in land have the ability to regulate their relationships with holders of inferior interests (i.e. a landowner or occupier can control what the tenant may undertake or permit to be undertaken on property).

The current lack of clarity causes issues for Code Operators upon the change of ownership of property with some purchasers refusing to acknowledge the continuation of code rights granted by the seller. A clear statement of the principle that purchasers, new occupiers and owners of any other interest created in respect of land affected will remain bound by existing code rights is recommended.

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.
We consider that anyone with an interest in the land should be bound.

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 comments on this.

10.12 Consultees are asked to tell us their views about the right to object to overhead apparatus. Consultation Paper, Part 3, paragraph 3.68.
We have no comments on this.

10.13 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence. Consultation Paper, Part 3, paragraph 3.69.
We suggest that it might be appropriate to decriminalise as the risks are low.

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

(1) to vegetation generally;

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

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

Consultation Paper, Part 3, paragraph 3.74.

10.15 We ask consultees:

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

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

Consultation Paper, Part 3, paragraph 3.78.

(1) Advances in technology and the rollout of new networks and services require apparatus deployed on existing sites to be upgraded (e.g. to support 4G services). Accordingly, Code Operators require the ability to upgrade as this enables them to deploy new technologies, increase capacity and data services and make efficient use of spectrum, at a lower cost to meet both Government targets and customer expectations.

At present, Code Operators can be faced with lengthy negotiations and ransom situations in order to acquire the rights to upgrade their existing installations. Lengthy negotiations slow down the roll out of new technologies and ultimately delay the improvement of networks and services available to customers.

If Code Operators had an ancillary right to upgrade their apparatus, then this would enable them to upgrade their apparatus and allow customers to have access to faster networks, additional services and new technologies. Please see also sections 4.1.2, 5.1.1 - 5.1.6 (inclusive) of our main paper.

(2) We fail to see how an upgrade would result in a further diminution in value which the landowner suffers as a consequence of an upgrade and accordingly no additional payment should be made.

10.16 We ask consultees:

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

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

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

Consultation Paper, Part 3, paragraph 3.83.

(1) The ability of landowners to prevent site sharing prevents the efficient use of land and infrastructure. If sharing was available on all existing and new sites then this would align the use of each installation with planning policies and enable Code Operators to rollout additional coverage and new technologies in a quicker manner which is beneficial for all parties, including customers who would have access to a greater choice of networks, services and providers. Please see also section 5.2 of our main paper.

(2) We think that Code Operators would benefit from a general right to share. The right to share should override any contractual restrictions for the reasons set out above. Please see also section 5.2 of our main paper.

(3) We do not consider that any additional payment should be made. A landowner should only receive additional payments if there is a diminution in the value of their land arising directly from the additional sharers use of the site/ infrastructure. Please see also section 5.2 of our main paper.

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.

This section is not useful to Code Operators in relation to sharing. Code Operators' concerns regarding sharing can be more adequately addressed by adopting the Recommendations set out in the main paper. Please see also section 5.2 of our main paper.

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) Code Operators face issues with landowners withholding consent to assign and this has prevented the rollout of additional coverage, services, networks and impacted on the availability and choice of services, networks and coverage to customers.
(2) Code Operators should have an absolute right to assign, overriding contractual provisions, without qualification. This would enable the rollout of additional coverage, services, and networks from existing sites and make available a greater choice of services, networks and coverage to customers.
(3) The ability to assign should not be subject to compensation as the landowner suffers no loss as a consequence of assignment.

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

Consultation Paper, Part 3, paragraph 3.94.

The rights under the Code need to extend to:

(i) enable relevant third parties (such as fixed line operators/cable companies/electricity companies) to provide essential services (electricity/data transfer communication) to the communications sites to enable Code Operators to operate;

(ii) enable Code Operators to secure road closures for operational emergencies to Code Operators apparatus/ networks such as dead cells (communications apparatus is not operational and no operational coverage is available) and service affecting faults. At present Local Authorities consider a road closure for an emergency from their perspective as to whether there is a threat of life or death situation arising from the state or condition of communications apparatus (e.g. communications apparatus has been damaged on a highway as a result of a road traffic accident colliding with a street works installation) and not whether the communications apparatus is operational.

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.
Code Operators do experience difficulties in gaining access to their communications apparatus due to obstructions or refusals of access from owners of third party lands which often leads to delays, dead cells (communications apparatus is not operational and no operational coverage is available) and increased costs due to access attempts being aborted.

10.21 Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.
We do not consider this to be directly relevant to our submission.

10.22 Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.
We are not aware of this being used.

10.23 We ask consultees:

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

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

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

Consultation Paper, Part 3, paragraph 3.106.

1) This can occur through access being blocked or through utility services to a site being interfered with. Each of these situations can cause issues with the operation of the electronic communications apparatus and impact on the availability and provisions of coverage, networks and services to the customer.

2) The issue is in relation to the speed of resolution of a dispute with a Landowner. It is neither beneficial to Code Operators nor customers to follow a slow court procedure process whilst the coverage, networks and services available to customers are disrupted/ unavailable.

3) We recommend criminalising unlawful interference with the operation of the electronic communications apparatus, the utility services which service electronic communication apparatus, rights of access to electronic communication apparatus and the exercise of code rights in relation to electronic communication apparatus.

   The creation of such an offence would act as a deterrent without actual enforcement being required in most cases. It would also provide Code Operators with an additional tool to achieve a faster resolution in a dispute situation with Landowners enabling each Operator to improve the availability of their coverage, networks and services to customers. Please see also our main paper at 3.2.

10.24 We ask consultees whether landowners or occupiers need any additional provision to enable them to enforce obligations owed to them by a Code Operator. Consultation Paper, Part 3, paragraph 3.107.
Landowners have a contractual relationship with Code Operators and have sufficient rights and remedies available given the nature of the Operators' 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.

The street works rights should remain drafted as per the existing Code within a revised Code.

However, the street works bond should be dispensed with as it is time consuming, costly and an administrative burden. The bond is disproportionate to the actual risks to local authorities. Refer also to section 6.5 of the main paper.

We do not consider that it is necessary to add to the existing level of regulation. There is already a significant amount of legislation governing such works (including the New Roads and Street works Act 1991, Traffic Management Act 2004 and the Transport (Scotland) Act 2005) which applies to such 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.

We do not consider this to be directly relevant to our submission.

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 very little, if any, experience in respect of the issues concerning tidal waters and how they are affected by the Code.

We would suggest that other consultees' are better placed to answer these questions.

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.

These questions are more relevant to fixed line operators as opposed to mobile operators and we therefore have no particular comments to make.

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 that the use of relevant conduits should require the consent of the conduits owner or the authority with control of the relevant conduit; however in any case we are of the view that the consent should not be unreasonably withheld or delayed.

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 that the substance of paragraph 23 should be replicated.

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 consider that if the Recommendations that we have set out in our main paper are adopted, a revised Code will not require any additional special regimes.	

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk. Do consultees agree? Consultation Paper, Part 5, paragraph 5.11.	
We agree that a revised Code should provide a mechanism for the alteration of apparatus which could be adequately dealt with in a revised paragraph 20 of the Code; however we would not endorse the right to remove apparatus under a revised paragraph 20. We are of the view that removal of apparatus should only be dealt with under a revised paragraph 21 of the Code. Where Operators carry out alterations following a request by a landowner, the landowner should bear all the reasonable costs in complying with the request including the cost of returning to the original location post completion of the landowner's works. We would add that any relocated site would undoubtedly need to be suitable for the Operator's purposes and any interim arrangement should be for as short a period as possible.	

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 do not consider that the alteration regime in paragraph 20 of the Code strikes the correct balance, taking into account the amount of work involved in most relocations, the fact that the regime is unclear as to whether it can be contracted out or not and the fact that the notice period in the current Code is insufficient to ensure network coverage is maintained during any alterations.	

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 it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code however this is on the basis that a revised code contains the following protections:

- Sufficient controls on landowners' ability to use this right including:
  - Costs to be borne by the landowner
  - An obligation to assist the Code Operator to ensure coverage is maintained
  - Notice periods sufficient to enable the Operator to maintain coverage and where necessary to deploy an alternative solution.
- There should be a clear distinction between large scale refurbishment and/or redevelopment of rooftops and minor works. This is because 28 days' notice could be acceptable for a straightforward relocation to a new position on the same area which utilises the same communications and power sources; however 18 months' notice would be required in most cases where major works are required and the site has to be vacated and an alternative site found as the Operator would need to secure the necessary consents for the alternative site and deploy an alternative site in another location with another landowner.

  - Any alterations should be subject to the principle of the Operator being able to maintain coverage for the benefit of the public in the affected area; and

  - The cost incurred by the Operator in complying with the landowners' request being met by the landowner.

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 are of the view that the Code does not offer Code Operators the same protection regarding alterations under paragraph 14 that it does under paragraph 20 of the Code.

In our experience paragraph 14 is not used. We are of the view that additional protections under paragraph 14 are desirable but not a priority especially if the recommendations we have proposed elsewhere are adopted.

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

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.47.

We agree that landowners' ability to request Operators to remove apparatus should be limited to certain situations, for example redevelopment of the land.

There is also a suggestion that if a revised Code is put in place, there will be no need for the Landlord & Tenant Act 1954 to apply to telecoms leases. As per our main paper, we are generally opposed to that idea unless key protections Code Operators currently enjoy under the Landlord & Tenant Act 1954 are replicated in a Code which combines the important elements of both.

A revised code should also restrict the rights of landowners to obstruct the Code Operators' access to their apparatus and restrict the landowners' ability to interfere with the electricity supply.

Please see also sections 3.6 and 3.7 of our main paper for further details.

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 that Code Operators should comply with current planning legislation and therefore a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed 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.

We agree that the onus should remain on landowners to take proceedings as they are the party seeking the removal of the apparatus and there are already potential costs sanctions if the Operator is being unreasonably dilatory.

Code Operators' ability to relocate is hindered by the ability to acquire and build a replacement site or sites. The costs and timescales involved are often significant in trying to secure a replacement and, bearing in mind the need to maintain coverage for the benefit of customers in the affected area, it is right that the onus remains with the landowner to take proceedings.

Please see also sections 3.6 and 3.7 of our main paper for further details.

10.39 We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus. Consultation Paper, Part 5, paragraph 5.50.
We believe that where a Code Operator is prevented from securing building integrating or replacing a site (and so forced to vacate an existing site) due to the actions of the landowner, then it is fair and reasonable in those circumstances that the landowner should be responsible for covering the Code Operator's financial losses. The same financial principles should apply between expiry of rights and removal of apparatus.

10.40 We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development. Do consultees agree? Consultation Paper, Part 5, paragraph 5.51.
We do not agree with such a suggestion and, in fact, are concerned that any revised Code should look to allow landowners to contract out of some of its provisions. In our view it is highly likely that every landowner and occupier we deal with will require us to contract out of the Code if it can. This would immediately defeat all the good intentions behind the drive to clarify the Code to make it a more effective tool to facilitate roll out and assist in the provision of a fully functioning mobile network for the benefit of customers (insofar as it puts at risk Code Operators' ability to provide a service to their customers). There is considerable fear among potential providers of sites that Code protection means that if they accept an Operator onto their site they can never remove them whether in light of a redevelopment or otherwise. If the new Code allows contracting out, we think it likely that lawyers and agents will, as a matter of course, advise their clients to contract out of its provisions to secure their clients' right to deal with the property. In our view, rather than going to the extreme of allowing landowners and occupiers simply to contract out of the Code, it would be better to have a balanced, managed and clearly set out process for a landowner or occupier to follow if it wants to redevelop a site that has telecoms apparatus on it. We think that process should be analogous to the current procedure under the Landlord and Tenant Act 1954 which, we believe, strikes a fair balance between protecting a landowner's right to ask an Operator to relocate (in the case of a settled intention to redevelop) and an Operator's code rights.

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 apparatus installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code? Consultation Paper, Part 5, paragraph 5.56.
We agree, as the provision of services to our customers must be protected and the landowner is not likely to be materially disadvantaged by any alteration of the 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 agree that 'consideration' has no role to play and terms such *"payment of compensation" and "adequately compensated" and consideration which is "fair and reasonable"* have been problematic and difficult for the courts to value. Due to the extraordinary and exponential demand for telecommunication services, beyond that envisaged when the Code was first brought in (mainly to protect fixed line communications), the current landscape is one in which customers regard mobile telecommunication services as essential to their daily lives. Unable to rely upon code rights and under pressure of burgeoning demand for mobile telephony, Operators have had to agree costs with landowners determined not by a reflection of the alternative land value but instead, on how much a landowner could negotiate from the Operator. In this regard, we concur with the Commission's conclusion that profit share or ransom and market value (paragraphs 6.62 and 6.63 of the Consultation Paper) should not form the basis of valuation of code rights. Accordingly, today's average market rates are the legacy of earlier market distortions which are not as a result of a genuine free market, but all too often the result of lack of alternative choice, the cost of moving and the time and difficulty of pursuing alternatives. We agree that the existing different methods of 'consideration' should be replaced with a single payment in accordance with the compensation code as below. We therefore agree that compensation should be valued on the basis of '*diminution in value*' of the land as we consider this to be consistent with the statutory compensation code applicable to utilities and Development Consent Order powers available to Nationally Significant Infrastructure	

Projects under the Planning Act 2008 (being the fast track approach to achieving planning consent and if needed Compulsory Purchase Order powers for infrastructure projects above defined minimum thresholds). As with the utilities, it is in the national and public interest for customers' access to a high speed and high quality electronic communications network to be protected. It should be noted that all of the 'utilities' are also private companies run for profit.

Diminution in value of the land is a tried and tested approach which looks at land valuation objectively on a value to the seller approach rather than on the basis of use or value to the user/operator/buyer. As stated in the paper, it strikes a fair balance between compensating a landowner for conferring code rights and recognising an Operator's service licence obligations to the government and more importantly, to its customers.

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.

At the time at which code rights are exercised, insofar as such rights affect any superior or other legal interests in land, then we would agree it would be fair that any such person should have a right to be compensated so long as it is established that a diminution in value occurs.

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 overriding approach, as stated above, should be the value to the seller (not the buyer) and on the basis of a no scheme world (the scheme being the telecommunications industry generally as stated in paragraph 6.66 of the Consultation Paper). As applied in *Bocardo SA V Star Energy UK Onshore Ltd*, an increase in value which is consequent on the scheme for which the land is being acquired must be disregarded.

This accords with the fundamental compulsory purchase principle of the 'principle of equivalence' that is:- '*… the right [of the owner] to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains a money payment not less than the loss imposed on him in the public interest, but on the other hand no greater.*'

The whole law of compulsory purchase began and developed with infrastructure projects (first canals, railways, then utilities) undertaken by companies in the private sector and that its application should now be extended in the context of valuing code rights in the telecommunications industry. It is a practical and known system where application of the second rule contained in section 5 of Land Compensation Act has been standard in the UK for some time.

Please see also section 4.2 to 4.3 of our main paper.

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 do not believe a statutory uplift on compensation is workable and instead, we can see potential in exploring a minimum payment regime in respect of defined standard apparatus and/or area occupied whether on a roof or in a field.

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 and it is acknowledged by both Code Operators and landowners that the current forum is slow and cumbersome. Partly due to the fact that this is an undeveloped area of law which covers areas with which County Court Judges are generally not familiar. Furthermore, the telecommunications industry is complex and so we feel it serves both parties interests better for it to be heard in a more specialist 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.
(1) We agree on the basis the Upper Tribunal is familiar with valuation and property issues and retains judges with specific expertise. We would need some comfort that the Tribunal has sufficient capacity to deal efficiently with the potential volume of disputes which may be referred to it. (2) We agree. Any procedure where parties are encouraged to work collaboratively in narrowing issues down and keeping advisory costs low as the key issue (compensation) is considered by the tribunal, we trust would be preferred by both Operators and landowners. (3) We have no current views on this.

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

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.31.

We agree that Code Operators should be able to exercise code rights at an early stage as this would enable Code Operators to provide their services more efficiently to customers (faster rollout). In addition, it would provide Code Operators with more certainty enabling them to relocate from redevelopment sites onto replacement sites within a more easily identifiable timescale. Equally the Tribunal should be equipped to resolve any disputes swiftly to ensure Code Operators can have certainty as to cost before securing rights.

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 Code Operators consider that a clear and definite procedure which includes clear steps to be taken and timescales including early disclosure of relevant documents between parties. The trial window should be within a maximum period of approximately 5 months of issue of proceedings. It would certainly assist deployment of new sites and upgrades of existing sites to have a fast track process with clear timescales and steps available. The fast track would be particularly helpful in securing replacement sites and temporary sites to address network faults and sites the Code Operators have been forced to vacate.

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

Code Operators consider that the general principle that each party bears their own costs should be the starting point in all cases.

(1) The Operators should not necessarily bear the costs, particularly as some applications will be at the request of the landowner and for the landowner's benefit.
(2) Each party should bear their own costs unless one party has acted unreasonably in which case the party behaving unreasonably bears the costs arising from their unreasonableness (to be decided by the tribunal in the absence of an agreement between Code Operators).

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

Consultation Paper, Part 7, paragraph 7.38.

We consider that each party should bear their own costs as the default principle.

We do consider that there may be scope for a more considered costs structure taking account of who is to benefit from the application but there would need to be proper and considered controls to ensure that all fees are reasonable and proportionate. We would wish to ensure that any costs regime which sees one party paying the costs of another is fair just and reasonable and tempered with adequate control mechanisms.

10.54 We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.52.

We agree that there should be consistent notice procedures throughout the Code.

The Code should overrule any contractual notice provisions.

All notices and counter-notices should take account of the manner in which operators take interests in land e.g. holding companies / joint names. Presently the notices do not allow for Code Operators to serve joint notices and increasingly the operators are jointly operating networks from sites in a manner which is truly joint. The form of notice should be flexible provided it clearly gives the relevant information.

So the code could prescribe the key information which must be given in the notices and counter-notices but allow flexibility in the presentation of that information.

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.

The critical point here for the Code Operators is a format and process that allows for joint notices and counter-notices to be served to protect Code Operators where more than one Code Operator jointly uses a site.

The Code should stipulate the information to be given but not the precise format of the notices and counter-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.
The Code Operators consider that landowners and their representatives would be best placed to address this question. From our perspective we consider that landowners do receive sufficient information within the current form of notices / counter notices.

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.
Agreeing terms with landowners can be a long and sometimes difficult process for both parties, however, in the absence of standardised terms being mandatory. There is little benefit in agreeing standardised terms that may not be accepted or only accepted in part. There is possibility that, if the Code is sufficiently prescriptive and clear without scope for uncertainty or negotiation on certain points, the Code Operators would be willing to consider standardisation of key 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.
We are generally opposed to the Law Commission's suggestion that in the event that the Code applies, Part 2 of the Landlord and Tenant Act 1954 shall not apply. The Code Operators views are considered in greater detail in section 3.6 of our main paper and as discussed there, if the Recommendations the Code Operators have put forward in the Paper are adopted. there is scope for the relevant sections of the Landlord and Tenant Act 1954 not to apply. If our Recommendations are not accepted, it is essential that the relevant sections of the Landlord and Tenant Act 1954 shall continue to apply as we consider this vital to our operation.

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 Code Operators agree that Land Registration Rules must apply but that code rights will prevail over the land registration legislation as to who is bound by the interest.

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us:

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

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

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

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

Consultation Paper, Part 9, paragraph 9.14.

We propose that the requirement to provide funds for contingent liabilities is removed.

Compliance is costly, time-consuming (the internal governance processes required to authorise the relevant certification alone, including board resolutions, can take a matter of weeks) and given our understanding that funds set aside under Regulation 16 have never been called upon. The likelihood is that one of the remaining Operators will use the infrastructure in a worst case scenario. This is especially so given the corporate infrastructure consolidation partnerships within the industry and the prevalence of sites accommodating more than one Operator.

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.

Only as necessary to implement the position summarised above in 10.60.

The Electronic Communications Code

Review of the 'Code' by the Law Commission

(Consultation Paper No 205)

Response prepared by the Mobile Operators Association (MOA)

1. INTRODUCTION AND OVERVIEW

1.1 The MOA welcomes the Law Commission Consultation Paper No 205 (issued in June 2012) and is pleased to set out its views and considered opinion in response to questions and issues raised.

1.2 Since the current Electronic Communications Code ("Code") was drafted, mobile telecommunication has been transformed from a luxury in the hands of a wealthy few to a near-ubiquitous and highly valued technology.

To put this in context, in a country of around 60 million people, there are over 82 million mobile phone connections; over 92% of the population use a mobile phone[1]. Mobile connectivity is a crucial driver for economic growth and brings benefits to individuals, communities and businesses across the country.

1.3 Mobile use is now about far more than making calls and sending text messages. It's about having access to a huge range of services via mobile broadband. 58% of the mobile phones in the UK are now smartphones and 20% of adults own a tablet computer[2].

1.4 Increased demand for data, especially in the light of forthcoming developments in technology is putting demands on the Operators from customers for improved connectivity. In addition, Government has ambitious aspirations for improving connectivity and coverage, especially in rural areas. Both of these factors result in the need to upgrade and improve mobile networks.

Since the original Code was drafted, the mobile telecommunications network has been built, through the private investment of Operators, into a crucial piece of national infrastructure in both economic and social terms. According to a recent report, "the impact of 4G mobile broadband will be in the order of half a percentage point of GDP. In today's terms, that is equivalent to £75 billion over a decade"[3].

The UK needs a regulatory structure which reflects this change in the way people communicate.

1.5 In order to facilitate the efficient upgrades and improvements needed to meet customer demand and Government aims, the Mobile Operators Association is calling for reforms in two areas: the planning system and the Electronic Communications Code.

1.6 It is important that this review is not seen in isolation from other areas of law and regulation that affect Operators' ability to develop their networks.

1.7 The MOA understands the importance of working collaboratively with landowners and other interested parties and one option could be to develop a code of practice and conduct to run in parallel with the Code building upon the success of the Code of Best Practice on Mobile Phone Network Development[4].

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[1] Ofcom Communications Market Report 2012
[2] YouGov survey of public attitudes to mobile phones, carried out between 7th and 11th September 2012
[3] Capital Economics report Mobile Broadband and the UK Economy. Link to Report: http://www.4gbritain.org/wp-content/uploads/2012/04/Mobile-Broadband-and-the-UK-Economy-30-April-2012.pdf
[4] Link to the Code of Best Practice on Mobile Phone Network Development
http://www.communities.gov.uk/publications/planningandbuilding/codemobilenetwork

1.8 The MOA concurs with Part 1 of the Consultation Paper in which the Commission sets out the importance of electronic communications as being essential in private life and in business, the importance being acknowledged by Government which has committed substantial funds to ensure the UK has the best superfast broadband network in Europe by 2015. Together with the Commission's recognition that the existing Code is poorly drafted reference being made to Mr Justice Lewison's comments in Bridgewater Canal v GEO (2010) "In my view it must rank as one of the least coherent and thought through pieces of legislation on the statute book."

1.9 The conclusion drawn is that currently the statutory framework suffers from defects and shortcomings which may be summarised as follows:

1.9.1 Ambiguity.
1.9.2 Uncertainty. Only rarely do the parties it is seeking to protect/regulate rely upon its provisions.
1.9.3 Complexity and inefficiency in terms of process.
1.9.4 No account is taken of current market conditions, statutory demands and obligations and/or licence conditions imposed upon Operators.
1.9.5 Imprecision and lacking clarity on the basis and level of payment for rights and how it is to be assessed.
1.9.6 Unrealistic timeframes for enforcement of rights.
1.9.7 Lacking clarity in its interaction with other legislation, particularly the Landlord and Tenant Act 1954.

2. BACKGROUND

2.1 The MOA's view is that there will be a significant benefit to the economy and society from telecoms Operators having the practical ability to use and enforce rights intended to be granted by the current Code, and for those rights to be updated to reflect the modern telecoms landscape to provide:

2.1.1 Expeditious access to land on fair and reasonable terms for the purposes of rolling out, maintaining and enhancing electronic communications networks.

2.1.2 The means to achieve the Government's target of creating the best superfast broadband network in Europe by 2015, making the UK communications and media markets more competitive globally, and improving mobile coverage across the UK with the aim of extending it to areas of the UK where existing mobile coverage is poor or non-existent (the Mobile Infrastructure Project launched in October 2011).

2.1.3 Access to new technologies such as 4G which will deliver huge benefits to the UK, through economic growth, job creation, investment and closing the Digital Divide through greater access to mobile broadband.

2.2 A clear framework may well also lead to opportunities to embrace the deployment of new technologies more rapidly to improve network performance and reliability and reduce congestion, ultimately improving the customer experience and potentially realising costs savings for the customer.

2.3 As Government and the Commission have recognised, UK businesses, key services and consumers depend on mobile and fixed line phone services, e-mail and the internet. Efficient management of both the spectrum and broadband infrastructure supporting the

effective delivery of these services underpins growth in the UK communications market. In particular, mobile communications support the delivery of high speed data to customers on the move, but also customers at home whether directly through a mobile connection or through the use of mobile spectrum as a potential replacement for the last mile of fixed broadband connections.

2.4 The MOA's firmly held belief is that the current Code is hindering mobile Operators from delivering these services in the manner that best serves the interests of the UK economy and UK consumers in the following key respects:

2.4.1 Failure to provide for the quality and continuity of service demanded by consumers and government policy.

2.4.2 By not affording mobile Operators similar rights to access land and comparable protection from interference and disruption with infrastructure enjoyed by essential utility providers.

2.4.3 By not reflecting modern business practice which demands that Operators act quickly and efficiently and by not providing an adequate framework for Operators to implement sophisticated corporate consolidation and sharing arrangements.

2.5 Below we set out our concerns in more detail and our thoughts on reforms to the Code that would address these points.

2.6 In addition we have included as a Schedule to this Paper our reply to the Commission's questions on the form of the Response Form.

2.7 Where defined terms have been used in this Paper the terms have the meaning contained in the Glossary to Consultation Paper 205. We have used the terms landowner and occupier in the same manner as the Commission to refer to those bound by the code rights (who in the current environment would be the mobile Operators landlords). Where we have added Q references e.g. *[Q3.53]* these refer to the questions which appear in the main body of the Consultation Paper 205.

3. RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

3.1 Purpose of the Code and Practical Enforcement

3.1.1 The Code should provide practical assistance to mobile Operators in line with Government policy objectives to rollout new sites and secure, maintain and protect mobile equipment and sites once they are installed.

3.1.2 Accordingly the Code must protect mobile network sites, simplify the deployment of technology enhancements and enable the rollout of new sites.

3.1.3 The language of the current Code is outdated in that its stated purpose is to secure just access to communications services. As reflected in public policy the quality and coverage of communications services is of increasing and paramount importance. This should be reflected in a revised Access Principle which recognises that in today's world consumers expect to be able to choose which Operator's network to connect to for the provision of their communications services. Customers have high expectations for their networks of choice,

demanding a high quality service which can only be provided by a robust, advanced and first rate network. It is obvious that the current Access Principle was developed in the context of fixed line communications to private dwellings and is accordingly significantly out of date. [Q3.53]

3.1.4 At the moment, mobile Operators have to rely largely upon negotiation to build and maintain their networks when their land interests expire, when they have to deal with hostile landowners and/or occupiers and when they face other access issues often in the context of a site having been switched off by the landowner or occupier. At the moment, the only real option is to enforce commercial property rights through the ordinary court procedure where this can be done.

3.1.5 There would be a clear benefit for customers in terms of network reliability if mobile Operators had clear and unambiguous rights to react quickly to maintain a site (within hours) and to be protected for a sufficiently long period of time to find and build a replacement site should circumstances require.

3.2 Protecting Mobile Network Sites

3.2.1 The process for an Operator to protect its rights set out in the current Code is slow, operating on a complicated notice and counter-notice system with rights enforceable only through the County Court. Generally, there are very limited practical consequences if individuals (including landowners or occupiers) interfere with mobile sites.

3.2.2 Mobile network equipment and sites need to be protected for a number of reasons:

3.2.2.1 As for other utilities, there is a high expectation that mobile services are very reliable and are fixed quickly when they malfunction.

3.2.2.2 A wide range of people rely on mobile communications services being available including of course the emergency services and other key public and private services.

3.2.3 Mobile communications equipment is expensive, sensitive, and dangerous for non-specialists to access and tamper with. We recognise the reluctance to recommend the creation of a new criminal offence. However, mobile Operators have historically been entitled to ask the police to protect equipment: this was removed in the Communications Act 2003 for unclear reasons. Section 46 of the Telecommunications Act 1984 (which was repealed by the Communications Act 2003) made it a specific offence to assault or obstruct an Operator or its employees and allowed the Operator to remove the obstruction or for a constable (where appropriate) to remove such offender on demand. This right should be reinstated, or (for greater clarity) there should be a criminal offence created that clearly establishes police jurisdiction to protect this infrastructure.

3.2.4 Any interference with a site by a landowner or occupier will have a disproportionate impact upon the Operator's network. It may:

3.2.4.1 Incapacitate the mobile communications available in an area thus having an immediate impact on the local community.

3.2.4.2 Significantly impact on emergency services in the area.

3.2.4.3 Significantly impact on the revenues of local businesses.

3.2.4.4 Incur the Operator in remedial costs which would typically far exceed the value of the matter in dispute.

3.2.5 The civil powers presently available to Operators are typically difficult, slow and expensive to secure (unless there are strong grounds to demand urgency) and are wasteful of court time. It would be entirely inappropriate for Operators to pursue each one of these as a matter of course (there are usually several hundred active disputes at any time reflecting the very large numbers of sites in any Operator's portfolio). In some cases the Operators have no option but to move to a replacement site.

3.2.6 By contrast, a police officer could be entitled to immediately secure access for the Operators or to prevent and or remedy interference with a site. The existence of the offence is very likely to have a significant deterrent effect. By preventing the unauthorised interference with telecommunications equipment a balance would be restored between the landowner or occupier and the Operator that would also protect the status quo and mobile services for the local community pending resolution of the dispute.

3.3 Temporary Moves

In addition, there are some specific areas where greater clarity is required It is not clear what the Operator's rights are to return to a site when it is moved or removed under paragraph 20 (e.g. for landowner or occupier maintenance works), and whether the parties can contract out of this.

3.4 Protecting Microwave Links [Q3.74]

3.4.1 The Code does provide protection for fixed line transmission lines. However, it has not been updated to reflect the use of microwave links, which provide a similar facility in particular in mobile networks. Microwave links depend upon a line of sight which can be obstructed by new buildings, or the uncontrolled growth of trees or other vegetation.

3.4.2 We would support the proposal to empower Operators to require trees and other vegetation to be lopped wherever that interference takes place whether on private or public land to protect both physical installations and invisible microwave links. *[Q3.74]*

3.5 Contracting Out

3.5.1 We are concerned by any suggestion that a revised Code could allow landowners and occupiers to contract out of some of its provisions. In our view it is highly likely that every landowner and occupier we deal with will require us to contract out of the Code if it can. This would, in a stroke, defeat all the good intentions behind the drive to clarify the Code to make it a more effective tool to facilitate roll out and assist in the provision of a fully functioning mobile network for the benefit of the public and our customers.

3.5.2 There is considerable fear among landowners and occupiers who are potential providers of sites that Code protection means that if they accept an Operator onto their site they can never remove them whether in light of a redevelopment or otherwise. If the new Code allows contracting out, we think it likely that lawyers and agents will as a matter of course advise their clients to contract out of its provisions to secure their clients right to deal with the property.

3.5.3 In our view, rather than going to the extreme of allowing landowners and occupiers simply to contract out of the Code it would be better to have a balanced, managed and clearly set out process for a landowner or occupier to follow if it wants to redevelop a site that has telecoms equipment on it. We think that process should be analogous to the current procedure under the Landlord and Tenant Act 1954.

3.6 Exit Arrangements and The Landlord and Tenant Act 1954

3.6.1 There is also a suggestion in the paper that if a revised Code is put in place, there will be no need for the Landlord and Tenant Act 1954 to apply to telecoms leases. We are generally opposed to that idea unless key protections Operators currently enjoy under the Landlord and Tenant Act 1954 are replicated in a Code which combines the important elements of both.

3.6.2 However, we recognise that the consequences of being the beneficiaries of statutory protection should be an enhanced duty and responsibility towards the landowners affected by the legislation.

3.6.3 We would propose:

3.6.3.1 Landowners or occupiers who are in the position of landlords should only have the right to break a telecoms lease if there is a contractual right to do so set out in the lease or on its expiry.

3.6.3.2 On the expiry of a telecoms lease the Operator should have an automatic right to renew the lease unless the landowner or occupier can demonstrate grounds to oppose a renewal. Those grounds should be similar to the Landlord and Tenant Act 1954.

3.6.3.3 A landowner or occupier should give not less than 18 months' notice of its intention to break for redevelopment purposes or not to renew the lease on or following expiry. The 18 month time scales proposed reflect the difficulty Operators currently face in finding an alternative site, obtaining planning consent for it and tying up the land agreement. If the Code is revised so as to make this much simpler and easier to do, these suggested time limits could be reduced to reflect the time actually needed.

3.6.3.4 The Operator should be able to serve a counter notice to challenge this, and there should be a procedure to refer the matter to court if the parties cannot agree terms for exit or for the lease to be renewed.

3.6.3.5 The landowner or occupier should be required to establish it has a "settled intention" to redevelop similar to what it would need to establish under the Landlord and Tenant Act 1954 proceedings although we propose that in addition to the requirements to demonstrate a "settled intention" under the

Landlord and Tenant Act 1954 the landowner or occupier ought to have a full planning permission and funding in place when the notice is served. This reflects the length of time it takes Operators to secure replacement sites due to planning requirements and the often lengthy negotiations with landowners and the significant associated costs in acquiring replacement sites. If it can do so, then an order for possession should be granted.

3.6.3.6 The Operator should be allowed to remain on site until the landowner or occupier actually needs possession as it is about to start work.

3.6.3.7 No Operator should be forced to leave the site earlier than 18 months from the date of the notice to quit – but may exit earlier if it wishes to do so.

3.6.3.8 These provisions should apply whether the lease is put in place by free market negotiation or following an application under the Code for compulsory acquisition of rights.

3.7 Landlord and Tenant Act 1987

We suggest that leases granted to Code Operators should be exempted from the operation of the Landlord and Tenant Act 1987. This Act is designed to give residential tenants a right of first refusal to buy the reversion (the freehold) of the building they live in should the owner wish to sell it (or part of it). The Landlord and Tenant Act 1987 requires landlords to serve offer notices on certain tenants when the landlord is proposing a "relevant disposal" and there are criminal sanctions for failing to do so. The tenants are given the opportunity of purchasing the interest being disposed of. A lease granted to a Code Operator could in certain circumstances potentially be considered a "relevant disposal" and therefore caught by the Landlord and Tenant Act 1987 meaning that the landlord must comply with the notice provisions which creates unwarranted delay in rights ultimately being granted which in turns inhibits rollout and network coverage. Technically, the tenants could elect to take the lease being offered to the Code Operator thereby frustrating the Code Operator's ability to operate from that site. We feel that this thwarts the purpose for which the Landlord and Tenant Act 1987 was created and is contrary to the purpose of the Code and the status of telecommunications as an essential requirement in daily life.

3.8 Recommendations

3.8.1 Update the basis of the Code and its language (in particular the Access Principle) to protect the rights for customers to receive from an Operator of their choice a high quality and broad coverage service, not just connectivity. The Code should recognise that it is in the national and public interest for customers to have access to a high speed, high quality electronic communications network of their choice. The Access Principle should be developed to ensure that the Court (or relevant decision making body) is directed to consider this principle when deciding whether to make an order under paragraph 5. [Q 3.53]

3.8.2 Prohibit interference with the site/equipment/electricity supply to communications infrastructure - this should be a meaningful and enforceable prohibition. We would therefore recommend that this is made into a criminal offence. [Q 3.16-3.17, 3.106]

3.8.3 Establish an automatic and default right for mobile apparatus to remain at a site (on reasonable terms which are comprehensive enough to ensure that a full service is maintained from the site at a reasonable price), without interference, including enforceable rights of access for operational reasons. In particular this should apply at the end of a lease pending the conclusion of renewal negotiations. [Q 3.16-3.17]

3.8.4 Simplify the process for invoking the Code and introduce simple and flexible forms for all parties to use.

3.8.5 Update the protection to include microwave links to deal with obstacles on both public and private land, including tree lopping provisions for trees and other vegetation. [Q3.74]

3.8.6 Provide Operators with proper rights to deploy and maintain equipment in line with utility Companies (for example, statutory rights re road closures).

3.8.7 Require developers to take communications requirements into account when designing and developing property, with compensation for mobile Operators where a development interferes with the network.

3.8.8 Provide Operators with the right on not less than 14 days' notice to survey any land in connection with a proposal to acquire an interest in the land or a right over the land to investigate the feasibility of the land for the purpose of ascertaining the nature and suitability of the land and/or buildings.

3.8.9 Clarify that an Operator's paragraph 20 obligations are to relocate on the rooftop, or temporarily to relocate (but with a right to return).

3.8.10 Clarify that code rights are mandatory and cannot be contracted out.

3.8.11 Clarify that when dealing with Code Operators, landowners are not bound by the right of first refusal provisions contained in the Landlord and Tenant Act 1987.

3.8.12 Provide applicants with the flexibility to apply directly to the High Court for the determination of complex Code issues.

4 TERMS

4.1 Lease/Licence Terms

4.1.1 The landowner or occupier is entitled to expect a mobile Operator to comply with reasonable terms in relation to its occupation of a site. However, without good reason, this should not include restrictions on the frequency that may be deployed from the site (beyond the frequencies the Operator is permitted to operate at), the types of technology that may be used at a site, or the types of customer that can be served from a site e.g. whether it is permissible to provide a roaming service to third parties from a particular site. [Q. 3.18]

4.1.2 Such restrictions prevent or slow down mobile Operators from deploying new technology, increased capacity data services, efficient use of spectrum, and they increase the cost of mobile services to customers. At the moment where Operators

face these restrictions they either have to accept they cannot upgrade the site in question or have to conduct negotiations from a "ransom" position. [Q 3.16]

4.1.3 For similar reasons, we would support the broad and purposive definition of "communications apparatus" because the underlying equipment may change but its purpose and the need for its protection should not. [Q3.27]

4.2 Price (Financial Rewards Under the Code part 6 of the Commissions Paper)

4.2.1 The clear intention must be to ensure the revised Code avoids uncertainly and that terms such as "payment of compensation" and "adequately compensated" and consideration which is "fair and reasonable" are clearly defined and understood.

4.2.2 The goal is to secure a Code which as for utility providers, sets out a clear approach by reference to the detriment and any diminution in value suffered by the landowner or occupier.

4.2.3 We strongly support the recommended changing of the forum for dispute resolution from the County Court to the First or Upper Tribunal (depending on the nature of the issue) Lands Chamber in order to secure greater expertise, free up court time, and speed up the process.

4.2.4 We agree with the Commissions approach to 'compensation' as set out in paras 6.7 to 6.10. The example quoted concerning the 2006 Welford case decision (in footnote 4 on page 63) is in effect part of 'Consideration' as the payment which equated to circa £150 per cable was in addition to the diminution in the value of land due to the presence of the cables which limited the extent of potential user and hence value. This is however largely a matter of terminology.

4.2.5 We accept and agree with the general thrust of the Commissions approach to 'market value' set out in paragraphs 6.18 to 6.21.

4.2.6 We strongly concur with the proposal set out in paragraph 6.35 being:

'*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'*

4.2.7 In respect of 6.36 the issue of compensation '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' we consider that compensation should be payable on the same basis as in paragraph 6.35.

4.2.8 Throughout, the overriding approach is value to seller (not buyer) on the basis of a no scheme world, the scheme being the telecommunications industry generally as stated in paragraph 6.66.

4.2.9 In paragraph 6.50 reference is made to standard pricing structures negotiated between such bodies as the CLA and NFU, we recognise the potential benefits in implementing an equivalent regime for telecommunications as already exists for electricity and gas installations and apparatus.

4.2.10 We strongly endorse the conclusion set out in paragraph 6.59 and emphasise that all of the utility companies which have the benefit of compulsory powers of acquisition of land and rights are also profit making privately sector companies.

4.2.11 We agree the conclusion in paragraph 6.61 that the interpretation of consideration in Mercury is too vague and should be replaced and concur with the Commissions conclusion that profit share or ransom and market value (paragraphs 6.62 and 6.63) have no role to play.

4.2.12 The proposal to assess market value using compulsory purchase principles set out in paragraphs 6.64 – 6.66 is accepted. We consider this to be practical and workable presenting no greater difficulty than is already dealt with within the electricity industry in respect of pylons, poles, overhead lines and underground cabling and tunnels.

4.2.13 The Commissions preference in paragraph 6.71 is shared.

4.2.14 We endorse and agree the provisional proposal in paragraph 6.73.

4.2.15 We can see potential in the future to explore a minimum payment regime in respect of defined standard apparatus and/or area occupied whether on a roof or in a field.

4.2.16 We do not consider the alternative of uplift on compensation as being an attractive proposition.

4.2.17 We also agree there should be no distinction for linear obstacles – paragraph 6.78. The electricity industry has no such additional power and is able to deal with situations which arise without undue difficulty.

4.2.18 As between Operators, an arrangement may still be required to share equitably the costs of maintaining shared telecoms-specific infrastructure. However, it would seem unnecessary to legislate for this as it could be dealt with through an industry code of conduct and practice.

4.2.19 It is considered there is a need for the same basis of protection provided to statutory undertakers to provide for protection of operational land and equipment such that land and/or rights can only be acquired if no serious detriment is caused to the carrying on of the undertaking. This protection to include the ability to protect for the provision of future network capacity.

4.3 Recommendations

4.3.1 A fair and clear compensation structure is needed (e.g. when exercising rights under paragraphs 5, 20 and 21) which will reflect the detriment to the landowner or occupier, which should be aligned with the Electricity Act 1989 process.

4.3.2 Compensation should be assessed by the First or Upper Tribunal Lands Chamber.

4.3.3 That the revised Code clarifies that when mobile Operators occupy a site under the Code that the site can be used without restriction for the full range of services and

uses permitted by the statutory framework of the Communications Act 2003, the Code and the Wireless Telegraphy Act 2006. [Q3.18]

4.3.4 Retain broad and purposive language to protect telecommunications equipment generally. [Q3.27]

5 DEVELOPING MOBILE SITES

5.1 Upgrading Sites [Q3.16]

5.1.1 Operators regularly repair, upgrade and replace equipment on sites. Advances in equipment technology are occurring with increased frequency which means it is inevitable that Operators will want to carry out upgrades of the equipment on site. [Q. 3.18]

5.1.2 By way of example, whereas some 2G equipment has been in operation for over 20 years, first generation 3G equipment is being increasingly phased out with an operational lifespan of less than 8 years, and second generation 3G equipment is now being phased out with a lifespan of less than 5 years. In parallel, upgrades are regularly being implemented in both software and hardware to enhance network capability (enabling features recently such as HSDPA, HSUPA, HSPA+ and 4G on existing infrastructure).

5.1.3 Similarly, future technologies such as 4G may take the form of upgrades rather than whole, new equipment deployments at sites – where this is possible, the delivery of high speed services to an area can be significantly faster.

5.1.4 It is mainly through the upgrade of existing equipment that Operators can increase data speeds and thus improve customer experience in line with government targets on access to high speed data.

5.1.5 By contrast, upgrades to apparatus have little or no impact on the landowner or occupier or the use of surrounding land.

5.1.6 Thus, it is of increasing importance that Code Operators be allowed to upgrade apparatus installed at site and this would be enhanced through being made the subject of clear statutory rights.

5.2 Sharing Sites [Q. 3.83]

5.2.1 Site and mast sharing has many benefits, reducing the environmental and planning impact of mobile networks and increasing the efficiency of land and infrastructure use. In some locations, there may be very few suitable sites, in which case it may be a prerequisite for introducing coverage (and competition) to a geographic area. It is a general condition for the exercise by Mobile Operators' of their code rights (see regulation 3 of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003), encouraged by public policy, usually required by local planning authorities, and mandated in some situations such as the Olympic Games Park.

5.2.2 The mobile industry has responded to these pressures by creating new sharing arrangements which lead it to request leases and licences in joint names (e.g.

through Mobile Broadband Network Limited (MBNL) which is a joint venture Company owned by Hutchison 3G UK Limited (Three) and Everything Everywhere Limited (EE) to establish and manage a consolidated network) or advanced sharing arrangements (e.g. through Cornerstone which is a strategic partnership between Vodafone Limited and Telefonica UK Limited by which Telefonica and Vodafone share structures on which their radio equipment is sited). The mobile Operators have to try to achieve the necessary rights through commercial negotiation because these commercial arrangements, and indeed more traditional sharer arrangements, are not clearly contemplated by the Code (in particular when it comes to renewal). Often landowners or occupiers are only willing to grant the Operators sharing rights in return for premium payments or rent increases.

5.2.3 In addition, there is scope for greater co-operation between telecommunications businesses in the use of masts, and faster/more efficient deployment of networks, if there were greater facility reserved for Operators to introduce sharers without financial penalty.

5.2.4 The mobile industry has suffered a general change in stance by landowners and occupiers in relation to sharing arrangements. Landowners and occupiers have sought to impose restrictions on mobile Operators in relation to sharing on a significant number of sites. Typically, these occur in situations where there are few or no alternative mast locations, or in situations where the mobile Operators have needed to renegotiate the terms of an existing lease or licence (even if the sharing provisions are otherwise irrelevant to the negotiations). This appears to have happened as a reaction to the attempts by mobile Operators to reduce the amount of equipment and the number of masts through sharing arrangements – which should otherwise have the effect of reducing the amount payable to llandowners or occupiers.

5.2.5 This is particularly in evidence with landowners or occupiers who control multiple sites. Discussions with these bodies typically revolve around the fact that they make a very large profit margin from each Code Operator on site, and they expect their profit margin and anticipated margin growth to be protected through enhanced fee arrangements if two Operators share a single set of infrastructure or equipment.

5.2.6 Assuming the basis for assessment of rent is to reflect the alternative (no scheme) value of land within the compulsory purchase regime, or if there is a modest uplift on the compulsory purchase basis, then the addition of a sharer should be assessed in similar fashion (i.e. by reference to the impact on the land). To the extent that there is little or no change in the footprint of a mast site resulting from the addition of sharers, a landowner or occupiers request for a rental uplift would be seen as being ill founded.

5.2.7 A statutory protection for Code Operators limiting or prohibiting the payment of significant sums to secure sharing rights would create a very compelling incentive for mobile Operators to pursue greater sharing of infrastructure in line with national policy.

5.2.8 This would carry very significant planning and environmental benefits for the nation, improve the ability of the Operators to provide enhanced coverage, support the MIP project, with minimal incremental impact on landowners and/or occupiers.

5.2.9 The main impact may be to change landowner and occupiers' expectations that they should be entitled to significant additional revenue for no additional burden as a result of infrastructure on their sites being used more efficiently by mobile Operators.

5.2.10 Incidentally, the creation of accessible sharing rights would also facilitate the introduction of new entrants to the telecommunications market (in line with Ofcom's competition policy) by creating an affordable way for them to share existing infrastructure.

5.3 Corporate Structures

It is also the case that mobile businesses have grown more complex, reflected in more complex corporate structures, whereas the Code contemplates a single operating company.

5.4 Transfer Rights

The ability to assign without consent/qualification/cost is essential to facilitate the consolidation of networks in light of the greater level of cooperation between Operators and the advanced network sharing arrangements [re Q3.92]

5.5 MOA Recommendations

5.5.1 The Code should take into account different leasing and corporate structures:

5.5.1.1 Allowing Agreements to be held in joint or multiple names (whether at the outset of the Agreement or subsequently).

5.5.1.2 Combined notice giving and joint rights).

5.5.1.3 Agreements where the communications assets, spectrum licences and property are held by different parts of a group, or are shared by more than one Operator.

5.5.2 The Code should include specific rights to encourage greater sharing of telecommunications infrastructure and to minimise the environmental and planning burden:

5.5.2.1 Permitting as a matter of public policy a Code Operator to share access to sites.

5.5.2.2 Making void a term that restricts access.

5.5.3 Requiring Operators to pay landowner fees that reflect the incremental cost of the sharer to the landowner or occupier only.

5.6 Regulation 16 – Street works Bond

We propose that the requirement to provide funds for contingent liabilities is removed. It is costly, extremely time-consuming (the internal governance processes required to authorise the relevant certification alone, including board resolutions, can take a matter of weeks) and given our understanding that funds set aside under Regulation 16 have never been called upon, has no clear benefit other than for the institutions providing the bonds/guarantees. The likelihood is that one of the remaining Operators will use the infrastructure. This is especially so given the corporate infrastructure consolidation partnerships within the industry and the prevalence of sites accommodating more than one mobile Operator.

6 CONCLUSION

6.1 The UK Mobile Operators remain committed to the responsible development of their networks which bring major benefits to individuals, communities and businesses across the country and which make a major contribution to economic growth.

6.2 As we have outlined above, In order to reflect developments in technology, the current state of the telecommunications industry and to keep pace with customer demand and Government aspirations, the Electronic Communications Code is in need of significant reform.

6.3 Mobile phone networks are a crucial national asset but they are built and delivered locally through a network of base stations. By facilitating expeditious access to land, on fair and reasonable terms, a revised Code would provide the means to achieve the Government's target of creating the best superfast broadband network in Europe by 2015, making the UK market more competitive and improving mobile coverage across the country.

6.4 We welcome the Law Commission's review of the Electronic Communications Code and we look forward to its recommendations and the opportunity to work with Government, landowners and others as we continue to provide a high quality mobile telecommunications service for UK customers in the 21st Century.

6.5 In preparing this response the MOA has been advised by a leading expert in the field of compulsory purchase compensation - Colin Smith FRICS Senior Director (head of compulsory purchase and compensation) at CBRE. He was an expert witness in Bocardo v Star Energy (for Star Energy) and Welford v EDF (for EDF). A member of his team was a witness in Cabletel v Brookwood Cemetery. The basis of his instruction was to provide 'expert witness' advice and guidance as to the applicability of the compensation code to Telecoms regard being had to the operation of the Code in respect of statutory utilities.

For further information contact:
Graham Dunn, Policy & External Relations Manager
[redacted]

Schedule

Response Form

By Email
Mr J Linney
Law Commission
Steel House
11 Tothill Street
London
SW1H 9LJ

Our reference DJS/0987924/O15752851.1/DJS

Your reference

26 October 2012

Dear Mr Linney

Law Commission consultation paper No 205 - Electronic Communications Code
Response on behalf of Surf Telecoms

Please find attached my client's response to the Consultation.

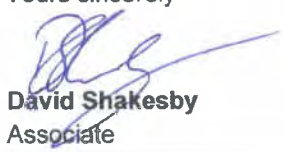
In our view, Surf's position is relatively unusual in the marketplace because it is part of the Western Power Distribution group of companies. It is a telecoms operator in a group owned by an electricity distributor. Unlike many telecoms operators it is often on both sides of the fence between operators and landowners. In relation to its telecoms operations it is clearly acting as an operator of a predominantly fibre network. However, in relation to its landholdings and premises it is often in the position of landowner or landlord in relation to other operators. In addition, its position as a group company of WPD means that it is also mindful of the impact of the Code on other utilities and infrastructure providers.

For these reasons, we take the view that the response provided by Surf to the Consultation is perhaps more balanced than some of the other responses are likely to be. Many responses are likely to be strongly in either the landowner or operator camps. The reality is that Surf is sometimes in one camp, sometimes in the other, and sometimes in neither.

The most significant commercial issue for Surf as a telecoms operator of a predominantly fibre network is that the costs of laying new fibre (whether in the form of underground or above ground cables) is often prohibitive. The consequence is that it is often only commercially viable to have a fibre network linking or within large conurbations. It is often not commercially viable to extend the network to remote areas or settlements because the cost of extending the network is significantly higher than the commercial revenue that can be created from it. This is a problem that needs to be resolved if all areas of the country are to benefit from fibre networks.

I should be grateful if you would acknowledge safe receipt.

Yours sincerely



David Shakesby
Associate
[redacted]

LAW COMMISSION
CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

RESPONSE FORM

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

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

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

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

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

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

We invite responses from 28 June to 28 October 2012.

Please send your completed form:

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

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

Tel: 020 3334 0200 / Fax: 020 3334 0201

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

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

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

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

Your details

Name:
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Telephone number:
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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):
Surf Telecoms Western Power Distribution Avonbank Feeder Road Bristol BS2 0TB
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.
Fundamentally, Surf believes that much of the existing Code should be retained. Where specific points require amendment, they are dealt with below. Other than the matters dealt with in the covering note attached to this response, there are no other issues that Surf believes require amendment.

10.5 We provisionally propose that code rights should be technology neutral. Do consultees agree? Consultation Paper, Part 3, paragraph 3.18.
Surf agrees. An important element is that the Code enables a level playing field between all relevant interested parties, avoiding disruptions or distortions to the market that may be unforeseen and/or be unnecessary. We agree with the reasons stated in paragraph 3.13 for the Code remaining technology neutral.

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.
Surf believes that there is no need for Code rights to impose general obligations on Code Operators, other than the existing specific obligations for certain activities. Code Operators are commercially driven to ensure that their equipment and the area around it is maintained properly, as well as to ensure that relations with the relevant landowners are suitable. The arrangements that are appropriate will vary from site to site and should be left to commercial negotiations between the parties. If the Code were to impose general obligations it would be likely that they may have an inappropriate effect in some circumstances and might unfairly benefit landlords and prejudice Operators if there are general obligations for example to provide insurance or indemnities in relation to adjoining land or the land of third 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.
Surf believes that the current definition is adequate.

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 rights created by an agreement under the Code should be binding on the owner, occupier and successors or assigns of land, either on a permanent basis (in the case of rights granted in fee simple), or for the term of any agreement if rights are granted for a term of years or a periodic basis.

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, although perhaps only where equipment is already located on land and the question is whether Code rights to retain it should be granted, for example where a term agreement has come to an end. (2) Surf recognises that it might be hard to justify such an extension of the Code where a landowner cannot be adequately compensated with money. In addition, from a practical point of view, Surf recognise that it would be very rare for them to exercise compulsory powers/Code powers in such a situation as their experience is normally that they will find a commercial solution with landowners, or that they will locate their equipment somewhere else. (3) The public interest/public benefit could be clarified in this situation. It is not clear whether the Access Principle only applies where there is no existing telecommunications network, or also for example where it is argued that it would be of benefit to introduce competition by allowing other operators to introduce their networks. There is also a lack of clarity over the distinction (if any) in these types of situation between cellular or other mobile operators and fixed line or fibre networks.

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.
On the basis that Code rights should be binding on the title and successors in title (see above), the agreement for Code rights should be obtained from the landowner, with consent from the occupier if it is necessary for that consent to be obtained in order for the rights to be granted. For example if the owner of a freehold reversion grants rights, a person with a leasehold interest would presumably be entitled to give or refuse consent as the owner of the freehold reversion has given up his rights to occupation during the term. In the case of a periodic tenant, or licensee the right to possession may be retained by the landowner, in which case the occupier's consent may not need to be obtained and if only the occupier's consent was obtained, it may not be capable of binding the landowner (at least in the general property law, although once granted and the equipment installed, the operator would clearly acquire Code powers to retain it). Once obtained, rights obtained by agreement pursuant to the Code should be binding on every interest in the land and on successors and assigns.

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.
The Right to Fly lines has only been used by Surf in situations where the landowner cannot be identified. If the landowner can be identified then agreement is reached, or in some circumstances, Code powers are exercised to acquire the rights. On the basis that the power has only been used where a landowner cannot be traced, and if they are traced rights are acquired, this power has not caused any problems and is rarely used.

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.
Surf takes the view that the current procedure has been acceptable thus far and that there is no need for it to change.

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 is often a practical difficulty in deciding on the best location for a notice if the structure is physically obscured or difficult to access. On occasions it has proved very difficult to comply with the requirement to display a notice. However, Surf's practice is to identify the landowner and to serve notices wherever possible. Surf believes that there should be a statutory defence if the Operator can prove that it has taken all reasonable steps to find and inform the landowner, or alternatively the offence should only be committed if the Operator has not taken all reasonable steps to find and inform the landowner. Surf also takes the view that this should not be a situation where there is a prosecution as the process is expensive and totally disproportionate. It would be far more appropriate if this was to become a regulatory offence subject to a fixed penalty notice.

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.

Surf suggests that operators should be able to lop all vegetation that affects lines or wireless systems, including non-cellular systems that rely on line of sight. The operator should be required to make good any damage or pay reasonable compensation for losses incurred to the owner or occupier.

10.15 We ask consultees:

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

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

Consultation Paper, Part 3, paragraph 3.78.

In practice this may not be necessary as this issue is routinely agreed commercially between the landowner and the operator and it therefore forms part of the contractual relationship between the parties. If there is an issue between the parties then either the right to upgrade is a matter that goes to the amount of the consideration for the rights (ie the right to upgrade may be reflected in a higher consideration and conversely, the lack of it in a lower consideration). The question of upgrading, in Surf's view, is an issue that should be addressed in the commercial negotiations at the outset and reflected 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.

Surf have not encountered significant problems with this issue where it is acting as operator as it is a matter that is addressed in their commercial agreements where the right to share (or not) is dealt with and is reflected in the consideration.

This is one of the circumstances however where Surf can often be in the position of landlord or landowner and provides sites for other operators. In those situations Surf takes the view that it is appropriate that if an operator shares a site, it pays a relevant proportion of the income that is then generated to Surf. This arrangement routinely forms part of the commercial agreements

between Surf and other operators.

Surf do not believe that there should be a Code right to share apparatus or sites, particularly where this may conflict with existing contractual arrangements or prohibitions on sharing.

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

Consultation Paper, Part 3, paragraph 3.88.

This provision is not relevant to Surf. Surf is happy with the arrangements as they currently exist and does not believe that any further provisions are required.

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.

This is not an issue for Surf. Issues of assignment (either permitting or prohibiting) are routinely covered in the commercial agreement. This is a matter that should be agreed and negotiated between the parties in the commercial agreement that they enter into. There is no need for additional Code powers.

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. The current arrangements (save where specifically commented on in this paper) are satisfactory.

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.
There are two potential problems if the Code does not permit the operator to obtain rights over land in the ownership of a third party: a) It will reduce the number of potential sites, or routes that are available to operators if they cannot obtain rights to locate equipment and to access it via the land of third parties; and b) It creates a ransom situation where either the agreement is only for a term, or if the rights of access to equipment are not equivalent to an easement in perpetuity if part of the original grantor's land is sold. If for example a lease is granted and rights of way are granted for the duration of the lease, if the freehold reversion is then severed there may be a right to renew the Code rights for the equipment, but in that scenario the operator would be unable to obtain new rights of way over the land of the third party who had acquired the freehold reversion of the access. This would potentially make the right to renew the Code rights impossible to exercise. We have seen instances where this has been used by landowners to ransom operators by deliberately transferring the access to another entity in order to improve their position on renewal of a lease. Code rights to acquire rights of way (or other rights necessary in relation to equipment on adjoining land) over the land of third parties, with appropriate provisions for compensation would remove this ransom position.

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.
Surf would prefer that the code operator has the ability to decide when and whether to exercise their code powers, and not to be forced to do so by a customer or subscriber.

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.
Situations have occurred where shot gun or other damage has resulted in huge repair costs for equipment. There can be difficulty in identifying the culprits, and it is often not cost effective to pursue the landowner as it is cheaper in the short term to pay additional sums. Strengthened powers and or sanctions might be a sufficient deterrent to prevent these tactics from being used.

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.
None that we can suggest

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.
Surf's experience is that generally agreement can be reached in relation to Crown land, albeit not on standard terms.

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.
It does not generally cause a problem for Surf, but it would be sensible if the Code were to apply and if the standard dispute resolution mechanism could be applied in order to level the playing field. At present, the Crown can either veto proposals or ransom operators. There should be a means of balancing the position, even if the Code was not fully extended to such situations.

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.

Surf's experience is that there is inconsistency in the way that the regime works. The owners of some linear obstacles work consistently with operators and there is transparency as to how they operate. Some are less cooperative, or inconsistent in their approach. Some are obstructive. The problem for operators is that it is difficult to use the powers and it is very often not cost effective to do so. It would make sense to apply the normal Code powers to this type of situation, or failing that to have a workable dispute resolution mechanism which would be cost effective.

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.
The concept of "adjacent land" is vague. Does it mean "adjoining", or does it mean "close to"? If "close to", how close is close enough? Paragraph 20 adds confusion and interferes (or has scope to interfere) with commercial agreements negotiated at length between the parties. A right to terminate, or a break clause, or rights to "lift and shift" are issues that should be negotiated and agreed between landowners and operators (and they routinely are) and those agreements should be reflected in the consideration or rent. Paragraph 20 cuts across these commercial agreements and introduces uncertainty. There is also considerable cause for confusion where both paragraphs 20 and 21 might apply and often notices under both provisions might be served.

10.33 Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the Code; does it strike the right balance between landowners and Code Operators? Consultation Paper, Part 5, paragraph 5.12.
For the reasons set out above, Surf believes that it does not and that the commercial agreement should prevail. It may however be appropriate where there is no contractual relationship between the landowner and the operator, for example in the case of adjacent landowners/landlords or in the case of a superior landlord whose consent was not sought by a tenant. There should be a greater degree of flexibility or discretion as to who should be liable for the cost of alteration (or removal) in order that a fair result can be achieved depending on the facts.

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.
Surf believes that it is a matter for landowners and operators to agree commercially whether they wish to contract out or not.

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.
Surf believes that modification is required. As highlighted elsewhere, there is inconsistency between the owners/operators of linear obstacles. The consequence is that it is possible/commercially acceptable to cross some linear obstacles, but not others. There should be a revised dispute resolution mechanism and there may be scope for either standard, or more consistent rates of consideration for exercising Code powers, to be assessed by the Tribunal.

10.36 We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.
The fact that landlords cannot guarantee that they can recover possession or control of a site is a substantial barrier to the expansion of telecommunications networks to some sites, or some areas. However, it is clear that an unrestricted right to remove equipment would unfairly benefit landowners and leave operators vulnerable to ransom situations. Surf believes that a right for operators to retain equipment is important, but that landowners should have the right to oppose that retention in certain circumstances. It seems to us that a similar arrangement to that in Part 2 of the Landlord and Tenant Act 1954 might be suitable (with appropriate modifications) to this situation. It works well in relation to commercial property and it cannot be said that the security of tenure provisions deter landlords from letting, although it is a factor to be considered when deciding whether to grant a lease with security of tenure, or a contracted out lease.

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

10.38 We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.
The current procedures seem appropriate.

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. The reality is that Surf pays landowners at the then current rates during such periods.

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, however where operators agree that the security provisions do not apply, this should be relevant to the level of consideration payable.

10.41 Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code? Consultation Paper, Part 5, paragraph 5.56.	
Yes, otherwise there will be the potential for complication and disputes. It must make sense for there to be one regime and not two with different rules.	

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.	
No – the right to compensation must arise when the rights are created. The fact that equipment is on land and subject to Code powers is something that should be disclosed to a purchaser and discernible from the register and it will inevitably be a matter that is reflected in the valuation of any interest that is acquired (freehold or leasehold).	

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.	
Surf does not believe that compulsory purchase compensation in a "no scheme" world is appropriate here. Surf is responding to this point in both capacities; as operator and as landowner. A valuation as proposed would cause significant problems with the supply of available sites, as it would potentially severely depress values outside prime sites, or cities where the appropriate valuation might be of land let for grazing. The telecoms market is well developed and market value is well established. There may well be scope for assessing whether the "correct" market value is being applied in some circumstances, and the Lands Chamber would be the ideal forum for that question to be explored.	

It also appears that the consultation focusses too heavily on the mobile or cellular market without identifying the differences between that market and fixed line, or fibre networks. With cellular networks, there are, in most situations, other potential sites available for a mast, which creates the scope for competition. With fixed line or fibre networks, there might be a very limited number of routes, which then potentially gives some landowners a ransom position. This is the type of situation that the Code needs to deal with and remove in order that operators can be in a position to expand telecommunications networks. It is suggested that it is not necessary in order to do this to remove the market value or market rent concept from the question of consideration.

It is therefore proposed that a market value or market rent should be the appropriate test of consideration, subject to the normal RICS guidelines, but which excludes any ransom value or profit share element on the basis that this is not a situation that is analogous to the calculation of damages in lieu of an injunction. This is fully in line with the judgment in the *Mercury* case.

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.

The practice of the Lands Tribunal (now the Lands Chamber of the Upper Tribunal) when assessing compensation, whether that is compensation for disturbance, the acquisition of rights, or the release or modification of covenants is that if, using the appropriate valuation methodology, the compensation would be assessed as minimal, or nominal, is to award minimal or nominal compensation, in the same way that if only nominal damages are due, the practice of the court is to award only nominal damages. In neither case does the Tribunal, or the Court award a minimum sum, or inflate the figure simply because the calculation arrives at a low figure. In addition, the practice of the Tribunal and the Court would be often to award costs against the receiving party on such occasions (on the assumption that an offer had been made and beaten) in an attempt to dissuade parties from running disputes/litigation without any real commercial value or prospect of success. In our view this approach should be taken in order to force/persuade landowners to be reasonable and realistic in their approach to negotiations with operators.

If the market value approach urged above is followed however, the situation where consideration is likely to be nominal should be rare. However, where the proper outcome of the assessment of consideration is that the payment should be nominal, that should be the result and there should be no minimum payment or uplift.

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, otherwise the landowner would potentially receive a windfall to which they were not entitled and operators would be capable of being ransomed by landowners. As a commercial reality there is often a negotiation and an agreement is reached between the landowner and the operator, but this should always be a commercial negotiation based on an assessment of risk and cost benefit. The landowner should not be in a position both to demand the alteration (at the operator's expense) and to retain the right to compensation which was assessed on the assumption that the equipment would be retained in perpetuity.

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.

Surf strongly agrees. The current system is not fit for purpose and as a consequence it is rarely used either by landowners or operators. It is uncertain and too expensive.

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.

From Surf's point of view, this is the most significant point in the consultation. The Land Chamber – Upper Tribunal (incorporating the Property Tribunal) has to be a more cost effective option than the County Court. Alternative dispute resolution such as Arbitration or PACT (Professional Arbitration on Court Terms) should also be available, if the parties choose to use it.

There might also be scope to consider a further alternative. In our experience, the Land Chamber is expert at determining questions of valuation, but questions of liability or principle, particularly in relation to utilities are often determined elsewhere. For example, in Surf's experience as part of the WPD group, in the case of electricity, if a Distributor exercises statutory powers to obtain rights for equipment, the question of whether those rights are granted is determined by the Secretary of State at an inquiry, with the question of the resultant compensation to be determined by the Lands Chamber. A similar procedure here, to bring telecommunications more into line with other utilities may be an alternative, and possibly a more appropriate solution.

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. To enable fast broadband roll-out it is proposed that operators be allowed early access to sites with the commercial terms of occupation to be determined at a later date.

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

Consultation Paper, Part 7, paragraph 7.32.

Some form of agreed procedure (similar to the pre-action protocols in the civil courts) would be appropriate to force parties to negotiate and resolve their disputes reasonably; to adopt a "cards on the table" approach, and to encourage or force the early exchange of information. There should be appropriate sanctions if parties fail to comply as this would encourage (as it has in litigation) a more suitable engagement between the parties at an earlier stage of the process, and ultimately to persuade more disputes to settle.

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 always be awarded on a discretionary basis based on the outcome and on the conduct of the parties. The costs jurisdiction should be the same as for any litigation so that the loser pays with certain types of conduct and the impact of offers modifying the principle of loser pays as appropriate.

If the operator was to pay regardless of the outcome it would encourage significantly greater numbers of disputes as landowners could take unreasonable positions knowing that they were litigating at the Operator's cost. This would significantly complicate the process and make it too easy for landowners to ransom operators.

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. If the dispute is resolved after a contentious process, costs should follow the event. If the parties agree to use some form of ADR it should be up to the parties to agree an appropriate way for costs to be dealt with.

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.
The drafting of some notices could be simplified and better structured.

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

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.	
It may be helpful for standardised terms to be available, but the parties should also be free to negotiate alternatives.	

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.

To avoid conflict between the two statutory regimes, it is proposed that the parties should decide which provisions they intend to rely upon. It should be possible for either regime to be contracted out of (or into). It should not be possible for operators to be able to rely on the 1954 Act, but also then to be able to fall back on Code powers if, for example, they have failed to serve an appropriate notice or counter-notice and lose their security of tenure. One of the statutory regimes should apply (the choice being determined by the commercial negotiations of the parties), but not both of them.

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.

Any interests in land created under the Code should be registerable and visible on the register so that purchasers/mortgagees and other interested parties have the ability to identify Code rights and powers that have been created/exercised. If the Code alters the normal rule of priorities in relation to registered land, this should be clearly expressed in the Code with any consequential amendments to the LRA 2002 and the Regulations.

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us: (1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon; (2) what impact regulation 16 has on Code Operators and on Ofcom; (3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and (4) if the answer to (3) is yes, what form should it take? Consultation Paper, Part 9, paragraph 9.14.
1) No 2) A high percentage of income with a potentially high workload to calculate the results 3) It is suggested that a common scheme is required that is fair, reasonable and easy to manage

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

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Our ref – 13/ZB/MI009.116 Your ref – Date 26 October 2012

J Linney Esq

Law Commission

Steel House

11 Tothill Street

London. SW1H 9LJ

Dear Mr Linney

Response to Law Commission Consultation Paper No205 on the Electronic Communications Code

I refer to Tom Bodley Scott's submissions on behalf of Batcheller Monkhouse of No. 1 London Road Tunbridge Wells Kent TN1 1DH that have been considered when writing this response to the consultation. I act for many site providers.

The Supreme Court's decision in Bocardo appears to have been given great weight before reaching the proposition stated at paragraph 6.7.3/4. The principle of Pointe Gourde has been taken out of context and Bocardo is not properly relevant to the consideration of code operator site valuation methodology. The Land Compensation Act 1961 is founded upon the principle that those landowners affected by new major infrastructure schemes under compulsory acquisition should be subject to the "no scheme world". The point here is a new scheme, focused upon specific freehold land that is "taken" for a specific project, not some nationwide cabal of commercial enterprises that can readily achieve its aims in the open market and have done so with remarkable speed to date at little comparative cost. The LCA ensures a new railway line cannot be ransomed, but the telecoms industry does not face any ransom, as Mr Bodley Scott's analysis proves.

It is certainly correct that where parties might disagree about more apparatus there ought to be some guidance and a code of practice, in default arbitration. The LC would be most valuable in promulgating that outcome. But there is no justification for departing from the general presumption that there is freedom to negotiate; to enable code operators to thwart legal terms reached at arms length and claim it need not pay more than a nominal sum, which it appears to be the approach. The notion that operators should be able to impose more apparatus for a peppercorn is equally flawed for the same reason. As for new sites

the position would be catastrophic as no potential site provider would agree anything. The obvious point is that Code powers apply to tens of thousands of masts and antenna over the country, rolled out in a matter of a few short years. To suggest that the law be changed to render existing site providers with the blight of such in perpetuity for a peppercorn would amount to a gross unfairness to those owners. There is no case to benefit already hugely rich multi billion pound corporate bodies that in any event pay quite modest sums for these sites. The raison d'etre of CPO is to facilitate major projects that are otherwise commercially unviable due to ransom, but equally there is no basis to import a compulsory purchase regime when there is no impediment to the telecom companies operations. The speed and proliferation of the existing network again speaks for itself.

The proposal to import compulsory purchase valuation methodology fails the public interest test. There is no new scheme of national importance arising here, the network is mature. It must be of significant concern that providing such power to peppercorn rent in favour of various vast conglomerates with limitless financial resources would result in exploitation of existing site providers and kill the prospect of finding willing site providers. There is no new infrastructure scheme requirement here and the proverbial horse bolted a few short years ago.

I agree with the approach suggested by Tom Bodley Scott that there are many aspects to code powers which need to be improved, and refinement and simplification is always a good starting point. However to ignore the obvious public concern expressed towards long established utility companies over charging reflects a clear British demand there be fair play. Telecom operators are commercial entities making a great deal of profit from their enterprises and naturally the government makes a killing from licences. The Human Rights Act and the current planning law framework makes perfectly clear that the balance has to be reached but the argument that code operators need the no scheme world to be applied for the public good is not made out and equipoise is absent. There is a vast patchwork quilt of telecoms apparatus networks governed by the law of supply and demand - the same must apply to site providers as to code operators. Otherwise any expansion that may be required will not occur.

The provisional proposal is therefore as misconceived as it is unnecessary. Taken to its logical conclusion it would open the floodgates to a much wider application of effective compulsory purchase acquisition for a wide number of commercial interests. As an example it may very well be considered that the public benefit from power generated by onshore wind farms. But these sites are provided by site owners for turbines that would clearly have no interest if a peppercorn was all that was payable. Millions of people would use the power generated but there is no suggestion that wind farm developers have CPO rights. The public would also regard it as inappropriate for say a German wind farm giant to be able to rent farm sites for a peppercorn, effectively compulsorily acquire land anywhere they wish for their great turbines. There are doubtless many other more examples.

The existing system and law demonstrates that there is an adequate and flexible framework that has enabled code operators to rapidly build up networks throughout the country, which never needed oppression to secure. It is clear beyond argument that there

can be no case for introducing a no scheme world to something that has flourished at great pace and works well already. I hope the Commission will see there is much to commend guidance and a code of practice, in default arbitration, but the proposal to change so dramatically what is paid by these conglomerates to site providers amounting to a peppercorn is simply as unnecessary as it is unreasonable for a nation that prides itself as a free market economy, which attracts the foreign investment in any event.

Yours sincerely

Nicholas Kingsley Smith
Kingsley Smith Solicitors LLP
For and on behalf of Kingsley Smith Solicitors LLP
[redacted]

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):
The views expressed in this response are the personal views of Odell Milne, as an individual, and do not reflect the views of Brodies 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.

I acknowledge the need to ensure access to the telecommunications network. The powers granted under the Code should reflect (i) the substantial interference that the code powers pose to landowners' private property rights and (ii) the fact that Operators are commercial bodies. Commercial gains of Operators must be viewed in light of the detriment to the landowner's rights and appropriate protections for the landowner and availability of compensation should be included. In terms of the particular query:

(1) the works to be executed should be restricted to those which are "reasonably necessary";
(2) there must be an opportunity for the landowner to remove the apparatus at the end of the term of the wayleave. Alternatively, the landowner should be made aware prior to signing the wayleave that the opportunity to remove may not be available to him and the equipment may be permanently fixed on his land; and
(3) I agree that the code rights should include rights for Operators to enter land to inspect any apparatus but this must be subject to giving reasonable notice and paying compensation for any damage.

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

Consultation Paper, Part 3, paragraph 3.17.

The code rights already contain adequate rights for the Operator. However, the position of the landowner is not adequately protected. Therefore, the scope of the rights should be clearly set out with appropriate checks and balances for the landowner. There should be clear provision for the landowner to apply for equipment to be removed and/or appropriate consideration or compensation paid and there should be time limits for the Operator responding. In addition the landowner should be able to obtain a remedy without the expense of a court process.

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.
The code rights should generate obligations upon Operators. The Operator should be bound to install the apparatus in locations which cause minimum disruption to the landowner/occupier. The Operator should be obliged to remove the apparatus and equipment at the end of the term of the wayleave, deed of servitude or lease. The Operator should also be obliged to pay all legal and other fees prior to entering the land. Finally, the Operator should be bound to stress to the landowner that he may not be able to remove the equipment from his land at the end of the term of the wayleave, deed of servitude or lease. This warning is not made clear to landowners/occupiers under the current system.	

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.
Whilst I am not qualified to comment on the specifics of the definition, I consider that the definition of electronic communications apparatus should be clear so landowners and their advisers can clearly identify what equipment or classes of equipment are included so that there can be no extension of equipment or additional equipment without consent.	

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.
Given the fact that the Code applies to both England and Scotland, the use of English lease terminology is not helpful. Specific provisions should be contained in a separate section of the Code which applies directly to Scotland. The Operator should be bound to get the consent of the owner of the land and not just of the occupier. Rights granted by the occupier should not bind the owner of 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) No. It is essential that the public benefit of the order sought be weighed against the prejudice to the landowner. Prejudice to the landowner in some circumstances may not be capable of being compensated by money alone. The weighing of public benefit against prejudice to the landowner is critical to protect private rights and in some cases can be a reason for relocation to other land that is less prejudicial. If only compensation is required, the Operator will be under no obligation to try to choose a location which is least prejudicial.

(2) No. This would seem to be contrary to natural justice and to the principles of the European Convention on Human Rights.

(3) The Code should be more consistent with wider compulsory purchase legislation principles. Compulsory purchase legislation and established principles take into account the rights of the individual, and the rights to the protection of property under Article 1 of the First Protocol to the European Convention on Human Rights.

The Access Principle needs to be clarified. At the moment it is not clear whether persons are entitled to access to one network or a variety of networks in order to satisfy the test. Some guidance on this in the revised Code would be helpful.

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

Consultation Paper, Part 3, paragraph 3.59.

No. It is inappropriate for an occupier to be able to bind those with a greater interest (such as landowners), particularly if obligations will bind successors in ownership or occupation. This is especially the case since compensation may not have been paid to the landowner, who is bound by it in the future.

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.
Where lines are added to existing electricity apparatus, the authorisation of the landowner/occupier should be required. The wayleave itself should grant specific rights and any extension beyond the existing term of the wayleave should not be permitted without separate authorisation from the landowner/occupier. In some cases additional lines granted can constitute an interference with use of land even if 3 metres or more above land depending on the owners' activities (forestry or farm lifting or storage can often involve equipment which could extend close to the 3 metre limit).

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 landowner/occupier is frequently not given notice by the Operator that telecoms equipment has been added to the electricity apparatus. This makes it difficult for the landowner/occupier to establish that telecommunication cables have been installed on his land. Furthermore, the Code does not make it easy for these telecommunication cables then to be removed once installed. It is inappropriate for operators to add telecommunications equipment without consent and then rely on the code to keep that equipment in place. There should always be a requirement for consent and if not consented there should be a simple procedure for an owner or occupier to have the equipment removed.

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

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

(1) to vegetation generally;

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

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

Consultation Paper, Part 3, paragraph 3.74.

(1) There seems no reason why there should be a distinction between trees and vegetation.
(2) There should be a limit on the extent to which this is authorised since in some cases the lopping or felling may constitute a significant interference with landowner or occupiers enjoyment of land. Therefore there should be strict limits as to the exercise of this power except for reasons of safety and in emergency.
(3) It does not seem appropriate to distinguish between a wireless signal and tangible apparatus provided that there are strict limits and provisions which entitle a landowner to be represented before lopping or felling if there is a significant interference.

10.15 We ask consultees:

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

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

Consultation Paper, Part 3, paragraph 3.78.

(1) Operators should benefit from an ancillary right to upgrade their apparatus provided the upgrade does not result in a higher burden on the landowner or visually intrusive effect. Any such upgrading should be accompanied by an increase in compensation or consideration to the landowner which the Operator should be bound to pay whether or not asked to do so. There should also be some method of ensuring Operators pay appropriate consideration or compensation. However, landowners have no access to information that shows the commercial benefit to the Operator.
(2) When the apparatus is upgraded this should be reflected in an additional payment to the landowner/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.

Consultation Paper, Part 3, paragraph 3.83.

There is currently a lack of consistency with regard to the extent to which Code Operators advise landowners of site sharing or allowing shared use of cables. There is generally no evidence available to landowners which shows the extent to which other parties are using the equipment. There should be some process by which Operators are bound to share that information with the landowners so they can receive appropriate compensation or consideration. This is something which cannot be easily ascertained simply from looking at the equipment (although for telecom masts the number of dishes, antennae etc can sometimes be identified). It is to be assumed that as equipment develops there will be less visibility for landowners and legislation must be drafted so as to reflect that so Operators cannot simply deceive landowners.

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.

Whilst I am not aware of this section having been used, a section that provides that landowners cannot unreasonably refuse consent to site sharing, should also provide that appropriate compensation or consideration be paid for that consent. There should also be provision that it does not increase the burden on the owner's land. There might be the need for there to be recognition of the position faced by a landowner where a proliferation of equipment creates a significantly worse situation than existed where one mast or cable was originally consented. There should always be checks and balances allowing the prejudice to the landowner to be considered and a right of appeal.

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) In my experience this does not cause any difficulty for Operators because, in practice, they often appear to ignore the terms of the Code. This may cause difficulty for landowners/occupiers because they are unaware of the equipment which is in place over their land in cases where landowners who have not permitted assignation in original grants of rights or who have specifically provided that assignation is prohibited without consent, cannot ascertain if assignation has taken place without consent. Operators simply send standard form intimations of assignation to landowners. Where the landowner disagrees, the Operators may ignore the landowner and rely on code powers because they are confident that the landowner will not seek to have equipment removed due to the expense of the court application it would require.
(2) Landowners should be entitled to restrict assignation.
(3) If the Operator assigns the benefit of any agreement then a payment should be made to the landowner/occupier.

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. There are already extensive rights for the benefit of Code Operators. All those rights constitute an interference with private rights and therefore it is essential that rights granted are strictly defined and entitlements strictly construed. Compulsory taking of rights constitutes a major interference with ECHR rights and should therefore be strictly construed or not capable of extension without justification and appropriate balance and checking provisions.

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 comment.

10.21 Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties? Consultation Paper, Part 3, paragraph 3.101.
Yes. Given that the justification for compulsory purchase is to benefit the public it makes sense that the revised Code should entitle landowners/occupiers to compel the Operator to use their powers to gain code rights against third parties.

10.22 Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used? Consultation Paper, Part 3, paragraph 3.102.
I have not encountered the use of paragraph 8 in practice and I am therefore not in a position to comment.

10.23 We ask consultees:

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

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

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

Consultation Paper, Part 3, paragraph 3.106.

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.

There is a need for these provisions to recognise the landowners requirement for a remedy which does not involve an application to court. There should be strict time limits within which Operators should reply or respond to notices from landowners and/or references to court. The misuse of paragraph 21 procedures whereby Operators serve a counter notice on a landowner who has served a notice requiring removal and then do nothing to move matters forward should be tightened so that Operators must follow up such a notice within a certain time with application to the court for an order that the equipment is required and must remain. If they do not obtain such an order within a specified time limit they should be required to remove the equipment. In order to make this procedure more accessible and cheaper for landowners, use of an alternative dispute resolution procedure should be considered. Extension of OFCOM's powers to cover disputes between landowner and Operator arising under the terms of the legislation and/or under the terms of lease, would be a useful provision and could benefit Operators and landowners in achieving resolution.

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.
Not applicable.

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.
I have no experience in this area which would permit me to 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.
I agree. There should be an entitlement to have apparatus relocated and removed if required. This entitlement may, depending on circumstances, have to be subject to relevant payments. The code should also include provisions with regard to time limits and dispute resolution. Provision for compensation to reflect interference or loss of development value as a result of existence of apparatus should be available to a landowner not only at the commencement of the agreement or when cables are installed the landowner meeting the cost of such relocation but only if proper compensation has been paid for the right in the first place. If a nominal payment for the right only has been paid and the Operator has benefited from the right for the common benefit sought, the landowner should not have to pay relocation costs. As with some other legislative processes (for example gas and pipelines) there should be scope for operators to either lift and shift or pay compensation if existing equipment interferes with a landowner or occupier's future use of land. Given the likelihood that the equipment will remain in place for many years, it is inappropriate for there to be a single payment of compensation and/or lease payment since it is impossible to determine whether or not this will adequately reflect the loss to the landowner and of sterilisation at a later date.

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 expense of the alteration regime for landowners and occupiers is unjust. It is unfair that the onus is on the landowner or occupier to raise a court action for alteration of the apparatus. There should be recourse to a less expensive process. Furthermore, the landowner could have a valid reason for requiring alteration of the equipment and therefore the default position of the landowner/occupier having to reimburse the Operator's expenses does not strike the right balance. The remaining provisions of paragraph 20 are quite fair.

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. Subject to the costs associated with the alteration regime being addressed (as suggested at 10.33) in the revised code.

10.35 We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code? Consultation Paper, Part 5, paragraph 5.18.
The Code should strike a balance between the rights and obligations of the Operator and the disruption to the landowner/occupier's use of the land. The Code should require that compensation be paid to the landowner/occupier when the balance cannot be adequately achieved.

10.36 We provisionally propose that a revised code should restrict the rights of landowners to remove apparatus installed by Code Operators. Do consultees agree? Consultation Paper, Part 5, paragraph 5.47.
I agree that paragraph 21 is necessary, but for the reasons outlined above, the Code needs to strike a balance between the rights of the Operator and the detrimental effect to the landowner. The equivalent provision of paragraph 21 in the revised code must include a time limit because, as things stand, the Operator is not compelled to take any action when served with a notice requiring removal. There is therefore no available remedy for the landowner. There should either be (i) a clear time limit following which in the event of no response and no court action, the Operator should be bound to remove the equipment or (ii) some other procedure which enables the landowner to enjoy use of his land without the sterilising effect of the equipment or (iii) there should be a requirement for the Operator to pay appropriate compensation for that sterilisation.

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

10.38 We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.
It is unfair to place the onus on the landowner given the fact that the landowner will, in most cases, be a private individual whereas the Operator is a large commercial organisation. The costs involved place an unfair burden on the landowner as does the requirement to show that the alteration "will not substantially interfere with any service which is or is likely to be provided using the Operator's network". The costs involved in evidencing such a requirement would, in the majority of cases, be high. The revised code should include a clear procedure for removal including time limits for responses and actions, and, in the event that either party does not comply with the Code there should be recourse to a less expensive forum for dispute resolution eg OFCOM.

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 Code should include an obligation to pay consideration in the period between the expiry of the code rights and removal of the apparatus with interest which will be an additional impetus on the Operator to reach agreement and/or pay the consideration on time. A statutory rate of interest would not be appropriate since that will not be an incentive and therefore a penalty rate of interest should be provided for.

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.
I agree. Paragraph 21 of the Code places an unjust onus of proof on landowners who require removal of equipment, even that equipment which is not used by the Operator and has been abandoned. The revised code should include provisions requiring the Operator to remove the equipment at the end of the term of the agreement and should also place the onus on the Operator to raise an action allowing them to keep the equipment on the land beyond that date. The parties should have the ability to contract out of the security provisions because, under the existing Code, the landowner has no guarantee that he will be able to recover vacant possession of the land at the end of the agreement.

10.41	Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code? Consultation Paper, Part 5, paragraph 5.56.
I agree. The provisions in force under paragraphs 20 and 21 of the Code need to be readdressed because existing measures place an unfair burden on the landowner. In addition, under the current regime the landowner is faced with difficulty in getting the equipment (even that which has been abandoned) removed from his land. The revised code should seek to address these problems and allow landowners and occupiers the ability to recover their land (regardless of the time the equipment was installed). For that reason, it is not inappropriate for the legislation to have retrospective effect although this is something that would, in many cases, be better avoided.	

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.
Compensation should be payable in addition to consideration. If the Operators are leasing for commercial gain then they should be obliged to pay a commercial rent and should also pay compensation for loss or damage, including payments for injurious affection. The interests of parties "bound by the rights granted" may, however, differ significantly and it would be hard to determine a single entitlement to compensation for loss or damage in such circumstances. In particular, I can envisage problems when dealing with landowners and occupiers and their entitlements to compensation. Their respective uses of the land might mean that their respective entitlements to compensation differ quite considerably. There is no justification for there being a single payment only to reflect the effect of the equipment for "all time". There may be a change in use of the land and/or a change in ownership or occupation. If at the date of valuation the compensation or consideration is paid on the basis of agricultural use and later on there is an opportunity for industrial residential or commercial use, there should be an obligation on the operators to pay appropriate consideration and compensation reflecting those changed conditions.

10.43 We ask consultees whether that right to compensation should be extended to those who are not bound by code rights when they are created but will be subsequently unable to remove electronic communications apparatus from their land. Consultation Paper, Part 6, paragraph 6.36.
Yes, the right to compensation and consideration should be extended in this manner. There should be compensation and consideration payable in such circumstances. In addition, parties may acquire land which they are unaware, through no fault of their own, is burdened with cables and equipment. In such circumstances those parties should be entitled to compensation and consideration for the Operator's use of the land. In addition, successors in ownership should have an opportunity to seek removal of the apparatus under a procedure which is less burdensome, expensive, time consuming and ineffective as the current procedure under paragraph 21.

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.

Whilst it is appropriate that there be consideration based on a willing seller and a willing buyer rather than simply compensation, there should be some reflection of the position where there is an unwilling landowner/occupier. An unwilling landowner/occupier should be entitled to receive payment in recognition of giving up his land for public benefit. The consideration payable should be a market consideration. However, I appreciate that comparables are very difficult to obtain. I would therefore suggest the consideration payable is a proportion of the commercial benefit to the Operator. Any disturbance payment should include legal and agents' fees. There have, for many years, been proposals put forward by parties consulting on the wider compulsory purchase compensation principles to the effect that there should be a payment in recognition of the fact that land is being taken compulsorily and against the wishes of the owner. Whilst early court cases did provide such a payment, the current legislation does not provide for it but there is general awareness amongst authorities who are acquiring land or rights under compulsory purchase powers and amongst those advising them that such a payment would better reflect the appropriate balance between the individuals right to enjoy his property and the public interest.

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.

The comments mentioned in relation to 10.44 also apply here. Market value consideration and a payment in recognition of the unwilling landowner whose land and interests are being affected for the public benefit should be reflected in any compensation provision. It is difficult to envisage a situation where there would be no compensation payable but if such a situation can be envisaged, then a minimum payment may be appropriate. The payment should also include the reimbursement of legal and agents' fees, so that the landowner is properly advised.

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.
There should be scope for repayment in some circumstances where it is fair and reasonable to do so. However, these types of problems would, to an extent, be resolved if the agreement was stated to be for a fixed term and the revised code and agreement provided that the Operator was bound to remove the equipment at the end of that term. It would, in such circumstances allow the landowner/occupier to make more effective plans for his use of the land and would limit the extent to which the alteration regime is required.

TOWARDS A BETTER PROCEDURE

10.48 We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes. Do consultees agree? Consultation Paper, Part 7, paragraph 7.26.
The County Court is not the forum for dispute resolution in Scotland.Rather it is the Sheriff Court. I agree that the Code should no longer specify the Sheriff Court as the forum for most disputes. There is certainly a need for a more accessible dispute resolution forum. Whether this is the Lands Tribunal (as is the case for compensation claims under compulsory purchase legislation), arbitration or some other forum. There is also a need for there to be an opportunity for referral of dispute to OFCOM.

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 equivalent body in Scotland is the Lands Tribunal for Scotland. There is some merit in using the Tribunal as a forum for dispute resolution rather than, as at present, the Sheriff Court. In particular, the tribunal is more familiar with concepts and process of valuation than one may find in the Sheriff Court and the former notably has input from experienced surveyors as part of the Tribunal. (2) In matters of valuation for the purpose of determining appropriate consideration for rights sought, one would expect a surveyor's input to feed into any court submissions about the appropriate level which should be paid for the rights sought. However, while there is merit in a procedure whereby a surveyor is appointed for these purposes, I have concerns about the surveyor's role in the fixing of other terms and conditions which will govern the rights which are sought to be granted, especially in terms of paragraph 5 procedure or its equivalent replacement. (3) Consideration should perhaps be given to the use of the Scottish Land Court for the determination of disputes. Much of the land over which rights are sought is rural in character and the Scottish Land Court deals mainly with this form of land. It is well placed to consider the respective rights of the landowner and the operator vis a vis the rights to be granted and the payments to be made by way of compensation and consideration in return for those rights, more so than the Sheriff Court or perhaps the Lands Tribunal for Scotland.

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.

There should be an opportunity for an advance payment to be made as there is under the current compulsory purchase regime. Given the reluctance of Operators to agree to terms which fairly reflect the needs of a landowner both in relation to reinstatement provisions, damage and consideration, there is often no alternative for a landowner but to refuse to sign the wayleave or lease or other consenting document and refuse to allow access to his land until all matters have been resolved and payment obtained. Whilst it would be reasonable to provide for an advance payment as there is under other compulsory purchase legislation, this must be balanced against the possibility that acceptance of such a payment may bind a landowner to terms which are not acceptable. Once the equipment is installed, the Operator has the benefit of the code and therefore the landowner is left without an appropriate forum for dispute resolution and/or removal of the equipment. It is therefore necessary that any provisions balance the need for certainty for the Operator in order to permit it to carry out its operations and the needs of the landowner to ensure that payment and terms reflect his needs. A more accessible method of removal and/or provisions which ensure an Operator must respond timeously and effectively and with appropriate compensation provisions if the equipment is to remain on site, would go some way towards managing this issue.

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

Consultation Paper, Part 7, paragraph 7.32.

I have encountered problems with delays extending over many years. Very often the landowner's only remedy and opportunity to force the Operator to act reasonably is by refusing consent and entry until terms have been agreed consideration paid. The comments in the preceding paragraph about mechanisms for protecting the landowner whilst enabling the operator to carry out its operations could avoid the need for the landowner simply to refuse to sign or allow access until terms have been agreed. In my experience the actions of the Operator are often incompatible with the individual's rights under the ECHR. In such circumstances there should be availability of recourse to OFCOM as a quicker and cheaper means of settling disputes.

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 costs should be paid by the Operator except in those situations where the landowner's conduct is unreasonable.

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. The rules on costs in the wider compulsory purchase regime should be reflected under the revised code. The reasonable costs of the landowner and occupier should in all circumstances be met by the Operator. The only exception should be where the landowner has acted frivolously and vexatiously. It is only reasonable to meet the cost of taking legal advice since the landowner is faced with an action by a licensed operator which will be a significant interference with his private right. The landowner's costs and actions should reflect the fact that the interference is for the public benefit.

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.

I agree. In addition, if the procedure is to be effective, it is essential that the revised code contains clear time limits and remedies for both parties if notice procedures are not complied with. The revised code should also contain recourse to a cheaper, alternative dispute resolution procedure e.g. Lands Tribunal in addition to OFCOM.

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.

The counter-notice provided under paragraph 21 of the Code insufficiently clearly drafted. At present, an Operator may simply state that the landowner is not entitled to remove the equipment without specifying why that is the case. In practice Operators may state that they are going to take steps to secure the right to have the equipment remain on the land, but there is no reason why they ought not to be held to a timetable for proposing the steps which they intend to take to secure that right. Counter-Notices should be required to be more specific as to the information to be provided, including the provision of advice to landowners that they have the right to have the dispute determined by whatever court or tribunal is selected as the appropriate forum for that purpose. This latter requirement simply reflects the significant imbalance of power which exists between the parties and serves to ensure that the eventual resolution of the dispute will be made by an independent party who will seek to balance the respective interests. The form of Notice required at present may lead landowners into thinking that their rights are more limited than in fact they are.

Notices under paragraph 5 of the Code should specify not simply the "agreement" required by the Operator, but the full terms and conditions of the agreement.

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.
There should be greater transparency. The landowner is entitled to an understanding of the commercial benefits which the Operator is obtaining from the agreement. In renewable energy situations the landowner is often entitled to a percentage of the rent and this could perhaps be considered as an appropriate payment mechanism. The landowner is also entitled to a clear specification and explanation as to the equipment and apparatus being installed on the land. The Operator should be obliged to make this clear at the outset. The Operator should also be obliged to pay the legal fees of the landowner. Finally, there should be reference to an ombudsman in the event that the Operator does not adhere to the terms of the Code. As mentioned above, there should be a clear notice that the landowner should take legal advice.

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.
There is an appetite for standardised forms of agreement and terms. However, the standardised agreements would need to be in a format which balances the interests of both parties whilst maintaining the opportunity to freely contract to those terms which they find acceptable. Standard terms being offered by the Operator currently, are drafted so that they reflect the interest of the Operator and are unacceptable for landowners who are prejudiced to a large extent with no provisions for additional protection. If the legislation and Code is more clearly drafted to give landowners appropriate protection, and it is enforced (because it might be said that the Code already provides some protection but it is inaccessible and expensive to enforce and possibly largely ignored by Operators) then wayleaves could be a standard document since there would not need to be the insertion of additional protection and remedies to the landowners that are not otherwise available. Clarification of the Code and legislation and clear enforcement mechanisms, together with the opportunity of referral to OFCOM, might mean that agreement could be simplified and accepted by a landowner without him being prejudiced and therefore enable matters to be dealt with more efficiently and avoid delays.

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 provisions of Part 2 of the Landlord and Tenant Act 1954 apply to England and Wales and equivalent terms are not found in Scots law. I am therefore not in a position to comment on this proposal.

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.
This is useful for reasons of transparency. In most situations it is not clear what rights and obligations there are in respect of a particular piece of land. Matters would be more straightforward if the agreements were registered in accordance with the provisions of land registration legislation. Registration would make it apparent to a purchaser, or party acting for a purchaser of land, that there is an agreement in place and would also mean that the agreement could be examined. There is a problem with "lost" wayleaves and agreements. This would be in the interests of both Operator and landowner.

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

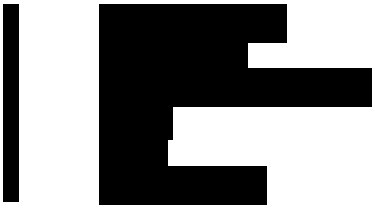
10.60 We ask consultees to tell us: (1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon; (2) what impact regulation 16 has on Code Operators and on Ofcom; (3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and (4) if the answer to (3) is yes, what form should it take? Consultation Paper, Part 9, paragraph 9.14.
I have not encountered a situation where regulation 16 has been called upon.

10.61 We ask consultees for their views on the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. Is any amendment required? Consultation Paper, Part 9, paragraph 9.39.
I have not encountered a situation where the 2003 Regulations have been applied so I am not in a position to comment.

NABARRO RESPONSE TO ELECTRONIC COMMUNICATIONS APPARATUS CONSULTATION

INTRODUCTION

Nabarro LLP has a large real estate client base and has a lot of experience in advising clients on issues related to the Electronic Communications Code. Our clients include a number of large property companies and financial institutions e.g:



We also have a number of public sector clients including Local Authorities, universities, colleges and a Police Force.

The issues that in our experience most concern our clients include:

- The ability of code operators to upgrade their apparatus.
- Site sharing.
- Security of tenure.
- The removal of apparatus where the land owner wishes to redevelop or refurbish its property.

Our response to the consultation is therefore focussed on these issues. You will note that the principal concerns of our clients centre around the need for certainty, in particular the certainty of being able to redevelop their property without undue delays or being put to additional cost.

RESPONSES

Response to Paragraph 3.78

Should Code Operators benefit from an ancillary right to upgrade their apparatus?

We believe our clients understand the importance of communications to occupiers, businesses and the economy generally. Our property company clients, in particular, are keen to provide buildings which supply the needs of modern businesses, and one of those needs is for fast and effective communications. We also believe, however, that our clients would not wish there to be an automatic ancillary right to upgrade although upgrading is not, itself, the issue, it is more what is involved in the upgrade.

When agreeing leases or code agreements with Code Operators, our clients will usually be prepared to agree an apparatus package with the Code Operator. In our experience this package is usually of a higher/more comprehensive specification than the Code Operator intends to install on the property initially. This allows for expansion and therefore upgrading. In the case of a rooftop site, this package will usually include, for example:

- A rooftop cabin or cabinets.

- Cabling including cable trays.
- Aerials.
- Antennae.
- Ancillary apparatus e.g. related to an electricity supply.

As a standard approach, our clients will not normally restrict any changes to apparatus inside the cabin or cabinet but would be concerned about the installation of additional aerial for antennae. The reason for wishing to place restrictions on additional apparatus being installed is the loss of flexibility for the landlord to make use of the building or the relevant space for other purposes e.g. plant and equipment that may be needed for occupiers of the building. Our clients will, usually agree that replacement of an item of apparatus (on the basis it takes up no more space or causes no loss of use to the landlord) would not be prohibited.

Should an additional payment be made by a code operator when it upgrades its apparatus?

We believe our clients take the view that if they agree a package or specification of apparatus with the Code Operator then no further payment should be due from the operator in respect of installation of apparatus up to the maximum limit allowed. Where the code operator requires additional space in or on the property to allow it to upgrade then we believe our clients would expect to receive further payment for that space.

Response to Paragraph 3.83

(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);**

We do not believe that our clients have any general objection to site sharing bout would have real concerns if they had no control at all. They are used to their tenants or occupiers sharing or subletting space within their premises. As a rule, however they will have some control over this e.g. in the case of a tenant wishing to underlet, the lease will provide for the landlord's consent to be required and for the terms of any underlease to follow or be consistent with the lease. The landlord will also have some control over the financial terms of the underlease, for example the lease will normally require the underlease to be granted at an open market rent. There are many reasons why the landlord wishes to have control over this process but one of them is to ensure effective management of its property. It is important for a landlord to know who has an interest in his property, the type of interest and the relationship between the tenant (Code Operator) and the site sharer. Where a landlord is seeking to empty a building for redevelopment purposes it must have certainty as to the parties upon whom notices should be served. Similarly where Code Operator or a sharer needs access to install or repair apparatus, this can prove problematical for both parties if one is unaware that the other has an interest entitling it to have access.

In addition a concern expressed to us by clients is the intensification of use that site sharing potentially leads to. Without controls over sharing and installation of additional apparatus, the concern is that the landlord will lose control and flexibility over it's property. It could also be more costly for the landlord if it wishes to redevelop it's property in the future as there could be extra

compensation due which, in some cases, might not have been factored in to financial appraisals.

In summary we believe our clients would be prepared to allow site sharing provided they can be certain that their approval will be required, and would be prepared to act reasonably, if they can be certain as to who has an inetrest in their property and the extent of that persons rights ; 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.

If it is negotiated between the landlord and the Code Operator at the outset that the terms of the agreement or lease will permit site sharing then we believe our client will wish to see that benefit reflected in the rent or consideration payable by the Code Operator. On the basis that this is taken into account, we do not believe our clients would wish to seek any further payment. However our clients would wish to ensure that any sharer would be obliged to comply with the terms of the lease or agreement and to adhere to any restrictions or conditions related to the amount or type of apparatus that can be installed.

Response to paragraph 5.12

"Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the code"

The problems that we have encountered with paragraph 20 is in the context of redevelopment and the Code's interaction with and its differences with the Landlord and Tenant Act ("the 1954 Act"). In particular with the ability of the landlord to oppose the grant of a renewal tenancy on the grounds set out in section 30(1)(f) of the 1954 Act.

The 1954 Act gives landlords a fair degree of certainty. They know what they have to prove (sufficiency of works, intent and timing) and they know that if they do so they will get possession back and the court has no discretion in this respect. They also know how long the court process is likely to take and there is also a large body of case law which gives guidance and therefore an element of certainty.

The problems with paragraph 20 are that the land owner has no certainty. It is up to the court to decide whether or not to grant an order for removal. One of the things that the court must take into account is that an order should only be given if the alteration will not substantially interfere with any service which is or is likely to be provided using the Code Operators network (paragraph 20(4)). This is something totally outside the landlord's knowledge or control and removes any certainty of possession.

Also if the service provided was to just one end user then, if it were removed, it would inevitably substantially interfere with the service being provided because the end user would have no service at all.

One of the things that a landlord must prove under section 30(1)(f) of the 1954 Act is that the redevelopment works will commence shortly after the termination of the tenant's tenancy. However if land owners are unable to obtain an order under paragraph 20 or, if the time for getting an order for removal under paragraph 20, does not tie in with the 1954 Act proceedings, then the landlord would fail in the 1954 Act proceedings.

There is also very little case law on paragraph 20 of the code.

Re paragraph 5.8

It does not make sense to land owners that they should be expected to pay (unless a court orders otherwise) for the cost of removal of apparatus belonging to operators at the end of the agreement which enabled the operators to install the apparatus.

Response to paragraph 5.13

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

Subject to whether it will become possible to contract out of the security provisions of the code, we do not agree that Code Operators and land owners should be prohibited from contracting out of paragraph 20 of the code.

We consider it important to be able to contract out of paragraph 20. Our clients' main concern with electronic communication apparatus is to ensure that it does not sterilise their buildings when it comes to redevelopment/refurbishment or it does not delay or make more costly any such development. Also, even in a non-redevelopment situation they are keen to ensure the removal/relocation of apparatus is possible if this is to make way for equipment which is necessary for the tenants who occupy their buildings.

Without the ability to insist on the removal of the apparatus without the uncertainty connected to paragraph 20, many land owners will simply not agree to having apparatus on their buildings in the first place. It is a requirement for most of the land owners for whom we act to contract out of paragraph 20. Prohibiting the ability to do this will be counterproductive. This is subject to our next comment.

However, it is suggested in paragraph 5.51 of the Consultation Paper that Code operators should be free to agree that the security provisions of the revised code will not apply to an agreement. If this is brought into force and if it means that a land owner will be able, as of right, and without any statutory fetter to retake possession at the end of an agreement and the operator would be obligated to remove its apparatus, then this would overcome the issue regarding not being able to contract out of paragraph 20. Land owners who need the certainty of getting their building back at a particular time will ensure that the whole agreement is contracted out of the security of tenure provisions, rather than just contracting out of paragraph 20 alone as they do now.

Response to paragraph 5.49

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

We would suggest that both the land owner and the Code Operator have the option of issuing proceedings within a set period of time e.g. two months from service of the counter notice unless they agree in writing to extend that time, such agreement to be reached prior to expiry of the two month period. If no proceedings are issued within the two month period, or such further extended time which may have been agreed, then the operator should be obligated to remove its apparatus.

Response to paragraph 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"

We agree that Code Operators and land owners should be free to agree that the security provisions of a revised code should not apply to an agreement absolutely.

The ability to do this is likely to lead to more land owners being prepared to allow their land to be used for apparatus. Contracting out is likely to affect the level of rent obtainable i.e. it will be lower because of lack of security. Therefore with those land owners who are interested in income as opposed to certainty of getting possession back at a set time without the apparatus, they would not opt to contract out.

Response to paragraph 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"

We are a bit unclear as to what is being proposed. If the proposals are brought into force whereby the Code Operator and land owner can and do agree to contract out of the revised code, does this mean that the 1954 Act will apply or not?

In a situation where the Code Operator is subject to the revised code but not to the 1954 Act, a land owner who buys property occupied by some tenants who are protected by the 1954 Act, would need to use the 1954 Act procedure to obtain possession from those tenants by relying on Section 30(1)(f) of the 1954 Act. Those proceedings would be in the County Court. In a situation where that same building had electronic communications apparatus on it which was subject to the revised code, then the landlord would need to use paragraph 20 to remove that apparatus. The evidence would be largely the same. Our view is that the two sets of proceedings would need to be dealt with in the same forum. If one were dealt with in the County Court (i.e. the 1954 Act proceedings) and the other in the Lands Chamber (the code proceedings) then the land owner would face the cost of two trials based on similar evidence. Also the timing of those proceedings might well be out of sync (which could impact on the land owners ability to succeed in the 1954 Act proceedings) whereas if they were both dealt with in the same County Court the proceedings could be heard together.

Nabarro LLP

26 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:
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10 Fitzroy Square London W1T 5HP
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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):**
As above
If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

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

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

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

(3) to enter land to inspect any apparatus.

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.16.

Yes we agree though in order to be of any use these rights would also need to include a right to operate the equipment. We also believe that the right in (3) should not be confined to a right to enter land to inspect the equipment but rather to inspect or to carry out any of the rights conferred under (1).

On a point of consistency, the Communications Act 2003 and the underlying Framework Directive both use the (defined) terms 'Electronic Communications Network' and 'Associated Facilities'. Throughout our response we have (in the interests of brevity) used the language used in the consultation document itself rather than the full terms used in the 2003 Act, however we believe it is vital that rights under the Code need to encompass not only pure network elements but also associated facilities as defined in the 2003 Act.

Throughout this response we have also used the term "CP" as an abbreviation for Communications Provider.

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.

Given the importance which is attached in modern society to having access to fast broadband networks (whether fixed line or mobile) we do not believe it would be in the interests of CPs, customers or indeed the country were Code rights to be restricted.

In practice it is not unusual for landowners to seek by agreement to restrict the rights which CPs have, particularly by restricting the ability to share ducts with other operators or to upgrade their infrastructure in response to customer demand. These are often justified by landowners in terms of seeking to retain control over their land but in reality they are more often little more than an opportunity to extract additional payments from CPs.

A clear, and workable Code is vital for CPs. As things stand, the practical and commercial reality is that in the absence of a workable code, a landowner can use delay or stalling tactics to ensure that a CP accepts whatever terms the landowner wishes. In practice the commercial reality is that CPs often have no choice to accept the terms demanded in order to get the work done, whether this be a major network deployment or a simple customer connection. The alternative is that the CPs walks away from securing the consent (and potentially from the deal with the customer). The CP suffers loss of business and the customer suffers through lack of service or at best reduced choice of service.

10.5	We provisionally propose that code rights should be technology neutral. Do consultees agree? Consultation Paper, Part 3, paragraph 3.18.
Yes. It is vital that the provisions of any new code are, to the extent possible, future proof. One only has to look at the change we have seen in the last twenty years to see how a statutory provision can quickly become dated if the drafting is too narrow and focuses on today's technology. Aligning the Code with the language used in the Communications Act (as referred to above) would go a long way to ensuring the provisions are technology neutral.	

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. CPs are already subject to detailed regulation, particularly in the general conditions of entitlement. It is hard to see what additional obligations Ofcom might impose. For example where a landowner suffers loss or damage due to the installation or operation of CP apparatus they already have a remedy since the Code already provides for compensation to the landowner.	

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.
UKCTA believes that this is an example of the way in which a statutory provision can quickly become dated (referred to in 10.5 above). While the definition is generally adequate and remains fit for purpose as it did in an era of fixed line only voice telephony, these days networks depend on a great deal of ancillary equipment which was not the case when the current code was drafted. Standby power, whether using generators and or batteries and UPS, is a crucial component of modern networks. Cooling is also far more important than was the case in the past and air conditioning and fire suppression systems are far more common than hitherto. The definition ought to be updated to encompass such equipment – but this should be done in a technology neutral manner in order to ensure that any future and as yet unknown developments can be provided for.	

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 understand the issue of concern here is that landowners fear that by granting right to a CP, they may be accepting restrictions which may preclude future development of their property, and therefore the value of the property may be reduced. The consultation identifies a risk that third parties not bound by the code may be unable to remove apparatus from their land.

We have no experience of this arising in practice though we accept that the drafting of the current code does lead some landowners to harbour such concerns.

Our members have seen an increasing use of restrictive clauses in wayleaves needed to serve customers, particularly in relation to commercial premises. Often wayleaves drafted by landowners now seek to restrict the period of occupation to the period of occupation by a named tenant. Thus when the tenant vacates the property, the CP is required to remove its apparatus notwithstanding the fact that the service might well be taken up by any new occupier. This not only causes detriment to the customer but is also unnecessarily disruptive for the landlord. This can cause difficulties where more than one occupier is provided with service using the network which is subject to the wayleave. We would suggest that a revised code ought to override such provisions and allow the CP to maintain its apparatus for so long as any occupier requires the service. Otherwise the CP can be required to remove its apparatus and then reinstall it having paid for a replacement wayleave in order to serve the new occupier (or more likely leave the equipment in place but make a fresh payment for the “new” wayleave.

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

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

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

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

Consultation Paper, Part 3, paragraph 3.53.

UKCTA believes that there is a definite need for a test which is clear and easily understood. This must balance the interests of the landowner to continued occupation of his land, the operational needs of the CP to deploy network infrastructure as well as the wider public interest in having access to a fit for purpose modern communications network (or networks).

A test similar to the current access principle will be required to balance these competing interests. Just as it is vital that the code be technology neutral in order to provide a degree of future proofing, so it is important that this test is not tied to a definition of what might be deemed as acceptable or fit for purpose at any particular point in time.

It is worth pausing to reflect that it is only six years ago that the maximum speed offered by BT’s IPStream ADSL product ranged from 250 kb/s to 2 Mb/s. Today, a mere six years later,

communities served by the 2006 maximum speed complain that they are poorly served and digitally excluded. Given the pace of change and the insatiable appetite for ever faster speeds, it would be foolish to try to define in any revised code what might be deemed an appropriate level of service when balancing the rights of CPs, landowners and customers.

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.
UKCTA has no views on this issue

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.
UKCTA has no views on this issue

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.
UKCTA has no views on this issue

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.
UKCTA has no views on this issue

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.
Given the increasing importance of wireless technologies, and the overarching need for the code to be technology neutral, it would be sensible to extend the existing rights to include the clearing of vegetation more generally. Although we have no direct experience of this, given that much equipment is placed underground, it might be sensible to consider extending this to include the cutting back of roots where these are causing interference.

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.
Network enhancements are carried out for the benefit of end users so when landowners seek to impose restrictions on the ability of CPs to upgrade infrastructure, it is end users who ultimately suffer. We believe that there should be no restrictions on the ability to upgrade so long as this work does not harm the interests of the landowner or cause them any disruption, or insofar as this cannot be avoid, so long as the landowner receives fair compensation for any such disruption etc

10.16 We ask consultees:

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

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

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

Consultation Paper, Part 3, paragraph 3.83.

The Government's long established policy is to encourage and facilitate sharing of infrastructure. There are sound environmental reasons for so doing and when network lies beneath the streets there can be traffic management benefits for so doing. There are obligations in relation to sharing in planning legislation for example and most recently in an effort to provide greater choice in the fibre broadband market, Ofcom has obliged BT to provide other CPs with access to its ducts and poles so that they might install their own fibre.

Set against this public policy objective, the reality is that private landowners seek as a matter of course to restrict the ability of CPs to share infrastructure. This is understandable from their perspective since enabling sharing removes potential additional revenue for the landowner should any additional CPs wish to deploy infrastructure on their land.

[redacted]

[redacted]

There can also be implications where linear obstacles are concerned. There may be limited crossing points for canals, rivers, railways, bridges, and even motorways. It would seem sensible, where a CP has spare capacity in an existing duct, to make that available to another CP, yet all too often this is prohibited by the terms agreed with the landowner, leading to the type of ransom situation seen in the Bridgewater Canal case.

Ultimately the absence of a right to share serves to frustrate the Government's public policy objective, hinders the development of competition and can even lead to customers being denied service. We therefore support the proposal that CPs should benefit from a general right to share apparatus. We also believe that there should be no automatic right to additional payments, particularly where the sharing results in no additional disruption or disturbance to the landowner.

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.

UKCTA supports any provisions that provide for the delivery of services to tenanted premises in a timely manner under reasonable terms to all parties.

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.

The industry has seen a great deal of consolidation in recent years with many formerly high profile names now being subsumed under one larger corporate entity. Yet it is often extremely complex, expensive and time consuming to sort out the consents which these CPs previously enjoyed. Prohibitions on assignation of rights are common place and this presents a real barrier to the integration of companies on acquisition.

We believe there is therefore great merit in allowing Code Operators to benefit from a general right to assign as outlined by the Commission. However there should be no entitlement to further payment to the landowner, assignation of a right is not detrimental to the landowner so we can see no basis on which additional payments might be justified.

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 refer to our answers to 10.4, 10.7 and 10.17 above.

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.

UKCTA has no views on this 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.
UKCTA has no views on this issue

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.
UKCTA has no views on this issue

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.
UKCTA members have not had a great deal of experience of having had to use the Code to enforce their rights once they have installed their apparatus – though perhaps this is because the Code is not the most straightforward piece of legislation. We would welcome any measures to provide a more speedy and workable system than that which currently exists. We do not believe however that there is any need to use the criminal courts in this regard.

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.
UKCTA is not aware if this being an issue in practice.

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 with what is proposed i.e. the retention of the current provisions under paragraph 9 . We would add that in addition to the Code there is already a great deal of regulation of works which UKCTA members carry out in the street, with legislation in the New Roads and Street Works Act 1991, the Traffic Management Act 2004 and the Transport (Scotland) Act 2005 as well as numerous codes of practice and regulations made under these statutes. Care should be taken in drafting any revised Code not to add to the level of regulation which currently exists.

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.
A number of UKCTA member companies have experience of dealing with the regimes for tidal waters and other Crown land. This is not a theoretical issue. As an island group the UK relies for connectivity on undersea cables. It is essential for all providers of fixed Electronic Communications Services to cross the Crown's subsea land in order to connect internationally. Given that the Crown has a monopoly on such land, CPs have in the past had to agree to terms to which they would not otherwise have agreed. UKCTA believes that in terms of EU law, the granting of 'special and exclusive' landowner privileges to any particular landowner (regardless of whether the right is inherited or the privilege is created by Statute) must be objectively justified. We have argued for a number of years that we can see no such justification.

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.

As may be seen from our answer to 10.26 above, we believe that such special regimes cannot be justified and indeed UKCTA believe they may be contrary to EU law. Elsewhere in our response we have suggested that landowners may seek to exploit their bargaining power when circumstances mean that a CP requires access to their land. The existence of special regimes for tidal waters and lands simply gives legal backing to a situation which allows CPs to be held to ransom. The continued existence of these regimes seems to UKCTA to be incompatible with the Government's policy objectives in relation to ensuring that the UK has the best broadband provision in Europe.

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.

As set out in our answer to 10.26 above, UKCTA believes the granting of 'special and exclusive' landowner privileges has to be objectively justified. But we can see no such justification.

Any hindrance put in the way of companies seeking to deploy network will inevitably result in a restraint of trade which raises issues in respect of both GATTS and the EU principle of the single market. It is also arguable that it is in practice nigh on impossible to avoid Duchy land when building an international (or mainland-to-island or island-to-island) route.
In this case, save perhaps for a very small number of exceptions where national security (or similar) is concerned, we can see no justification for continuing to permit a particular private landowner to retain the right to prevent reasonable rights of way.

Furthermore, the Crown should be required to charge fees that are consistent with the proportionality principle in accordance with Art 13 of the Authorisation Directive http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0020:EN:HTML

In relation to linear obstacles, as the Bridgewater Canal case highlighted, the existence of linear obstacles and the special Code provisions relating thereto can lead to highly contentious disputes between landowners and CPs. In the Bridgewater case this dispute not only led to significant additional costs for the CP concerned but also substantially delayed the deployment of a government funded electronic communications network and the provision of services to the end

users. In other words the effect of the statutory code was in direct conflict with another area of public policy, namely the deployment of the network.

Nor was Bridgewater an isolated case, we are aware of other issues in relation to [redacted] dating back over the last twenty years. The issues are numerous, but essentially they originate from the unique position enjoyed by the landowner which was exploited to the full, with the result of extremely onerous terms being imposed on various CPs as a condition of granting rights in relation to that land. These conditions have the effect of substantially fettering the CPs' ability to deal with their network and have also resulted in significant annual payments bearing no relation to the value of the land and/or rights granted. Such costs are ultimately borne by end users in the shape of higher charges for the services provided over the CP networks.

Leaving aside the financial elements of this special regime, it is our view that whatever the reasons, if any, for the Code containing special provisions for linear obstacles when originally drafted, they are now very much superseded by the need to balance the interests of all parties in the light of the present commercial and technological environment, which is very different to that which existed nearly 30 years ago.

We therefore believe the acquisition of rights by CPs in, under, or over linear obstacles should proceed under the "general regime" applicable to other land, provided that that regime is amended so that the operator can achieve fair terms at a fair consideration without undue delay. In particular we believe that the regime should permit the sharing of new or even existing duct assets with other CPs (again this is consistent with public policy direction set both by Ofcom and by central Government).

In view of the above, questions (3) to (5) are not relevant.

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.

UKCTA agrees that this is a sensible precaution which ought to be included in any revised Code.

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.	
UKCTA also agrees 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	
UKCTA would refer to our answers at 10.26 to 10.28 above. We would not support the continuation of the existing special regimes referred to in those previous answers since these represent a restraint on trade and are, in our view, incompatible with EU law. We do believe the linear obstacle regime should be expanded to include waterways all linear obstacles which have the potential to lead to a ransom situation developing (e.g. rivers, private roads, major motorways, bridges which are not owned by a railway or waterway)	

ALTERATIONS AND SECURITY

10.32 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk. Do consultees agree? Consultation Paper, Part 5, paragraph 5.11.	
We agree that a procedure is required in respect of situations where a landowner requires apparatus to be relocated in order to carry out the redevelopment of the landowner's property. However, any such procedure must balance the interests of CPs with those of landowners and ensure that the CP's relocation costs are met. The current provision in paragraph 20 requires that alterations must be necessary in order to avoid spurious or vexatious requests to move apparatus. It is important that this safeguard is retained in order to protect the interests not only of CPs but the customers who rely to an ever increasing extent on the services provided by CPs.	

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.
UKCTA has no views on this issue

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 with the proposal that it should not be possible to contract out of paragraph 20. In the experience of UKCTA members, many landowners seek to insist on agreeing terms which dis-apply the rights under paragraph 20 and which give them the right to require the alteration of apparatus during the term of an agreement. More often than not this is coupled with a requirement that the CP meet the entire cost of such relocation. Although these are very unwelcome provisions and involve CPs accepting a degree of risk and uncertainty, they are often accepted in order to secure the rights required in order to serve a customer. When the equipment involved is used to provide what might be termed backbone network (ie not a customer connection), the risk is far greater since relocation can often be more difficult and might put at risk service to a great many customers. In practice where the parties can reach agreement on relocation of apparatus then they do so. But allowing parties to contract out of paragraph 20 would simply allow landowners to insist on relocation without the need for negotiation.

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.
UKCTA has no views on this issue

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

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.47.

We agree that the revised code should restrict the rights of landowners to remove apparatus installed by CPs.

The UK's reliance on electronic communications networks has grown enormously since the Code was drafted. It is now more important than ever that the security of networks be protected. The importance of this can be seen in other public policy developments such as the statutory requirement for Ofcom to assess and report on the resilience of UK networks. It would seem odd indeed were the Code to go against this policy direction by threatening the security of tenure of CPs.

We believe that the Code ought to ensure that networks are adequately protected in circumstances where development is proposed or removal is sought for other reasons. Given the public and national economic benefits of such networks, the operational needs of the CP should continue to have precedence, with landowners being compensated for any losses suffered as a result.

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.

UKCTA has no views on this issue

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.

UKCTA disagrees with this proposal.

We believe it is important that the onus to take action ought to remain with the party seeking removal. We believe that a reversal of the current position would simply lead to an increased level of litigation much of which would be required merely too safeguard the CP's network during negotiation of a revised agreement with the landowner. This would result in increased costs, costs which would inevitably be passed on to consumers..

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 refer to our answer to 10.36

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.
UKCTA strongly believes that it should not be possible to contract out of the paragraph 21 procedure for removal of apparatus as the likelihood is that landowners would require contracting out to be done as a matter of course.

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.
UKCTA has no views on this issue

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.

UKCTA would like to correct the statement in the consultation that no concerns have been raised with regard to the issue of consideration. UKCTA has expressed concern for some time now that the word "consideration" when used in addition to "compensation" has given rise to an expectation among some landowners that there is an entitlement to an additional element of financial reward. This we believe has led to much of the tension between Communications Providers (CPs) and landowners which can arise when negotiating terms for the installation and keeping of apparatus on land. We do not dispute the right of landowners to be compensated but we believe that the use of this single word, "consideration", has been unhelpful.

UKCTA also questions why the electronic communications Industry is treated completely differently from all other vital utilities. We consider that electronic communications apparatus in terms of its importance to the UK economy justifies it being treated in the same way as networks used to supply gas, water and electricity?

The electronic communications sector is becoming increasingly important to the UK. In 2011 DCMS described it as playing "a pivotal role in the UK economy". In 2011 telecoms operator revenues were worth £39.7 billion to the UK economy (http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/UK_0.pdf) Given the extent to which modern life is reliant on electronic communications it is arguable that the industry provides the arteries of both commerce and government, underpinning the economic wellbeing of the nation. The current consultation does not address this fundamental difference in approach yet UKCTA believes that this vital issue has to be considered.

Within the terms of the current consultation however we do believe that the Commission's proposal for a single entitlement has merit and may go some way to remove the problems created by the use of "consideration". The fundamental principle underpinning the Code must be that a landowner should be entitled to compensation for losses which arise from the burden placed on the land as a result of the partial acquisition by a CP in accordance with the principles under the Compulsory Purchase Act 1965.

The arrangements under the compulsory purchase legislation seem to us to be a sensible start point when attempting to calculate a fair level of compensation - though we do accept that a move to pure compulsory purchase principles is unlikely and that some modified form of these rules is likely to be implemented for the purposes of the electronic communications industry.

In the event that the Commission does not wish to consider combining the current twin elements of the value of any award (i.e. compensation and consideration) then the calculation of value of compensation should not include the value of the land taken, otherwise CPs would be paying for the value of the land taken under both the compensation and consideration elements of one of the heads of claim.

If the Commission is minded to continue with both compensation and consideration then claims for compensation ought to include severance, injurious affection and disturbance whereas the value of the land taken would form part of the "consideration" element.

As will be clear from the foregoing, UKCTA agrees with the proposal to have a single entitlement rather than the complicated provisions in the current version of the Code. We maintain that it would be sensible to simplify this further by removing reference to consideration and providing one entitlement to compensation, which would include an element for the value of land taken.

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.

UKCTA has not been able to find any members with experience of this in practice and we struggle to see how such compensation might be calculated given that the situation envisaged would almost inevitably be hypothetical at the time of the rights being granted. The proper time to consider this type of compensation would be at the time when a third party (ie not originally bound by the rights) seeks removal of apparatus and that removal is refused by a CP.

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 refer to our answer to 10.42 above. We believe that the use of the word "consideration" has caused and continues to cause needless difficulties when agreeing the levels of payment to be made to landowners. Rightly or wrongly a perception has developed that in relation to electronic communications apparatus, landowners can expect payment of an additional element over and above compensation for the value of the land taken. As highlighted above in our answer to 10.42, there should be no question of a CP being required to make double payment for the value of the land taken. The proposals from the Commission do not address this risk. Our concern would be that unless this issue is dealt with there remains a risk that the compensation element will require a CP to pay for the value of the land to the owner, and consideration will require a separate payment in respect of the value of the land to the CP purchasing it. It is this latter element which we believe has led to the most difficulty in agreeing values with landowners.

We agree with the Commission's conclusion that a clear and simple basis for calculating payments is essential. Subject to our comments above about the continued use of the word "consideration" we believe that the Commissions' proposals to base the value of rights on their market value excluding the value of the "actual scheme" is a sensible approach, concentrating as it does on a fair value for the land but excluding and added value particular to the purposes for which a CP might be seeking the rights. The practical difficulty which will arise however is the lack of freely available information on comparable transactions due to the approach taken to such matters by the electronic communications industry in the wake of the 2002-2006 OFT investigation against the UKCPC. The uncertainty caused by that investigation has created an environment where CPs no longer share the sort of market information which might be available in any normal property market.

The current consultation may represent an opportunity to improve transparency and normalise the operation of the market by providing a valuation framework setting out valuation principles or methodologies. Without such reform however, the approach proposed by the Commission would not operate as envisaged due to the complete lack of transparency in the current market.

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.

We disagree with the proposal since it would remove the protection against CPs being held to ransom which was only recently clarified at the conclusion of the Bridgewater Canal[1] case

The land involved in such cases is very different in nature from that to which the General Regime applies. Such land has typically originally been acquired by means of compulsory purchase for the purpose of running the railway, canal or tramway. There is no justification for the statutory undertaker being entitled to the same financial award provisions which are applied to private landowners under the General Regime.

This was clearly established in the Bridgewater Canal case where it was held that

"*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…*"

The regime for linear obstacles is quite different from the general regime in that it is designed to provide for network crossings, ie the crossing by one network of another at the shortest point possible. This is confined to crossings which are necessary and unavoidable. The circumstances are quite different from those under which the general regime applies and we believe it is important that the current distinction in terms of the financial award to the different types of landowner is maintained.

[1] [2010] EWCA Civ 1348.

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.
UKCTA has no views on this issue

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.
UKCTA agrees with the Commission's provisional conclusion. Experience demonstrates that the normal courts (County in England and Sheriff in Scotland) are not the place to resolve disputes which arise under the Code. In the experience of UKCTA members, the issues in such cases tend to centre on questions of payment ie valuation issues. This requires specialist knowledge which Is simply not available in the normal courts. We therefore support the proposal that disputes should be heard by the Lands Tribunal (in Scotland) and the Upper Tribunal (Lands Chamber) in England and Wales as these have the appropriate specialist knowledge and are already well established in relation to other property related 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.

See above in response to question 10.48

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 UKCTA supports the provisional proposal. We believe that much of the tension which often arises in attempting to agree valuations with landowners stems from the power which is placed in the hands of landowners when a CP is under pressure to deploy new network or upgrade customer service by enhancing existing network. This proposal would go a long way to removing the relative imbalance in bargaining power and would therefore most likely help reduce the number of disputes arising.

In the absence of this measure, landowners will quite naturally seek to maximise their own return in financial terms since they know that in many cases CPs are under time pressure to complete their work for the provision of services. However there would be obvious difficulties if a CP was granted access and then the parties failed to agree terms. Therefore we would suggest that the proposal must also be accompanied by a clearly established and fair methodology which can be used to determine the fair value to be paid to the landowner. There must also be a process whereby disputes over that value can be resolved quickly and efficiently. Rather than have this right invoked automatically in all cases it might be better to allow the parties to attempt to reach terms in the normal manner but with a right for the CP to invoke a granting of code rights in advance of reaching agreement on the value to be paid to the landowner. This would allow for the landowner to ask for onerous terms that could still result in a ransom situation.

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.
UKCTA has nothing further to add beyond our answers given 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
UKCTA has no views on this issue

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.
UKCTA has no views on this issue

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.

UKCTA members believe that whereas the rules and requirements around notices which CPs have to provide are clear and work well, those relating to notices by landowners do require some attention.

Under the current code there are no clear and unambiguous rules which apply to landowners' notices. As a result, CPs often receive communications from landowners which may or may not qualify as notices under the code. This is highly unsatisfactory. In the absence of certainty, CPs have no option but to err on the side of caution and as a result many communications are doubtless wrongly classified as notices.

So for example, any letter or email which mentions removal of apparatus is likely to be regarded as a formal notice. As such it will normally be met with a formal counter-notice by the CP. If the landowner did not intend to serve a formal notice then the CP's action might appear aggressive and confrontational leading to a deterioration in relations between the parties at a time when they need to be communicating effectively with one another. This action can inadvertently be construed as an act of aggression on the part of the Operator, which is not a productive.

Since the code was originally drafted, email has become a much more mainstream method of communicating. So any revised Code ought to deal expressly with the issue of whether service of notice by email is acceptable. We have no particular views on whether or not email should be used, so long as the form of notice is clear and can be identified as such.

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

Consultation Paper, Part 7, paragraph 7.53.

No, See above at 10.54

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, See above at 10.54

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.
UKCTA thinks there is definitely scope for development of a set of industry standard terms, however the reality is that professional advisers on both sides will always be inclined to seek to use their own preferred terms. Indeed some bodies such as the NFU and CLA already have an agreed form of agreement which their members can use with BT, together with tariffs which they "recommend" should be used when negotiating with CPs. For example the NFU information is at http://www.nfuonline.com/Telecommunications-Business-Guide/. The Country Landowners' Association web site appears to publish similar pricing recommendations information but this is not made publicly available. In addition, the infinite variety in sites and types of land over which rights will be sought does limit the extent to which a standardised set of terms can be imposed on the parties. UKCTA and its member companies would be willing to assist any initiative designed to standardise terms and conditions. To have any chance of succeeding. Any such initiative would have to be facilitated at an industry level since there is such a wide variety of different conditions in place. It would not be acceptable for instance for different terms to be offered to say larger, more powerful CPs (whether these were more or even less favourable terms). Consistency and transparency is key to the success of any such initiative.

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.
UKCTA has no views on this issue

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.
UKCTA has no views on this issue

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.
UKCTA (and indeed predecessor organisations) have consistently argued against this particular measure. We welcome the Commission's decision to investigate the matter. We believe that it is time to bring the Funds For Liabilities concept to a close. It is costly, time-consuming and brings no tangible benefit to anyone other than the insurance companies and banks who sell the policies and instruments used by CPs to comply with the requirement. To our knowledge they have never been called upon even at the height of network roll-outs in the late 1980s and early 1990's. At that time local authorities were justified in raising concerns about network builders running out of cash and leaving open trenches in swathes of our road system. Following the Duopoly Review in 1991, there was a period of considerable and sustained investment so the risk prevailed. However, at that time, it was the duty of the Director General (ie Oftel) to trigger the requirement. They never saw any need to do so. Even at the peak of network deployment and digging up of the UK's roads they saw no reason to bring the FFL regime into force. In 2003, due to lobbying by the local authorities, the Government was persuaded that rather than leave the matter to the discretion of the industry regulator (ie the expert), that they ought to make it a compulsory requirement. In practice, following the demise of Atlantic Telecom, which was the largest business failure we can think of, all fixed assets were redeployed (by BT). Since then the requirement to have in place an instrument capable of meeting the requirements of the scheme has been a burden which has been costly and difficult to administer. There is no

demonstrable mischief which the scheme seeks to address.

It seems to UKCTA that the risk is more perceived than real and the need for security is not justified in light of the weight of the burden of providing it. The only beneficiaries are the banks and insurance companies who provide the instruments. The costs of compliance are passed on to UK consumers. The Government has made much of its desire to abolish needless regulation or red tape. UKCTA would submit that the Funds for Liabilities regime ought to be high up any list of regulations to be abolished.

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 refer to our answer at 10.60 above.

LAW COMMISSION CONSULTATION

ELECTRONIC COMMUNICATIONS CODE REVIEW

RESPONSE BY THE CENTRAL ASSOCIATION OF AGRICULTURAL VALUERS

PART 1

OVERVIEW AND GENERAL SUBMISSION

October 2012

This paper introduces the CAAV's response to the Law Commission Consultation of June 2012 on the Code, outlining its understanding of the issues and key points. It is accompanied by two other papers:

- a response to the specific questions in the Consultation paper
- a response on the assessment of payments to be made in respect of Code rights.

The three papers are to be read as one combined submission.

With our practical interest in achieving a Code that can work well on the ground, the CAAV is very happy to explain, clarify or explore all points and any subsequent proposals with the Law Commission as it prepares its recommendations.

1. **Introduction**
2. **The Need for Review**
3. **The Background to the Code**
4. **There is Not a New World**
5. **The Fundamental Principle of Agreement**
6. **Do We Need a Code?**
7. **What Should a Code Do?**
8. **Interaction with EU Law**
9. **The Specific Operator**
10. **Interaction with the Law on Fixtures**
11. **The Role of Ofcom – Regulator and Issuer of Licences**
12. **Definitions**

1. Introduction

1.1 The Central Association of Agricultural Valuers (CAAV) represents, briefs and qualifies some 2,500 professionals who advise and act on the very varied matters affecting rural and agricultural businesses and property throughout Great Britain. Instructed by a wide range of clients, including farmers, landowners, lenders, public authorities, conservation bodies, utility providers, government agencies and others, this work requires an understanding of practical issues.

1.2 Many of our members advise owners of land used to support communications infrastructure and some specialise in this sector. A smaller number act for the operators of communications networks. Both parties in *Geo Networks v Bridgewater* were represented by CAAV members and the arbitrator in that case was also a member of the CAAV.

1.3 The CAAV does not exist to lobby on behalf of any particular interest but rather, knowing its members will be called on to act or advise both Government and private interests under developing policies, aims to ensure that they are designed in as practical a way as possible, taking account of circumstances.

1.4 The CAAV has taken an active interest in the operation of the Electronic Communications Code in response to issues found by members and their clients with:

- first, the wider development of fibre optic networks including those reliant on existing utility infrastructure
- second, agreements for telecommunications masts as operators have sought to reduce numbers and rents, share or transfer facilities or oppose other development.

The need for members to have comprehensive briefing on the topic led the CAAV to publish its text, *Telecommunications Masts*, in 2010, reviewing the commercial and technological development of the sector, the Code, its interaction with tenancy law and many other practical concerns. With the way the heavily amended Code had developed, it appeared that there was no readily available consolidated version and so one was prepared and included in the text.

2. The Need for Review

2.1 We welcome the Law Commission's review of the Electronic Communications Code. From our efforts in trying to make practical sense of its provisions, we understand the frustrations of the Judge in *Bridgewater*:

> "The Code is not one of Parliament's better drafting efforts. In my view it must rank as one of the least coherent and thought-through pieces of legislation on the statute book. Even its name is open to doubt. Although section 106 of the Communications Act 2003 says the Code set out in Schedule 2 to the Telecommunications Act 1984 is referred to as "the electronic communications code" in "this Chapter", the amendment made by the 2003 Act did not include changing the title to Schedule 2 … "

and again:

> "It must be apparent that, in my view, the Code is extremely difficult to understand; and the overall scheme of the Code is difficult to fit into a coherent framework."

2.2 From our work on the Code, this appears to be the result of two particular factors:

- first, since its origins in the legislation for the developing telegraph network in the first half of the nineteenth century, it has developed as a 'patchwork quilt'. Each change has been a response to new practical questions and concerns over network infrastructure and its interaction with private rights, especially as the technologies developed and changed, most obviously with the development of telephones from the late nineteenth century, and then wireless broadcasting in the twentieth century with more recent developments of mobile telephony and electronic communication. While each set of changes or special regime is assumed to have made sense in its own right, their accumulation has resulted in a complex piece of statute law which is difficult to understand and apply.
- second, in developing as a self-contained regime, the Code's drafting does not appear to have taken practical account of the law governing the rights and interests in land that are inevitably created by the agreements for infrastructure that are then governed by the Code. The agreements may, according to their circumstances, most often be wayleaves (as for many cables) or leases (as for masts) but others may be licences or easements/servitudes. The greatest difficulties have arisen in the interaction between the Code and the Landlord and Tenant Acts governing business tenancies in England

and Wales, so adding substantially to the confusion of the legislation. This is more generally compounded by the law on fixtures.

The result is that much of the Code is clumsy and while it has offered a framework that has been successful in seeing rights and apparatus established it has been less competent in handling the continuing relationships between operators and owners.

2.3 The position is compounded by the widespread ignorance of Code with the result that its significance is not perceived by many of those affected by it. They therefore do not appreciate the impact it has on arrangements that they regard as simply commercial agreements. This will have diminished recently as the force of Code powers has been more often used. While this will be true of many owners it is also evident that some acting for operators, whether in the field or over legal rights, may not be fully seized of the regime. One consequence has been that the full potential of the current Review has not been widely understood and this may affect responses to it.

2.4 More recent confusion, including some analysis seen in the process of this review, has arisen from trying to force this entirely distinct regime to fit into the main framework for compulsory purchase. As we demonstrate, it is both a practical and an historical mis-interpretation to regard the Code as a species of compulsory purchase and working on that basis leads to mis-understanding a successful, large and complex market with risks that accompany that.

2.5 The fundamental, complex and wide-ranging nature of this review has been challenging, probably for all those engaged in it. It requires fresh analysis of much that has perhaps been taken for granted or not covered and responding to challenges expressed in new ways. The CAAV has sought to rise to this challenge and work from first principles of land law and commercial practice to urge the best framework for the future development of this important sector while building on what has worked and not doing violence to the enormous number of existing agreements. We have done what we can with the resources to hand in the time allowed. What this has shown is the importance, scale and inter-relationships of the issues involved. There will doubtless be areas where, within the time available, we have only been able to take thinking to a certain point at which we have offered our argument and current conclusions but can see that further, perhaps more focused, discussion would take matters further. Accordingly, we would be very happy to review further any matters of interest to the Law Commission where this may be of assistance or to explain, clarify or comment further on points we have raised.

3. The Background to the Code

3.1 The provisions of the Code were not the chaotic invention of the Parliamentary draftsman in the Telecommunications Act 1984 but represent the current and consolidated form following a review in 1982, the results of which became the 1984 Code, since amended in 2003 and otherwise.

3.2 The 1984 Code replaced a long series of some dozen Telegraph Acts and consolidations in the 1890s and 1930s. In doing this, the Government's Consultation Paper made it clear that:

> "The Government's general instinct is to re-enact the provisions of the existing Telegraph Acts in the form of a modern Telecommunications Code making only the minimum of changes where this is necessary to eliminate obscurities or reflect modern developments".

Thus, in commenting on the Code today we can draw on the long experience of the application of the provisions as they have applied to successive waves of technological revolution in communications since at least the mid-nineteenth century. Those provisions themselves had predecessors.

3.3 That paper expressly carried forward the historic approach to private land:

> "The general principle in the existing legislation [for private land and buildings] is that telecommunications undertakings can only place plant with consent. The Government wishes to follow the general approach of the existing Acts but proposes many detailed modifications."

That basic and longstanding principle (noted in the paper as running back to the Telegraph Act 1863 but with an earlier history) is, as will seen throughout our response, of fundamental importance to understanding the Code. It is also the reason why the Code cannot be seen as a species of the main regime of compulsory purchase and should not be brought into line with it just because it may appear to some to be a simple analogy in understanding what can be a difficult area.

3.4 In case it is objected that this is based on a history that is too old to be of value and relevance, it is of the same generation as the main regime for compulsory purchase (consolidated in the 1845 legislation, then brought forward in 1919 and since) from which it has over that time been kept distinct. Both originated in periods of great development and technological change, but the regime for communications has retained the principle of agreement as its basis throughout.

4. There is Not a New World

4.1 While review and reform of the Code is entirely desirable, this process has to recognise that it is working with an existing, large, complex and diverse world in which some 50,000 masts and hundreds of thousands of agreements for cable exist. In substance, the United Kingdom's entire apparatus for telephony, broadcasting, communications networks, cables and mobile communications has been installed using rights under agreements made under the framework of the Code. The outcome of this review should not do violence to this existing world.

4.2 Revision of the Code should not disrupt that existing universe of agreements which have been achieved consensually and commercially with remarkably little litigation over the life of these provisions, let alone since 1984. When preparing the CAAV's publication, *Telecommunications Masts*, in 2010 we could only identify six reported court cases – three concerning value between the parties, two on rating and one on planning (the only one that concerned masts). Even a few more cases would leave that in stark contrast to the voluminous case law on compulsory purchase, never minding the much larger number of formal Compulsory Purchase Orders and equivalent formal actions under that law.

5. The Fundamental Principle of Agreement

5.1 Despite all of this, analysis of the evolution over the last two centuries of statutory provisions, from the Admiralty Signal Stations Act 1815 through the various Telegraph Acts to the Telecommunications Act 1984 and the Communications Act 2003, for communications services to be established over ordinary private land shows that the heart of the main regime is the simple principle of it being done by agreement. That is fundamental to understanding how it works and what is needed to make it work.

5.2 That principle means that it is not useful to try to understand the Code as a species of the main compulsory purchase regime. With all the difficulties that analysis of the Code has posed, it is easy to see why many have reached for that simple analogy and then sought to build on it. However, it is very different in its origins and its approach. As importantly, it is an approach that has seen the practical and commercial delivery of successive waves of major communications revolutions across private land with remarkably little litigation and dispute – by contrast to compulsory purchase. There are successful lessons to be learnt and carried forward just as there are procedural problems to resolve.

5.3 Indeed for all but the specialists, almost no one in the countryside (and quite probably elsewhere) was aware of the Code until perhaps only three years ago as operators, having rolled out their networks, sought to cut their costs or, as agreements expired, relied on Code rights to remain on what had been taken to be conventional business tenancies.

5.4 Now set out by paragraphs 2 and 5 of the Code, the grant of necessary rights and interests is to be by agreement. Where an agreement cannot be reached, there are provisions for one to be imposed by the courts but on the terms that might be reasonably expected to be in such an agreement. That approach underpinned the development of telephony over a century ago and, perhaps more importantly for contemporary purposes, has been the way that the development of the networks of communications masts has evolved over the last three decades, in practice as well as in law.

5.5 Without that basic approach, these developments would have been much more contested and confrontational – perhaps especially with the concerns that were recurrent about public safety. It should be said that the great majority of the 50,000 masts and the hundreds of thousands of miles of cable in the United Kingdom have been established by agreement without recourse to legal procedures.

5.6 The strength of this understanding that all rests on the principle of agreement is that it recognises that the landowner is not simply a passive person but an economic actor in his own right, just as much as a Code operator. He is not holding land just to be prey for others but to use for his own objectives, purposes and profit. The granting of Code rights involves an intrusion on the use of that resource, re-directing the allocation of resources.

5.7 In operational terms, Paragraph 5 effectively gives Code operators the right to seek a Court order for an agreement where the landowner would not freely give it. That dispensation is to be on terms that seem reasonable to the court. The financial provisions of paragraph 7 look at what would be "fair and reasonable if the agreement had been given willingly" and 5(7) applies the order with same effect as an agreement and making it capable of variation and release by agreement. The court's implicit task is to impose what might reasonably be expected to be the agreement between willing parties.

5.8 In determining whether to dispense with the requirement for an agreement, the court is to judge the extent of the prejudice to the owner relative to the public benefit having:

> "…regard to all the circumstances and to the principle that no person should unreasonably be denied access to an electronic communications network".

5.9 One of the most important features of this is the distinction between the public's reasonable need for access to a network providing electronic communications services, not to any specific operator's network.

5.10 As a consequence of this approach, other economic relationships, including values and investments, are created by or in response to it and now depend on it. This basic principle of agreement (or the simulacrum of an agreement) is very different from the approach taken by compulsory purchase despite the apparently simple analogies that can be drawn.

5.11 However, a recurrent theme in our analysis and this response is that while the Code (often in the further background) has provided a very successful framework for installing apparatus and establishing networks, it has, at least in recent years, been less successful as a framework for the continuing relationships thereafter between operator and landowner. This may be found in the practical experience of issues under an agreement such as review of consideration, the renewal of an agreement and the discussion of alteration, removal, assignment and site sharing. A revised Code should be able to build on the wisdom of the principle of agreement to remedy the present Code's deficiencies in handling continuing relationships between operator and landowner.

6. Do We Need a Code?

6.1 While some will argue that commercial businesses should be free to agree whatever terms they can between themselves, we believe that a Code is of greater benefit to all interested parties in setting a framework for their respective rights and responsibilities and how disputes over them may be determined, so that projects deemed reasonably necessary in the public interest can be carried forward while treating the interests of those affected fairly.

6.2 Operators need some assurance that they will be able to provide a network without risk of being held to ransom and landowners need to know that they are not being exploited (the more so with the growing concentration of market power with major operators – see 7.5.1 below) and that those who may ultimately be able to take an interest in their land or impose a right of access to their land have only limited and specified rights to do so, for which those affected will receive reasonable payment and practical terms.

6.3 An effective mechanism is needed to resolve disputes under the Code.

6.4 It is also material that, by contrast to the simple nature of most compulsory purchase as a one-off event, the rights regarding apparatus on land governed by the Code generally create long-run relationships between operators and landowners, contractually so whether they amount to tenancies or licences (including wayleaves) and physically so for easements. A fair balance is an essential pre-condition for that to be satisfactory and this becomes an obligation on the Code if it is felt right that such rights should, if necessary, be imposed by using Code powers on owners.

6.5 In these tasks the Code is holding the ring between the public, operators and owners. It is judged that a Code is needed to give the powers to ensure that the public can have necessary communications services. That requires imposing on landowners and the use of their land. Operators are both the means to deliver the public benefit and also interested in their own right as shareholder owned, profit making, private sector companies that are not subject to the same level of business regulation as the main utilities. The task for a new Code is to find the balance between these that will work best for the future, learning from the past and working with what we now have.

6.6 In doing this, the Code is essentially concerned about function rather than how it meshes with the wider legislative and practical world. Thus, it creates rights but the agreements for those rights may manifest themselves in forms that necessarily take effect variously as leases, easements/servitudes, wayleaves and licences, some of which may need to be made as deeds.

6.7 Within this framework, perhaps the largest question not directly posed in the Consultation Paper concerns the renewal of agreements. It is necessarily commented on in a number of places especially since the problems over this become intimately connected with the procedures for the removal of apparatus.

6.8 There are implications of the statutory regime. It needs to identify which agreements are covered by the Code; that might either be done by a notice or, preferably, on the face of the agreement itself so there is one document. Logically, those that are not so identified are outside it but may still offer perfectly viable means for supporting communications services.

6.9 It is also recognised that, as much under the Code has been agreed between parties without recourse to Code powers, parties may also follow approaches not laid down by the Code.

6.10 Any Code then needs to be durable which, especially with rapidly developing technology, points to drafting being general rather than specific, concerning function and ensuring effective procedures rather becoming mired in issues where the balance of judgment may change or new points emerge.

7. What Should a Code Do?

We hope that a revised Code will include the following elements:

7.1 Balance the Public's Interest in Access to Electronic Communications Services with the Interest of Members of the Public in their Properties

7.1.1 The Telegraph Acts, the Telecommunications Code and now the Electronic Communications Code have provided a regime to enable the public to have access to and benefit from a communications network (commercially provided by a variety of private operators), while recognising that this will often require the taking of rights over or interests in private land, usually already in use for other purposes, often for farming. The public interest is in the overall network and not directly in the specific interests of any specific operator. Setting that framework leads directly to three issues:

- how to judge when it is right for an operator to impose equipment on a private landowner: in what circumstances does the interest of a private landowner legitimately outweigh the public benefit of an operator imposing equipment on specific land?
- the terms on which interests in land or access to it are granted to the private operators
- how disputes over access and terms are to be resolved.

7.1.2 In combination, these lead to real legal difficulties in getting apparatus removed or simply moved (as where a building carrying a mast needs to be replaced or redeveloped).

7.1.3 Again, a mast can have a larger effect than just on its site where its utility depends on a line of sight to another mast or dish. Protecting that line of sight requires a "cigar shaped" cordon in which operators will generally object to any development proposals of which they

are aware. While it can harder for them to be aware of such development in an urban context, it does more effectively sterilise that land in rural areas where development is more easily monitored and is a significant obstacle to diversification, energy schemes and other projects of which most landowners are unaware until the objections are made. If one or more of these masts are on that owner's land, the matter could in theory be addressed by payment, either initially, or where planning permission is refused on this ground, in a manner similar to that provided in many electricity wayleaves. Where the relevant apparatus is not on land owned by the person affected by the cordon, he will have no claim to compensation once the initial Paragraph 17 period has elapsed but he is unlikely to be aware of the issue in that period.

7.2 A Coherent Framework

There should be a common logic to the Code's operation in similar circumstances. As one example of the "special regimes" within the Code alongside its general regime, *Bridgewater* highlighted the distinctive position of certain crossings (called "linear obstacles" in 1984 but really a fossil regime) which are then dealt with in a separate manner from other obstacles and have their own dispute resolution procedure.

7.3 Consistency with Existing Legislation

The operation of the Code must fit well with land law in general and, particularly with business tenancy legislation.

7.4 Founded on the Principle that Rights Over or Interests in Land Governed by the Code are Granted by Agreement and, Where Agreement cannot be Reached What is then Imposed should be on Terms that are Fair and Reasonable for such an Agreement.

This carries forward the basic principle that has given this country the networks that it has on a largely consensual basis and underpins the current structure of values both between the parties and the investment interests that have since developed. Changing it in any way that undermined that structure would have far reaching effects.

7.5 Acknowledgment that There is Frequently a Significant Imbalance of Power between the Parties Involved

7.5.1 The communications sector in Britain is controlled by a small number of very large businesses. By contrast, there are many thousands of land owners with only small numbers of infrastructure sites each on their land – indeed, many of them will have only one mast site or one length of cable. This is currently shown most sharply in the telecommunications masts sector which is a more concentrated sector than the grocery sector and in which it is the (prospective) tenants who drive the process. In terms of the masts market, that concentration is still increasing as not only have T-Mobile and Orange come into one ownership (now EE) but the joint ventures between the major operators mean that this may now be seen as an effective duopoly. As a result and by contrast to much of the property sector, commercial arrangements in the sector are mainly driven by the tenants as large corporations, organised for efficiency which does not often allow them to have meaningful relationships with individual sites. Equally, there will be occasions where a local broadband scheme or a commercial project essential to a private customer may be completely dependent on the co-operation of a landowner.

7.5.2 As remarked above, the commercial and consensual background has generally meant there has been little contention over the grant of rights for communications apparatus. Practical problems under the Code have, in the main, focussed more on relationships thereafter. The picture then perceived by many landowners is one of operators who are

generally so much larger than they are and uninterested in the continuing relationship that is created by the mutual agreement between them. This sense of living with an elephant can arise when reviewing the payment for the agreement, seeking alterations to accommodate other development and, especially, on securing an agreement for renewal. The operator is not only usually a large company with the cumbersome approach that can bring, but has all the inertia of having possession with its apparatus in place and working.

7.6 A Disputes Resolution Mechanism

Justice that is delayed, not reasonably accessible or not competent to the case is justice denied. The Code needs to ensure that disputes can be heard and determined efficiently, appropriately and effectively – such a mechanism will, by its own existence, encourage better behaviour by all.

7.7 A United Kingdom Code

While the remit of the Law Commission only extends to England and Wales, the Code applies throughout the United Kingdom as do the relevant communications networks. With many members working in Scotland and since the Communications Act 2003 is not a devolved matter, we believe it can only be sensible for all parties if there is a common Code throughout the United Kingdom. That means the review should take similar account of the law and issues in Scotland and also Northern Ireland. We understand that the Law Commission is conducting its review in conjunction with the Law Commissions for Scotland and Northern Ireland.

8. Interaction with EU Law

8.1 Electronic Communications

8.1.1 It appears that the Code may to some extent now be overlaid by the consequences of EU Directives (particularly the 2002 Framework Directive 2002/21) on the provision of electronic communications. With the existing problems of the Code, it cannot help to have an additional regime.

8.1.2 Regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations 2011 gives 6 months for the "authority" to determine an application to grant rights to install "facilities" on private property. That appears to overlay the provisions of Paragraph 5, imposing a time limit. The underlying Directive confirms that the applicant should have a right to appeal against that determination. It is important in equity that the affected owner has the same right.

8.1.3 The timeliness implied by this is important not only for applications for new apparatus but also for renewals of agreements.

8.1.4 The Directive's empowerment of member states to impose sharing arrangements on operators is also by implication a potential imposition on owners who may have the additional costs and effort of both the legal and practical consequences of dealing with access to the property by multiple parties.

8.2 Electro-Magnetic Frequencies – The very nature of the current technology for mobile communications makes the Physical Agents (EMF) Directive (2004/40 as amended) a pertinent concern in discussing masts.

8.3 State Aid Rules

Statutory intervention here should not breach the EU's State Aid rules ensuring free competition. While originally applied by the EU to direct industrial subsidies and sales of public property at an undervalue, it is now applied much more widely – as to the design of agri-environment schemes. Its policy rests on market value.

9. The Specific Operator

9.1 Being licensed as Code operator is to be given a statutory privilege with access to Code powers where the tests of the Code apply.

9.2 This is a key anchor for the Code regime as the rights are vested in that operator alone. Throughout the Code, a key concept is that of the Operator's own electronic communications network. For example, a paragraph 2 agreement is required for conferring on an Operator "for the statutory purposes" the right to execute works and to keep electronic communications apparatus installed. The "statutory purposes" are defined as "the purposes of the provision of the operator's network". It is not for the provisions of facilities for third parties, even if those third parties are other Operators.

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

9.4 The protection afforded by the Code is at all points for electronic communications apparatus installed and used for the purposes of the Operator's own network.

9.5 Although the Code refers to "the operator's electronic communications apparatus", it does not seem that it is necessary for the apparatus to be vested in the operator (see para 21(11) of the Code). Ownership or proprietary interest is not crucial. The test is whether the apparatus "is being, is to be or has been used for the purposes of the operator's [network]". This enables an operator to exercise the right to obtain a new agreement even if they do not have a written agreement in place (as might arise where, for example, a fibre optic cable is run between electricity pylons without the landowner's knowledge).

9.6 An operator should not be able to use statutory powers on behalf of or to gain valuable income from a third party.

9.7 The necessity for a clear framework is evident when considering the relationships where there are several Code Operators on a structure such as a mast. In such situations, it is reasonable for the landowner to have ownership of the mast in order to grant Code Operators the rights they require rather than one operator have a controlling interest over competitors with the same statutory rights.

9.8 The provisions of Paragraph 22 as to when an operator can lose Code powers is salient, being dependent on maintaining the function warranting Code powers:

> "where the operator has a right conferred by or in accordance with this code for the statutory purposes to keep electronic communications apparatus installed on, under or over any land, he is not entitled to keep that apparatus so installed if, at a time when

the apparatus is not, or is no longer, used for the purposes of the operator's network, there is no reasonable likelihood that it will be so used."

10. Interaction with the Law on Fixtures

10.1 The Code applies to varying types of apparatus (cables (above and below ground), masts and ancillary equipment). The concrete pads, matting, mast and buildings of a radio mast are sufficiently attached to the land not to be a chattel: they are not perfect in themselves and not capable of removal as a whole while preserving their essential character. They are fixtures, becoming part of the land.

10.2 Ordinarily fixtures, being fixed to the land, would be the landowner's property with the tenant's interest in them (including any disregard of them for rent reviews or compensation on termination of the lease) expiring with the tenancy.

10.3 Again, though, the drafting of the Code has ignored issues of land law and complicates matters. Paragraph 27(4) provides that the ownership of any property is not to be affected by it being installed on or under, or affixed to, any land by any person in exercise of a right in accordance with the Code. There seems to be no decided case on what this means and so on the position of such fixtures as masts in situations where the Code applies.

10.4 In the absence of case law, possible interpretations include:

- that the ownership of the apparatus would pass on the end of a lease to the landlord regardless of any Paragraph 21 notice that has been served. On this interpretation, the mast's status as a fixture has not been affected.
- that the common law position is over-ridden by paragraph 27(4) and the operator retains effective separate ownership of the apparatus. Even on this basis, it may be that an operator relying on a Paragraph 21 notice has no power to grant rights to third parties for airspace on the mast.
- that, if the second option is correct, the landlord may still take to the fixtures in situations where apparatus has been installed but Code powers do not apply, as perhaps where the work was done before the date of any written agreement or before any notice exercising Code powers (as under Paragraphs 5 or 21) which might then only protect the operator for apparatus installed subsequently.

10.5 Where the apparatus can be shown to have passed to the landlord on the termination of a tenancy, the landlord may then, depending on the wording of the lease, be entitled to charge the former tenant for the cost of its removal. If there is a subsequent agreement, it could be part of the landlord's property for valuation purposes. It may be however that if this matter came to Court an operator could obtain relief from the minority decision in *Ponsford v HMS Aerosols Ltd* if the wording of the Code is not to open market value but fair rent. Clarification should be given on this issue.

10.6 The practical logic is that the mast or other equipment should be treated just like any other fixture – there is no warrant for overriding basic common law – that the operator's interest in it be protected while there is an agreement in place. It is then in the operator's interest to secure a new agreement where it wants one on the expiry of an existing one.

11. The Role of Ofcom – Regulator and Issuer of Licences

11.1 In general, where statutory powers are exercisable by private companies, there is oversight by Government, usually now through the regulator of the relevant industry and the framework within which that regulator grants the necessary licences to those companies. Thus, licences are issued to water companies (and indeed to other utilities) giving them access to compulsory acquisition powers. The licences to water companies include provisions as to codes of practice and complaints about alleged poor practice, non-compliance and abuse of powers are monitored by Ofwat.

11.2 An operator has to be licensed by Ofcom as a Code operator for it to have access to the powers and benefits of the Code. Ofcom licenses Code operators and so should have a regulatory interest in their use of Code powers and taking action where operators are acting breach.

11.3 At present, Ofcom is found to deny that it has any responsibility beyond issuing the licences to operators that give them Code rights and so either has no power or does not take up its responsibility to monitor compliance by licence holders with the terms of their licences and apply sanctions for breaches. That is by contrast to other regulators, even Ofwat. With the concentration of the market for mobile communications that is a very serious shortcoming for a regulator and should be remedied as part of the overall review of this sector by government. In the meantime, it is a factor to be borne in mind in shaping the framework that the Code provides for the relationship between the few operators and the many landowners with whom they deal.

12. Definitions

12.1 In reviewing the present Code we have identified a number of issues over the definitions in Paragraph 1 which, while not raised in the Consultation Paper, are raised here to aid clarity of understanding.

12.2 "Agriculture" is defined in the Code by reference to the Highways Act 1980. This would not be an obvious reference to practitioners in the agricultural sector advising rural landowners, who would more usually look to the existing statutory definitions of agriculture in either the agricultural holdings statutes (the Agricultural Holdings Act 1986 and the Agricultural Tenancies Act 1995) or in planning law. It is not understood that there is any substantive difference between the definitions and so it might be easier either to state full intended definitions or to refer to tenancy legislation for ease. The present reference can be seen to imply a distinction or inwardness that may not exist.

12.3 The names and definitions of **"bridleway" and "footpath"** may need review in the light of subsequent legislation.

12.4 A **"structure"** does not include a building in the Code definitions, but "building" is not defined. This could give rise to disputes when considering equipment cabins, for example, and a more detailed definition might be helpful.

12.5 **"Alteration"** – Clear reading of the Code, notably of paragraph 20, is not aided by the definition in Paragraph 1(2) of alteration to include "the moving, removal or replacement of the apparatus". It would be better if these concepts were referred to directly where they are relevant as in Paragraph 20.

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LAW COMMISSION CONSULTATION

ELECTRONIC COMMUNICATIONS CODE REVIEW

RESPONSE BY THE CENTRAL ASSOCIATION OF AGRICULTURAL VALUERS

PART 2 – RESPONSE TO CONSULTATION QUESTIONS

October 2012

Note - The Law Commission's questions and the CAAV's answers are numbered here using the numbering of the Consultation Paper's Section 10 (and cross referring to the paragraph in the main body of the paper). Within each answer, the paragraphs are separately numbered by the number of the question being answered. Thus, the paragraphs in the response to Question 10.3 are numbered 3.x and those to Question 10.4 are numbered 4.x.

Consultation Paper – Part 3
The Rights and Obligations of Code Operators: General

10.3 (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?

3.1 We agree that, in principle, these are the activities that should be potentially subject to the Code so that when the Code is invoked by an operator they become Code rights.

3.2 The only proviso at this point is that Code protection should only be available in respect of apparatus that is the apparatus of the specific Code operator seeking to rely on the rights given by the Code.

3.3 We note two changes of wording from the present text in paragraph 2(1) and in both cases prefer the current wording of the Code. These are:

- (1) refers to "land" and not "that land". Appreciating that this may simply be an issue of the larger drafting within which this might finally be set, it is important to retain the specificity of the definition of Code powers.
- The loss of the text after the first phrase of (3) and so the reference to the apparatus being that which is "kept installed … for the purposes of the operator's network".

3.4 Of necessity, these rights will be implemented by a wide range of types of agreement as necessary for their use. This practical aspect has not been of direct interest to the Code as drafted but is critical to its effective operation. These will variously be:

- leases – as for masts and other permanent apparatus requiring exclusive possession. As an example of the many issues that are raised in the analysis for our response, it

may be that where a cable duct does not have the dominant land that would allow it to be an easement, it is not a wayleave but a subterranean lease.
- easements, servitudes and wayleaves – as for running cables over or under ground in ways that do not require exclusive use of the land by the operator – or perhaps for a microwave link over land
- licences – as to enter briefly onto land to repair a cable or, subject to constraints reviewed later, to enter to cut vegetation and so typically very short term in nature.

An agreement may be for an initial installation or to renew an agreement for existing equipment. Some Code agreements will require the use of more than one of the means according to the different parts of the apparatus.

3.5 Paragraph 2(1) does require that an agreement has to be in writing to be covered by Code but there are many instances where Code operators rely upon the Code while in breach of this. It should be clear from the Code that if an agreement is not in writing or, if in writing but does not declare that the Code applies, then it is not covered by the Code.

3.6 As it becomes important to know if an agreement is covered by Code rights, we suggest that for an agreement to be protected for the purposes of the present paragraph 2(1)(b) of the Code, it should:
- be in writing
- invoke the Code
- provide for its term
- provide for consideration, its payment and review
- include necessary conditions regarding access, maintenance, sub-letting, assignment and sharing use of the apparatus
- provide for disputes to be referred to arbitration.

3.7 It is possible that there is a case for the Code to recognise a lower requirement for a licence for temporary access as opposed to continuing rights.

3.8 The differing types of equipment and needs of operators see a variety of agreements used (including wayleaves, leases and easements/servitudes). Not only is this not taken into account in the drafting of the Code but inappropriate agreements are sometimes used. As an example, many mast agreements are labelled as licences when they must, under the ordinary rules of land law, be leases.

3.9 There are instances in Scotland of Code operators are relying on wayleaves that are not binding on singular successors and so can fall upon the sale of a property.

3.10 It is, of course, the specific Code operator who has the agreement who has the Code rights arising. This does not always seem to be understood in practice by operators and their advisers. one recent example is concerns apparatus in the Code rights are held by one operator on which the notice for removal was served. Yet, the counter-notice was served by another operator within the same consortium which has no Code rights in the mast, suggesting that an urge for commercial convenience has overtaken a proper understanding of legal rights.

10.4 (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?*

4.1 As the proposal above affords protection for the installation, repair, maintenance and inspection of a Code operator's apparatus we do not think there are other powers that need to be brought into the Code and can see that it is practical to retain the powers proposed.

4.2 More generally, it is the consequences under the Code rather than the scope of the rights considered in Question 10.3 that affects landowners' attitudes towards the provision of sites for communications apparatus. That creates a balance to be judged in the design of a revised Code. If the Code had fewer consequences for landowners they would be more accommodating, but one of the points of the Code is to provide certain rights.

10.5 (3.18) *We provisionally propose that code rights should be technology neutral.*

Do consultees agree?

5.1 The question of technological neutrality is harder than it appears.

5.2 In principle and especially in a market that sees such technological development, it is right that the legislation be technology neutral. It should be entirely a matter for the market which technologies are used by whom and where. A distinction developed now could prove problematic in future decades as technology and apparatus change.

5.3 The purpose of the Code is to support the public's access to a communications network weighed against and subject to the interests of those on whom apparatus may be imposed. The Code operator and the specific technology (like the individual Code operators) is merely an intermediary in this of no specific interest in themselves to the Code.

5.4 However, different technologies have different impacts on the ground and their associated arrangements have evolved in the market place in different ways. A mast with its cabin is almost of necessity the subject of a lease – the landowner is excluded from site for a defined period. A cable may usually be, according to circumstances, installed under an easement or wayleave.

5.5 Those various arrangements are different in character and typically carry different rights and obligations, some under property statutes and others under common law. The market has, to some extent, also dealt with them in different ways, perhaps partly as a result of these differing consequences and their natures, partly because of other transactions seen as comparable and maybe also due to the different development of the technologies.

5.6 In brief, it seems that while both are under the common application of the Code, there seems a difference in character between the markets for rights which involve leases and those for easements and wayleaves.

5.7 Leases are fundamentally commercial in character with a relatively deep, textured and understood market for their rents and widely varying terms (albeit largely reflecting the developing drafting of operators' lawyers).

5.8 Easements and wayleaves, which are also commonly met in the context of utilities with standard compulsory purchase powers, have in the countryside often been addressed under advised standard rates per length of run such as those issued by the NFU and CLA, sometimes in conjunction with specified operators in the same way that they have traditionally done for utilities cables (as was debated in decisions in *Brookwood Cemetery*). Some owners of long landholdings have agreed bulk rates for cables running along their land (as in the manner of the old electric telegraph lines). There is clearly more value and detail in such rights crossing more valuable land, but those will often be subject to confidentiality agreements.

5.9 The effect of this is that there is a case when coming to consider the payment regime for the basis of payment to reflect the nature of the right taken.

5.10 That is a matter of judgement and the CAAV's preference would be for the present "fair and reasonable" basis to apply throughout under the Code as it has been understood (so excluding ransom value but not following *Bocardo*). However, it is recognised there is a case for it to apply similarly to leases. In this, it is noted that super-fast broadband is, at least today, a matter essentially for fibre optic cables rather than wireless technology.

5.11 If being technology neutral is to allow the market to work freely then it should do so on the basis of real market values for the rights granted.

10.6 (3.19) *Do consultees consider that code rights should generate obligations upon Code Operators and, if so, what?*

6.1 In the same way that a tenant is expected to use the property rented in a tenant-like way, so operators should have equivalent obligations in respect of property rights held under the Code. Such "tenant-like" use is not just the negative obligation not to cause nuisance but to show commitment to the agreement, being timely in its processes. Given Code rights, that approach should apply as long as the operator's occupation under them endures, even while holding over or due to renew that agreement after the expiry of its term.

6.2 Given the statutory protection of the Code, it is right that these should include the obligation to liaise and negotiate with those with other interests in the land, especially the owner of the freehold. Experience suggests this does need statutory support rather than a mere Code of Practice. Official Codes of Practice have been seen to deliver little in the context of some utilities and operators' low levels of engagement with owners over renewals and do not suggest a promising starting point for a Code of Practice in this sector.

6.3 Where an operator takes resources from an owner (such as electricity) the operator should reimburse the reasonable cost of that with an addition for administration.

6.4 It would be natural for there to be an obligation to reinstate the property at the end of the agreement. This is, for example, conventional in voluntary agreements for wind turbines leases, usually subject to leaving mass concrete that is more than a metre below ground.

6.5 They should carry liability for the consequences of their apparatus and its use. It should be a matter for them whether they use insurance or self insure, but the liability for loss and damage arising from their Code rights should be clear. Where masts are concerned

operators can, in practice, be concerned to impose a limit on their liability – a point which troubles some landowners who can see that this means they could then face claims in excess of that limit.

6.6 While an easy answer would be to require insurance for this, it may well be that it is best for the Code to impose full liability and leave it to the operator to demonstrate how it is doing it. Where there are large portfolios of assets, it can often make sense to carry the risk internally rather than incur the overheads of insurance (self insuring). The main threat to that strategy is where an otherwise diverse portfolio faces a single universal risk for which the most obvious present candidate is a challenge on health grounds.

6.7 That should include bonds to guarantee the funding for decommissioning apparatus. These have been talked of but it is not clear if operators actually do make any general provision for such work. This is standard practice for such projects as wind turbines.

6.8 As discussed below, under approaches to payment for Code rights, the privileges they bring make it hard to see that confidentiality agreements over payment rates are warranted. Excluding those where Code rights are invoked would much aid the transparency of the cable market in particular.

10.7 (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?*

7.1 The definition of apparatus must, of necessity, be general and based on purpose rather than its nature. The history of technological development and the unforeseeable nature of its future make any alternative foolish, unnecessarily storing up problems.

7.2 It is noted that it is this sector which saw one of the key cases that statutes can apply to circumstances not in the minds of the legislators when *Attorney General v Edison* found in 1876 that the Telegraph Acts did apply to the new technology of telephones. Even 30 years ago almost no one would have foreseen the mass use of mobile communications now taken for granted.

10.8 (3.40) *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.*

8.1 The persons bound by Code rights should be the specific parties to the agreement, that is the specific operator (who is then protected by the Code rights) and the person(s) with the interest in the land capable of granting the agreement – not the person who happens to be the occupier. It cannot and should not run wider than that to burden those who have not consented, or by paragraph 5 type action, be deemed to have consented. In principle, the agreement should be with or include the owner.

8.2 The present provisions of paragraph 2(4) are woefully complex and in practice misleading since parties that may not be legally bound under 2(4), are for all practical purposes (and acknowledged by the analysis in the Consultation Paper), treated as bound

when it comes to the important issues of alteration and removal in paragraphs 20 and 21. This is entirely inequitable.

8.3 At various points the Consultation Paper appears to presume that the grant of Code rights is to the benefit of the occupier (or indeed the owner) of the property. While this may well be the case for a direct line or cable to a property, it is most specifically not the case for most masts and core cables – and, indeed, not where the telephone line to a house has to cross other land. The point of the networks that form one of the basic concepts of the Code is that they do impose on people whom they do not directly benefit. Analytically, the issue of benefit to an occupier is best treated separately from and not confused with the imposition of Code rights.

8.4 It is reported that an occupier's agreement has on occasion been construed from it being shown that he had done no more than fill in an operator's application form. This may raise few, if any, problems where the occupier is the owner but can become very problematic where there are tenancies and licences in place. The risks of this are shown by the Consultation paper's own recognition that a weekly tenant would be the occupier.

8.5 In practice, the agreements covering such occupations will frequently exclude any power to grant the rights sought. Even agricultural tenancies with lifetime or long term security will conventionally exclude the right to grant easements and wayleaves or to sub-let. The occupier will not, just by being an occupier, conventionally hold the interest (or all of it) in future development rights in the land that could be profoundly compromised by the effect of Paragraph 20 and 21. In the case of an agricultural tenancy, non-agricultural development is often a ground for a notice to quit while the tenant's erection of agricultural buildings which might involve Paragraph 20 or 21 is again conventionally subject to consent.

8.6 This suggests that paragraph 3.30 of the Consultation Paper is wrong to suggest that the focus of the application should be on the occupier. It cannot be sensible to waste time on a party who does not have capacity to grant the right nor right to focus on the person who may not be the one who could suffer most from the imposition.

8.7 This focus on the occupier appears to be a problem created in 1984. The original 1863 legislation required the consent of the owner, lessee and occupier. The 1982 Consultation Paper felt that should be amended because:

- difficulty in obtaining multiple consents and finding who the parties were – but this is done for compulsory purchase
- remote interests should not prevent someone from securing a service (the example was a property on a long lease)
- landlord had used this to harass tenants – there is other legislation to control this
- a further issue of applications to the court to require the landlord's consent.

Even then, the Consultation Paper's conclusion was that where the occupier was a short term tenant, landlord's consent would still be needed (with legislation that it was not to be unreasonably refused). It would be for the operator to secure further consents if that was felt necessary to protect its commercial position.

8.8 We now have nearly 30 years' experience of the focus on the occupier and the apparently necessary consequential rule that even if an owner is not bound by an agreement he is bound by paragraphs 20 and 21. That outcome is one reason why owners, becoming aware of the impact of the Code are suspicious of it.

8.9 Without reverting fully to the former position, we conclude that the more practical answer is that, for anything other than a brief licence, the agreement should be with the owner and anyone else with a long term interest in the land. At its most basic, the agreement has to be with the person who is actually capable of granting the interest required and that must recognise that the terms or covenants regulating an interest may deny its holder the capacity that might initially be assumed. No one who cannot grant the right should be party to an imposed agreement for that right. If fair and reasonable value is not to be paid (see 10.44) then these requirements should include a mortgagee as well as a tenant with a secure interest where that interest endures after the grant.

8.10 There should be no incentive for anyone to avoid contact with the owner of a relevant interest or to encourage a tenant to breach his contract.

8.11 The current drafting of the Code raises the interesting question as to whether an agreement made (or imposed on) someone who could not grant it is a valid or effective agreement on which the operator can really rely.

8.12 Operators should undertake the same research that those using compulsory purchase powers have to. The obvious step is to ask the persons obviously involved with the land for full details of those with interests in the land. Other research is now easier with the recent intensive drive for voluntary registration of title with the Land Registry after which the great majority of land is now registered. That has dramatically changed the position for rural land where, with relatively little changing hands by conveyances over the decades, the majority was still unregistered until recently.

8.13 So far as an operator needs the valid agreement of a person, that grant will be the basis for a potential payment of consideration, a matter addressed in our answer to question 10.44. Otherwise the issue may give rise to claims for compensation or be an economic matter between third parties and those making the grant depending on their legal relationships.

10.9 (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 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?

9.1 This is a fundamentally important question about what is sufficient to warrant imposing apparatus on private property. Given the sense that the public's interest in access to electronic communications means there should be a Code, it seems right that that should be a

demonstrable and significant benefit. Lewison J followed this through in his decision in the first court hearing of *Bridgewater*:

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

Any re-working of the test for imposing an agreement should allow for the possibility that the landowner's (or other) concerns are capable of outweighing that public interest in access and might helpfully cast more illumination on when that might be.

9.2 It is a serious criticism of the present version of this Access Principle that it appears to be a test that an operator cannot fail. That largely arises from the requirement that satisfying either leg of the present test will suffice. Since we have so far neither met nor imagined any realistic circumstance in which the imposition could not be compensated for in financial terms, it appears impossible to fail since the second leg of benefit need never be tested.

9.3 This, together with there being payment for the rights, is perhaps a key to answering the question that can be raised under Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms. Case law suggests that courts look to weigh competing claims under the Convention and apply a sense of proportionality.

9.4 Thus, the Access test should address whether the gain in the public's access to electronic communications is sufficient to warrant the specific proposed imposition on private property and the people affected (who, as will be suggested, need not just be the affected owners). Where voluntary agreement is not forthcoming, that test should turn on whether the gain is demonstrable and significant – especially were the payment to be based on a no-scheme assumption rather than today's fair and reasonable consideration.

9.5 The weight of that will vary according to the existing available provision and so be less in areas where there is already provision to good contemporary standards. To illustrate this, Ofcom figures show that 96 per cent of people in the UK live in postcode districts with at least 90 per cent 2G coverage from one or more operators. This figure is 99 per cent for England but is lower in Wales, Scotland and Northern Ireland reflecting lower population densities and limitations imposed by the terrain. 3G coverage is relatively similar. Yet there are those people in "not spots" and growing expectations of 4G when it is available. The essential point is that the test should be so drafted that overriding private property rights needs particular justification, so that Paragraph 5 powers should only be used as a last resort and not as standard practice where the parties might otherwise agree terms between themselves.

9.6 It is the public's access to electronic communications that matters, not the interests of any specific operators. It is the service that is or would be available to the public. Thus, it may well be that it is not an extra cable that is at stake (that may just be an operator's interest) but the services available through a cable. The Code's justification is that it is a charter for the public, not for any one operator.

9.7 The test has to remain a general one. By contrast to a world of landlines, access is no longer a simple question of being available or not being available. There are now issues of choice and quality to be taken into account, making the issue of access, when contested, one of judgement. That requires assessment of the evidence and then a requirement that, if the

imposition is granted, the operator does then deliver the improvement in access that was claimed and which warranted the imposition.

9.8 At this point, it is interesting (and perhaps a quirk of the historical development of the Code) that more practical tests are posed by paragraph 17 regarding recently installed overhead apparatus than for paragraph 5. It seems a little silly that these tests can only come into play once the operator has gone to the expense of installing the apparatus rather than them being considered earlier. However, it may be better that the test is stated in the most general way to allow its use in the wide range of circumstances that can come forward.

9.9 It is also interesting to note that while there seems to have been no recent litigation over this, records show that there were cases under the equivalent provisions of s.4 of the Telegraph Act 1878 as overhead telephone cables were installed across the country before the First World War. There was much objection to overhead cables and in *Postmaster General v Epsom RDC* the judge found that it was not unreasonable for Epsom RDC to refuse consent in 1913 for poles and cables over 1,130 yards of common land, regarded as spoiling the beauty of one of the most beautiful parts of Surrey and interfering with the amenities of the neighbourhood despite the cost of putting the cable underground. However, it was unreasonable to object to overhead cables in private roads – though the Court of Appeal found subsequently in *Postmaster General v Hendon UDC* that the Council consent was not required for private roads. Other cases on whether grounds for not giving consent were reasonable or not include those between the Postmaster-General and Watford UDC (1908), Woolwich BC (1908), Tottenham UDC (1910) and Croydon Corporation (1911). These cases also show that the issues are not just those of payment.

9.10 The approach under development control includes asking if there any reasonable alternative site. While that might look like “pass the parcel” it is a question that allows a review of the different balances between prejudice and benefit for different sites.

9.11 It should be possible for the disputes forum to hold that an extra operator’s service was not warranted if it found there was already good quality and choice that would not be markedly improved by the proposed apparatus. Does the gain from a fourth mobile operator warrant statutory imposition where it cannot be negotiated?

9.12 If the financial test is justified, then it should be a second further test to be met in addition, not as an alternative.

9.13 There is a further point for which the discussion of tidal waters offers an instance, though not a self-contained one. There may be circumstances where the consideration of Code apparatus affects other public interests than those of access to communications. While it might be the conventional answer to this point, the developing system for development control may not always provide a forum for this to be done. There may, as in the issue raised by significant tidal ecologies that are recognised as important, be some need to allow for the balance of public interest to be judged before weighing it against the landowner’s interest.

9.14 That point and, indeed, the *Epsom* case noted above may explain why paragraph 5’s consideration of the prejudice arising from the order is not limited to the prejudice to the affected landowner but is simply “any prejudice”.

9.15 In conclusion, taking the specific questions in turn:

9.16 (1) The Tribunal should not be able to make the Order just because the prejudice to the landowner is capable of being compensated.

9.17 (2) This question probably concerns unusual circumstances we have not imagined. There seem to be few things for which a payment cannot be assessed. If the payment due is large, that may lead an operator to review alternative situations. As with the *Epsom* case, there may be ways in which the prejudice can be mitigated through the terms of the Order rather than by payment. Ultimately, if the prejudice cannot be made good by money or conditions, then it seems likely to be greater than the benefit at stake.

9.18 (3) As noted above, the present formulation is (and it seems right that it should be) wider than just the prejudice to the landowner. There may also be a prejudice to the public as well as a benefit to the public. It seems to need a simple expression weighing the benefit offered by the Order against the prejudice threatened by it. It is then a matter for the Tribunal to determine on the basis of the circumstances and evidence. Any more sophisticated formulation is likely to create more unforeseen problems than it may resolve, especially since so many of the issues may now be about quality and choice rather than the simple fact of service. The only proviso is that the Tribunal should consider whether terms or conditions should be imposed to mitigate the prejudice.

9.19 A practical issue is that this judgment will often involve weighing quite different kinds of concern. It may be that the evidence for the operator as to public benefit may be significantly technical in content and form and so be a challenge for the landowner and his advisers to assess and cross-examine effectively. That points to the test being that the public benefit anticipated from the rights sought should not just significantly outweigh the prejudice that may be caused by them, but demonstrably do so. A marginal net benefit may simply be too vulnerable in or sensitive to its assumptions to be secure and actually delivered if the right is approved.

9.20 That suggests that the burden of proof for the imposition on private property should lie with the operator so that the benefit is demonstrated positively. Were it to be the other way round, then it would be for the landowner to demonstrate how the prejudice compared with a technical case that may be hard to appraise.

9.21 Payment of consideration does not weigh in this since it is a consequence of the agreement imposed by the order.

9.22 As a final observation, the tribunal should have complete discretion in this to avoid such situations as what appears to be a quirk of the present drafting that paragraph 5(3) requires the court to make an order if the test is met even if the operator no longer wants it. Analysis of this provision in particular cases suggests that where it can be shown that either of the tests are met the court *has* to award the order. Thus, if the prejudice is capable of being compensated the court has to award the order even if the operator changes its mind.

10.10 (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.*

10.1 At its most basic, the consent of an occupier should not bind anyone with a greater interest in the land than that occupier. Indeed, it may be that the practical occupier does not have any interest in the land.

10.2 As the consultation paper analyses, that may technically be the present position but the practical operation of the present paragraphs 20 and 21 is to bind superior interests to their potential considerable disadvantage. That should not happen.

10.3 Instead, it would be necessary to secure the agreement of the owner of the freehold (as well as any mortgagee).

10.4 In an agricultural context, tenants with security under the Agricultural Holdings Act 1986 and the Agricultural Tenancies Act 1995 (and the equivalent legislation in Scotland) are conventionally barred by their agreements from sub-letting while landlords reserve the sole right to grant easements and wayleaves. In either case, the tenant occupier granting such consent would be in breach of his tenancy agreement.

10.5 This part of the Consultation Paper considers neighbours from whom an ancillary right is sought since once they consent to an agreement they are then within the Code with all its consequences. The same points apply, that the agreement should be with the person owning a sufficient interest in the neighbouring land to grant the right sought and not just the occupier of that land.

10.6 Utilities seeking to exercise compulsory purchase powers over land need to identify those whose interests they are acquiring so it should not be as problematic for operators to do this as seems to be implied, while a proper regard for property rights makes it necessary.

10.11 (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.*

11.1 The 3 metre clearance above private land is a direct carry over from nineteenth century legislation (when it was 10 feet that may usually have been sufficient for a horse and cart – and so has been marginally reduced by metrication). The 2 metre rule was originally 6 feet.

11.2 This does raise a particular problem with modern farm machinery and the movement of such important plant as irrigation pipes (typically long enough to be an occasional problem with overhead power lines – metal pipes are typically in 6 or 9 metre lengths). It is assumed that no operator would want in practice to install an overhead cable at such a low height in these circumstances but even along hedgerows it would interfere with current or potential field accesses.

11.3 It should be understood that access may not only be needed to the fields of the person consenting but also by anyone with a right of way, as to a house or a quarry, beyond the

owner in question. That may, for example, mean removal, delivery, quarry, plant or forestry vehicles.

11.4 With the opportunity of the review it would seem sensible for this figure to be reviewed and increased. In this, it is noted that the standard freight trailer is 4.2 metres high while the carriageway is generally expected to afford a height of 5.03 metres.

11.5 A more practical answer still might be to follow the template of Regulation 3(2) of the Electronic Communications Code (Conditions and Restrictions) Order 2003 and require that the height above ground shall be sufficient not to interfere with the use of the land as at the date of the installation (unless the owner and occupier give consent).

11.6 Under the present Code Paragraph 17 gives a time limited opportunity to object on a range of grounds, but if the installation is problematic on such a point it would be better for those points to have been taken into account before installing it. That requires agreement and notice.

11.7 At the Consultation Paper's paragraph 3.62 and footnote 49, it is noted that permitted development rights may often mean that affected owners will not be aware of the prospect of the apparatus before it is installed. A general point flowing from that is that the bias of policy is to broaden permitted development rights so making the development control system less applicable, whether as a basic means of notifying affected parties or balancing conflicting public interests.

10.12 (3.68) *Consultees are asked to tell us their views about the right to object to overhead apparatus.*

12.1 It does seem reasonable that anyone potentially affected by apparatus should have an opportunity to object (or indeed support) where a proposal is being reviewed by a forum considering the public interest, whether a planning committee or a dispute forum considering whether to impose an agreement on an owner. Where possible, it seems better that these arguments are considered before the operator goes to the expense of installing the equipment, especially if it proves that the objector has a good case.

12.2 It is not clear why this issue is, as now, limited to overhead apparatus.

12.3 Where the owner consents, then the matter is perhaps of necessity left to be dealt with under a paragraph 17 procedure.

12.4 Overflying by cables is an issue that is found as an impediment to subsequent development in other sectors using cables. An example of an electricity case is the Lands Tribunal decision in *Turris Investments Limited v CEGB* concerning the claim for the impact of a overflying cable on a development proposal for which it would sterilise ground. That example points to the problems where payment for the Code right is not based on an unconstrained market value, but on a no-scheme world where that no-scheme world then changes.

12.5 A more recent problem (also noted in considering powers to cut vegetation) concerns wireless links across property, whether that of the landowner who is party to the agreement or

of a third party who may be ignorant of the wireless link passing over his property. That wireless link will then commonly lead its operator to object to any development that may affect it. This is a particular point in the countryside where such development (whether a building, woodland, a wind turbine or other) is more identifiable than in an urban context. It has now become an issue for the subsequent location and viability of wind farms – a form of development little contemplated for the first two thirds of the period in which masts have been in wide use.

12.6 Since (by contrast to deep oil wells or aircraft passing over at 35,000 feet) such links can therefore have a significant effect on the use and value of property, it seems right to give active consideration to:

- ensuring that affected owners are notified ahead of the link being established
- enabling a paragraph 17 type action to be available. Depending of the final shape of the larger Code this should perhaps not be limited to three months from installation but to a period from being reasonably expected to be aware of the over-sail (that might relate to someone who only became aware of a microwave link on an application to lop their tees) or of a development proposal.
- ensuring that full reasonable compensation is available, particularly where it limits a planning permission that has been obtained.

10.13 (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.*

13.1 Code operators should be required to identify publicly their interest in overhead apparatus benefitting from Code rights with a notice that is readable by those who might also be interested, and in particular those who might wish to exercise paragraph 17 rights or to know of whom to inquire on considering buying or leasing property. That means solving the problem raised in *Jones v T-Mobile* about inaccessible apparatus.

13.2 There may be parallels to be drawn with notices regarding planning applications.

13.3 Perhaps the real sanction is that Code rights should not apply unless they do so identify themselves – that may be more important to a corporate commercial entity than a criminal record.

13.4 We suggest elsewhere in this response that there would be benefits from ensuring that underground apparatus was similarly identified.

13.5 However it may be done, it should be possible for those who need the information to be able to find it without undue inconvenience.

10.14 (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?*

14.1 Were the present limited Code powers to lop trees to be extended to all private property, even if still subject to court review, it would have such significant consequences that it should be subject to major new safeguards which should include the notification and registration of an overhead rights before the power can apply, potentially subject to a paragraph 5 type procedure.

14.2 It can be seen that there is an operational utility for the right to lop to apply to all vegetation rather than only where it overhangs a street and be subject to a decision as to what constitutes a tree. The present Paragraph 19 procedure allows this interference with private land to be referred to a court which can only sanction it on the ground that the work is necessary to maintain a service to the public.

14.3 If this were generally extended to private land, it is easy to see that it could seriously intrude on issues of economic, environmental or sentimental importance. The vegetation could, among other possibilities, be commercial woodland, part of the amenity of property (and so significant to its value), an important aspect of a Site of Special Scientific Interest, an arboretum with botanical, arboricultural and commercial interests, or a memorial tree. The trees may have been required as planning conditions, under a covenant binding the property or have a role as a shelter belt protecting other trees, farming or activities. Not only should the owner of such land be notified of his position when the right is established, but there should be the chance to weigh the competing benefit and prejudice. There should not be an unqualified right to cut third parties' trees and vegetation.

14.4 There is the potential for a landowner to feel that such a power was biased were an operator to install apparatus and then immediately clear vegetation so that apparatus could function, making both actions in effect part of one operation. That suggests the need for the expiry of some initial period after the apparatus is installed before these powers are available.

14.5 When considering this in respect of wireless links, such a power may affect people who have no previous idea that they are so affected. That raises obvious practical problems of identifying the relevant owners and making them aware of the prospective cutting with chance for them to make any necessary representations. That may actually suggest that there are no Code rights in such a wireless link unless established by agreement and that without such Code rights no lopping should take place.

14.6 This may be illustrated by a recent case on the island of Jura where the link between two masts 4 kilometres away led, under the current rules, to negotiations for the cutting of a 1200 metre line through woodland on land that was in different ownership, whose owner had not previously been notified of the link over his property and not been affected by the original installation of the masts. In the framework of such a negotiation, it might have proved cheaper to move one or both masts. It is, of course, possible that the masts had not been intelligently sited in the first place.

14.7 A register of such wireless rights could be of wider assistance making it easier for purchasers, mortgagees, longer term tenancies and others to be aware of the burden this may form for the property. Since it may be difficult for it to be comprehensive, the approach might be to say that registration of a public register was essential for Code rights to apply to the link.

14.8 We note that the Consultation Paper's paragraph 6.80 acknowledges that extending lopping provisions to private land would require a compensation provision.

10.15 (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.

15.1 (1) The operator should have no rights beyond those in the agreement which specifies the rights that operator is granted. Any alternative implies having granted a larger bundle of rights than would usually be the case. It would be strange for an agreement for a 24 fibre cable to imply an ability to increase the number of fibres or for a mast to carry upgrade rights beyond the agreement. Any such right is likely to add to any level of mistrust between landowner and operator.

15.2 In this, it is noted that "upgrade" may be very hard to define in a way that left both parties clearly understanding what they could or could not do, unless it gave the operator carte blanche. Were any such right to be given, it should only be for the operator holding the agreement to upgrade its apparatus on the site for its use.

15.3 Leaving this to freedom of contract and so for the parties to address in their agreement avoids the apparently inevitable problems of definition, now and in the unknown future, that would arise were the Code to intervene in this respect.

15.4 (2) Upgrading of apparatus beyond that agreed should be the subject of further agreement for which fair and reasonable terms should be due. In principle, they could often be expected to be granted for a further payment but that necessarily implies an unconstrained market basis for payment of consideration, not a no-scheme special assumption basis for market value.

15.5 There is market evidence as to typical rates for extra antennae – See the table in Annexe C at C3.9 of our response on the Basis for Payment for Rights Governed by the Code.

10.16 (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.

16.1 (1) It is recognised that operators may desire freedom of action on other parties' property and outside the agreements with those parties and so may feel frustrated where they do not have full and unfettered commercial flexibility. However, such ambitions should, like those of anyone else, be limited by their legal agreements and their ability to negotiate with those landowners and we do not believe there are unreasonable difficulties. These issues

should not be difficult in practice if operators liaised in a genuine spirit with landowners and with the recourse that operators do have to paragraph 5 powers. The fundamental assumption of agreement that has long underpinned the approach of the Code should exclude a cavalier carte blanche approach which is surely incompatible with being granted limited statutory privileges by their licences to be Code operators.

16.2 Where a facility is shared, it means the owner is likely to be dealing with more parties wanting access to the property subject to the rights. It multiplies the number of legal relationships. It can create confusion as to which operators are genuinely using and protected by Code rights (especially in today's world of joint operations between operators) with further implications for the exercise by the owner of his opportunities under the Code and the agreement. If sharing is to be imposed, these factors need recognition. That recognition might be hard to deliver if the Code took a no-scheme approach to payment.

16.3 (2) Code operators should not have a general right to share their apparatus. Contractual terms prohibiting or controlling it should stand.

16.4 While this is most commonly discussed in the context of masts, it can also arise for cables. An operator who has installed a duct (perhaps with sub-ducts) and a cable may then consider granting rights to other operators, whether to use surplus unused cables or fibres originally laid against this eventuality ("dark fibres") or to put new cables through – in either case for third party use. It can be difficult for landowners to monitor whether fibres and cables are being used, by whom and for what (in the case of purported internal use by a utility). The reported occasions where agreements have been breached in these respects lead to suspicion – a concern that would be compounded were a carte blanche right given to operators.

16.5 (3) Any sharing of apparatus beyond that agreed should be the subject of further agreement for which fair and reasonable terms should due. In principle, they could often be expected to be granted for a further payment but that necessarily implies an unconstrained market basis for payment of consideration, not a no-scheme special assumption basis for market value.

16.6 We comment on current experience as regards payments for site sharing in our response to Question 10.44. This seems really to have surfaced as a mast issue rather than a cable issue. In summary (and recognising the wide variety of clauses found in mast agreements), agreements have typically have accepted the prospect of site sharing (consent not to be unreasonably withheld) with an increase in the rent by a prescribed proportion of the income from the additional operator. Developments in operators' commercial practices appear to have rendered such clauses (in which landowners often set store) ineffective since the sharing may often now arise under master agreements between operators under which no mast specific payment is due or identifiable. As 30 per cent of nothing is nothing, the rent remains unchanged and the landowner may become jaundiced.

16.7 Yet, as noted above, he may well now be dealing with a more complex situation and more parties with the prospect of more notices to serve and negotiations as issues arise over renewal, alteration or renewal. In practice, it is of importance to landowners to know that they are dealing with only one operator who benefits from Code rights in respect of the apparatus on their land, rather than several of them.

10.17 (3.88) *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.*

17.1 We understand that s.134 offers a protection to a tenant whose lease restricts his choice of electronic communications provider by allowing him to ask for the landlord's consent to change supplier, which consent is not to be unreasonably withheld.

17.2 This is not an issue which is customarily found in rural work and we suspect it may more often be found in multiple occupation developments (such as blocks of flats or offices) where a head tenant or managing owner has entered into a general contract with an operator to supply electronic communication services. It may be that a tenant's motive is secure a higher quality or capacity of service. It may then be matter of practicalities and contracts as to how far site sharing is relevant or possible. In so far as this concerns cable, it may be an issue of what services are available through the cable rather than the choice of cable provider.

10.18 (3.92) *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.*

18.1 (1) It is recognised that operators may desire freedom of action to deal in agreements regarding other parties' property and outside the agreements with those parties and so may feel frustrated where they do not have full and unfettered commercial flexibility. However, such ambitions should, like those of anyone else, be limited by their legal agreements and their ability to negotiate with those landowners and we do not believe there are unreasonable difficulties. These issues should not be difficult in practice if operators liaised in a genuine spirit with landowners. The fundamental assumption of agreement that has long underpinned the approach of the Code should exclude a cavalier carte blanche approach which is surely incompatible with being granted limited statutory privileges by their licences to be Code operators.

18.2 (2) Code operators should not have a general right to assign their agreements. Contractual terms prohibiting or controlling it should stand as the agreement is made between the two consenting parties and is subject to its terms.

18.3 In a rural context, it should be advised that landowners have a strong and longstanding preference to know who their tenants are and so do not countenance assignment. Thus, not only do almost all agricultural tenancies throughout Great Britain contain an absolute prohibition on assignment, but assignment can be barred for oral tenancies under the Agricultural Holdings Act 1986 (and the equivalent Scottish 1991 Act) simply by serving a notice requiring such a tenancy to be recorded in writing. The same approach means that

landowners do not customarily let to companies (whose ownership and control can change by share transfer) but only to individuals.

18.4 A change in the identity of a tenant is a point of proper concern to the landlord. It does not just concern the covenant for the rent but also the conduct of the relationship and possible negotiations. It should be open for the agreement in question to bar assignment completely, govern it on agreed terms or allow it, in each case with a commercial recognition of the status chosen in the financial relationship.

18.5 (3) Any assignment of an agreement beyond that agreed should be the subject of further agreement for which fair and reasonable terms should due. In principle, they could often be expected to be granted for a further payment. At the very least, it is standard commercial practice for the intending assignor to pay the landlord's full reasonable costs in reviewing and handling the matter proposed.

10.19 (3.94) *We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code.*

19.1 The Code should not cover any further ancillary rights.

19.2 The parties are, of course, free to agree any other matters they can, but they should not be subject to Code rights.

10.20 (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 of multi-dwelling units or others.*

20.1 While having little experience of this specific issue in rural work, the necessary place of an effective and proportionate disputes system is just as relevant where an operator finds an unreasonable or unresponsive landowner as where a landowner is dealing with an unreasonable or unresponsive operator.

10.21 (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?*

21.1 No. There is a history over the years of such powers being used to require the Post Office and then BT to provide landlines to remote places. Where warranted that has happened though, now, the alternatives offered by mobile telephony have given other lower cost ways to answer the real issue in some cases. Perhaps the lesson from that is that the service demanded may not be the one that warrants use of the Code – alternatives may be more cost effective.

21.2 Beyond that, we have no knowledge of Paragraph 8 being used, perhaps suggesting that the market is answering the issue and so such formal situations rarely arise (or perhaps not in the simple form that can be solved in this way).

21.3 With a diversity of possible operators and technologies as well as practical circumstances, Paragraph 8 appears to deal with the balance between the demander and the operator from whom he chooses to demand the service. The request may not always be reasonable or made to the most appropriate operator. There is recourse for the demander to challenge the operator's reaction. The access principle addresses the balance between the operator and the intervening landowner and has been discussed above.

10.22 (3.102) *Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used?*

22.1 Only as reported in answering question 10.21.

10.23 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 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.*

23.1 We are not aware of any issues on this point and would need to see examples before commenting further. As described, the general law provides remedies for unlawful activity and breaches of agreement which are there to be applied by the courts to whoever is relevant.

10.24 (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.*

24.1 As reviewed briefly in our previous answer, the general law provides remedies for unlawful activity and breaches of agreement which are there to be applied by the courts to whoever is relevant.

24.2 The practical problem is one of ensuring a culture in which landowners do not need to take legal action to enforce their rights under the agreement and the Code and so the need for the design of the Code to ensure that operators, with their statutory privileges as licensed Code operators and typically large companies, are active in their engagement with landowners and occupiers.

24.3 There is very widespread reported experience of operators being unresponsive and dilatory on a range of issues, most obviously those surrounding any negotiation after the installation of the apparatus has been achieved. It can appear that, once they have secured that, they are confident in having effective possession under the Code and feel no need to engage.

24.4 It may also be that Code operators are reluctant to carry the costs of effective negotiations with those from whom they hold rights. That would bode ill for any payment approach based on compulsory purchase principles.

24.5 As this has been an issue from long before the Code review, it appears institutional rather than just a market reaction to the Code review itself.

24.6 This may most frequently arise on renewal of agreements. As a very current example, there is a general frustration among landowners' agents over the lack of response and activity by [redacted] over the [redacted] cables for which agreements are due for renewal with discussion of appropriate rates.

24.7 It is also reported on the end of mast lease agreements where operators usually manage to serve their counter-notice and then frequently take no further action until driven into the courts. Similar experiences are reported on rent reviews, where a response may only be achieved from an operator on the door of arbitration that perhaps need never have been reached.

24.8 This is a deeply unsatisfactory state of affairs which is seen by landowners to reveal the complacency of large companies with statutory privileges in disregarding the interests of the individual owners with whom they have a legal relationship.

24.9 The most obvious remedy is for the Code to require timeliness in responses and then for it to have an effective and appropriate dispute resolution mechanism that should of its own existence encourage better behaviour.

24.10 The operators may properly observe that it falls to all parties to be timely and we would agree. However, in doing so, we point to the substantial imbalance of power between the parties that is typical at this stage. On the one side, the operator is (with a few exceptions) almost always a large company and will have statutory protection for the rights it needs. On the other side are generally individual landowners with limited resources for whom the legal agreement presumed by the Code has terminated. It can often be felt that the operator has at that point already everything it needs and so has no need to respond to the owner. The owner's only significant moment of control was when granting the original agreement – hence the importance of the terms of that agreement not being further extended by the Code (such as has been canvassed in questions 10.15, 10.16, 10.18 and 10.19).

24.11 In the case of agreements that have expired, operators might be encouraged to respond in a more timely and effective way if the landlord could terminate their Code rights if the operator did not act after a specified period has elapsed after serving the counter-notice without further action. It is assumed that a threat to an operator's possession and apparatus will prompt sufficient self interest to behave properly.

24.12 One missing part of the jigsaw is the place of Ofcom as the regulator for the sector and, more specifically, the licensor of operators who thereby gain Code powers. Even by contrast to the other regulators it appears to have no effective statutory authority to monitor or impose sanctions on an operator which is in breach of the terms of its licence. This area needs policy attention.

Consultation Paper - Part 4
The Rights and Obligations of Code Operators: Special Situations

10.25 (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?

25.1 The long history of the law in this area has generally provided for the regime that is now encapsulated in paragraph 9 in sharp distinction from the main regime for private land. We have no understanding of any general difficulties here.

25.2 Issues here may most properly be commented on by the highways authorities as the direct managers of the publicly maintained highways affected by this. There are natural concerns about disruption of the highway by successive bodies with statutory authority or for an extended period with detrimental effects on both users of the highway and those householders, businesses and others taking access from the highway.

25.3 With no general background of difficulties here drawn to our attention, there are three specific points that should be raised:

- where apparatus is permanently installed above ground it should not interfere with the public's practical use of the highway to pass and re-pass
- while a highway may be publicly maintainable, the land affected by it may often still be privately owned with the owner (usually the adjoining landowner) still having rights in the sub-soil and quite possibly in the verges which may also affect the drainage of neighbouring land.
- that apparatus may then limit the ability of the neighbouring landowner (quite possibly the owner of the verge or sub-soil of the highway) to open an access onto the highway or to develop his land from the highway.

25.4 Although it would appear that the Paragraph 9 right to install and keep apparatus under, over, in, on, along or across a street (or in Scotland a road) is unqualified where the street or road is a highway maintainable at public expense, paragraph 9(2) would seem to require a written agreement under paragraph 2 or a court order under paragraph 5 for highways that are not maintainable at public expense. It is reported that this tends not to be followed by operators.

10.26 (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.*

26.1 Some CAAV members work specifically in this area but the limited work outside the Crown means that other members' wider experience more generally concerns the landfalls for other cables and pipes, usually under other statutory regimes.

10.27 (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?

(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?

27.1 (1) With limited experience of the issues here, we have not so far understood any special reason for the Code to treat tidal waters differently from other property. The Government's 1982 Consultation Paper understood this issue, under the heading of "Sea and Seashore" as needed because of the possibility that apparatus might be a danger to navigation first covered in legislation in 1863 and 1878. Navigation issues were to be protected by the role of the Secretary of State. No additional reasons relevant to the 1980s were offered but other interests could include the large network of underwater cables and pipes and their landings – cables may be for other communications or carry power from off-shore sources or be international power connectors, while pipes may carry oil, gas, carbon dioxide or other substances. Further work may reveal more issues than we have so far taken into account in answering this question.

27.2 In practice, it could well be that, with the current concerns over conservation and the common existence of leisure interests, this offers a good example of cases where there may be more involved in judging the public interest side of the access principle, however finally defined, before weighing the outcome against the landowner's interest. Those issues are by no means limited to coasts and estuaries, but many delicate environments subject to important controls are in or adjacent to tidal zones and the Marine and Coastal Access Act 2010 (the Marine (Scotland) Act 2010) specifically applies to such situations.

27.3 This is not only a direct question of public policy but also of the activity of landowners in tidal zones. An increasing area of ecologically important tidal land is owned by conservation bodies or managed for conservation purposes.

27.4 The growing network of ports, wharves and similar facilities may provide both the need for communications and problems for their installation (or perhaps more particularly their alteration).

27.5 There may be cases where the effect of the regime under the EU Habitats Directive could be that where apparatus was seen to damage an ecologically important site, compensating measures would be required beforehand, potentially affecting the landowner more widely – or even other landowners.

27.6 These factors (combined with the problems posed by preserving unnecessary special regimes) point to recognising all owners as equal and so bring tidal waters into the general regime for private property.

27.7 (2) If there is not to be a separate tidal regime this question falls. If there is to be one, then it should as far as possible follow the principles of the general regime for private property. It offers an example of cases where the prejudice that could be caused by apparatus may not just be to the landowner but other public concerns as reviewed in our discussion

above of the access principle. It is simplest if those are weighed together at the same time, perhaps rather than in sequence.

27.8 (3) While our instinct would be that all owners of tidal land should be treated equally, we do understand that this could require consideration of the Crown Estates Act. In noting that it could be that there is then other legislation, especially that governing ports and harbours that also need to be considered, whether general or for specific ports such as the Port of London Act.

10.28 (4.30) *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)?*

28.1 (1) The regime now headed "linear obstacles" (a title apparently invented in 1984) is in our opinion a spent, fossil regime probably stemming from the days when the electric telegraph ran *along* railways, canals and tramroads and where there might been quite practical operational reasons to take care over crossing them. (The 1982 Consultation Paper reported a shift in railway operators' interests from apparatus running along their property to concerns about apparatus crossing it.) It is distinctive in not requiring agreement and in referring to arbitration with the disputes reference to the President of the Institution of Civil Engineers. It looks like a geological relic embedded in the strata of the Code as a special regime whose origin, ambit and function are no longer relevant.

28.2 Despite its recent title (and the apparently implied justification), it is not about linear obstacles in general (the phrase is not used in the body of the Code) and so not about the general problems operators might face with them. This regime is solely about railways, canals and tramways. Within that there are potential arguments as to what constitutes each of those. That is perhaps particularly an issue for canals given the widespread canalisation of rivers.

28.3 The thinking in the 1982 Consultation Paper in carrying forward the substance of the previous regime here seems to have been to see crossing railways, canals and tramways as analagous to crossing highways in conjunction with a less strong presumption as to operators' rights to place lines along them.

28.4 We submit that there is no need for this regime for railways, canals and tramways which should all fall under the remainder of the Code alongside all other linear obstacles with consideration for the right assessed on a narket value basis.

28.5 We note that railways, canals and tramways are but three of the authorised statutory undertakers with powers under Paragraph 23 for the alteration or removal of apparatus.

28.6 (2) The lack of clarity of this regime is illustrated by the need of the parties in *Bridgewater v Geo Networks* to resort to costly litigation and the successive decision and judgements in that case.

28.7 The lack of other litigation typifies the essentially commercial approach that all parties have long pursued to the establishment of agreements for installing communications apparatus without recourse to the Code. It remains to be seen if the understanding of this special regime given by the recent litigation will lead to new difficulties.

28.8 (3) If the regime is kept then offences under it should be civil ones. There seems little concern about a company acquiring a criminal record in such a circumstance.

28.9 (4) These issues should be a matter for the agreements between the relevant parties.

28.10 (5) As we suggest that this special regime should be abandoned, we have not considered this.

10.29 (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?

29.1 We agree with the recommendation. If [redacted] a cable is to be installed in a London sewer, that should be on terms set by the sewerage authority. This is another area where the wider public interest and possible disruption of water, sewerage or electricity services can be a key issue.

29.2 In essence, this applies the principle of agreement absolutely to these conduits without recourse to the tribunal or appeal (save perhaps as now possible under Regulation 3 of the 2011 Regulations). Along with the other terms of the agreement, the consideration would also be outside the Code's dispute provisions and simply be what the parties agree.

29.3 In some cases, the conduit will itself be subject to covenants and terms that may limit the right of an undertaker to give consent. We see that aspect as a private matter between the undertaker and the owner, rather than a proper subject for the Code. The Code should not intrude on this.

10.30 (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?

30.1 We have no experience on which to suggest anything other than carrying the present regime for statutory undertakers forward in general, but accept the proposal made at 4.38 that the operator should not just be the passive subject of an undertaker's requirement but rather that the balance of interests can, if necessary, be judged, including any consequent effect on other parties.

10.31 4.43) *We provisionally propose that a revised code should include no new special regimes beyond those set out in the existing Code.*

Do consultees agree?

31.1 We agree. In principle, there should be no more special regimes than are absolutely necessary.

Consultation Paper – Part 5
Alterations and Security

10.32 (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 Operators' networks at risk.*

Do consultees agree?

32.1 While the legal form of the present provision may appear flexible (Consultation Paper 5.9), its practice is more onerous and cumbersome for landowners. Operators, having established apparatus, are (perhaps understandably) reluctant to consider changing it to suit a third party with objectives not associated with the operator's business – this is disruption for them, however important it may be for the landowner. The issue then turns on whether the change will not substantially interfere with the service provided by the operator's network. That is a technical issue of which it can be very hard and costly to achieve a competent independent assessment, either on its own or as a review of the case that the operator may present. As in any other issue, there is no reason to suppose that the operator's presentation is necessarily accurate or immune from critical review. Those technical issues may have to be argued before a tribunal.

32.2 In stepping back from this, the public's interest is not in the individual operator's network *per se* but in the availability of electronic communication services.

32.3 That done, landowners feel in particular jeopardy over the provision for the applicant to reimburse the costs of the alteration or removal. Concern over this should not be about the principle as this is a variation of the agreement – and, as we argue through our response all variations may have a financial consequence which should then be recognised. It is rather about how that cost is in practice assessed and then reviewed for its reasonableness. (Elsewhere, landowners have found it very difficult to understand the rationale behind the costs that can be quoted for securing a power line giving access to the national grid whether for supplying renewable electricity or taking a high capacity supply.)

32.4 In short, an apparently flexible and appropriate regime poses more difficulties on inspection, difficulties which it may only be worth tackling where high value development is involved. Operators do, of course, have to engage in the process for it to move forward in any sensible way, so inertia on this point is an additional frustration.

32.5 We consider the wording used in the recommendation needs review for it to be appropriate.

32.6 We see this as a straightforward balance between the specific Code operator and the landowner in the actual circumstances. It is not a general balance but a specific one and so should be drafted in the singular.

32.7 We do not see the need for the final phrase adding an additional protection for "the Operators' networks at risk". This is not only because it is in the plural but because:

- the individual operator's interest (so far as that matters) is already encapsulated in the main phrase

- the Code is not to protect the Code operator who is simply the intermediary for the public interest in access communications
- the public interest warranting Code protection is in the matter of general access and not necessarily the commercial concerns of the individual operator's specific network.

32.8 Accordingly and without, we think, doing violence to the intended principle, we suggest that the final phases of the recommendation here should read:

> "… on terms that balance the interests of the public's access to communications services with those with interests in the land ."

32.9 We believe that such wording would be more true to the basic principles of and justification for the Code, the purpose of which is not, in the final analysis, to protect individual operators but the service to the public.

32.10 In considering the implementation of this in the context of the present Code, we believe there should be a unified regime covering paragraphs 20 and 21 which currently offer a dual regime with different recourse and consequent confusion.

32.11 Since removal may more often be sought as a means to attract the operator's interest in renewing the agreement, we have, sadly, to return to the recurrent theme of the difficulties of getting operators to respond to landowners' needs in this area. Accordingly, we suggest an additional sentence to the recommendation:

> "That procedure should be one that prompts timely and effective action by both operator and landowner."

10.33 (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?*

33.1 The operation of paragraph 20 has been found problematic. Lay reading is obscured by its use of the word "alteration" to include moving and removing apparatus – applied by paragraph 1(2).

33.2 On matters of more substance:

- the alteration has to be shown to be "necessary" not just "desirable" for paragraph 20 to apply. "Necessary" could be read to be a very strong test.
- the burden is on the applicant to show that the alteration "will not substantially interfere with any service which is or is likely to be provided using the operator's network"- an apparently tall order for a party not involved in communications operations and likely in many cases to require great cost. It could be argued that this is the wrong way round and so for the operator to show the detriment or perhaps more usefully the balance between different options.
- the default presumption is that a successful applicant will reimburse the operator for its costs of alteration. These may not only be large but are in practice hard to predict (they are reported to differ widely between cases) or, afterwards, to cross-check for reasonableness.
- the uncertain interaction between this power and the fixed term of any agreement, as it may not remove the powers of the operator to re-impose itself on the site after the development but within the agreement. There seems to be no clarity as to the status of

the rights given to the tenant by the tenancy on the equipment being removed from the site. Have they ended as if the agreement has now been frustrated or repudiated? Is it still bound by the obligations of the agreement? Can it return once the reason for removal has occurred?

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

33.2 Paragraph 20(3) seems awkwardly worded in that the operator "shall … only" make the required alteration if the court requires it.

33.3 In the court's consideration of terms for such an order it may include modifications only if they are agreed by the applicant.

33.4 The payment to the operator is to be for its expenses (not its loss) in making the alteration though these are not qualified by the need for them to be reasonable.

33.5 While not tested and in contrast to paragraph 21, the Code has no provisions which preclude contracting out of paragraph 20.

33.6 The implication of the points is that, in practice, paragraph 20 rights are only available where the greatest value is at stake. In more ordinary circumstances, the requirements of this procedure are simply too demanding for it to be useful.

33.7 Reviewed overall, it is not clear why there needs to be the two regimes for removal of apparatus offered by paragraphs 20 and 21. It might be simpler if Paragraph 20 powers, however defined, applied to genuine alteration of apparatus, with a separate paragraph 21 type provision applying to its removal, as that paragraph is the root of the operator's security of tenure and so would link in with renewal issues.

33.8 Some issues could be handled by an equivalent to a simple "lift and shift" provision or compensation in lieu where any planning permission is refused.

33.9 It may be that particular provision is needed where a building on which there is apparatus needs redeveloping. Even more practically, there are cases where equipment installed on a roof needs to be moved temporarily so that the roof can be repaired before it rots through, with the apparatus then returned. That requires this power, if only to secure the operator's interest in and attention to the matter, while the work might otherwise even be construed as a disturbance of the lease whether as a derogation from grant or an intrusion on quiet enjoyment.

33.10 That example leads to the conclusion that the present regime uses the approach for two different situations which might better have two separate provisions:

- temporary removal to allow such necessary repair or building works to take place or a building to be replaced as part of a development with the apparatus to be restored to position as soon as practicable

- permanent removal of the apparatus (perhaps for re-development) which in turn should distinguish between that being sought during the period of the agreement and on/after the expiry of the agreement.

If the replacement for paragraphs 20 and 21 recognised these different situations it might be more useful to each of them. Not doing so appears to leave a muddle in practice.

10.34 (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?

34.1 A pure preference for freedom of contract would see no need for the Code. The Code exists to impose defined rights for the operator on the landowner in certain circumstances. The opportunity to secure alterations, while it may be a breach of the terms of the lease or other grant, is in substance the correlative of the operator's right to insist on remaining despite the expiry of the agreement. Lift and shift clauses would customarily be the subject of negotiation in many equivalent voluntary agreements.

34.2 This is one of the few parts of the Code that can give some recourse for the landowner on whom rights may have been imposed and such a mechanism should be retained. Even if the agreement (commonly drafted by the operator) does not contain a lift and shift clause (that might often be seen elsewhere) this is an avenue that may offer one if the need arises. It allows people to improve their properties and undertake economic development.

34.3 It may be assumed that if it were possible to contract out of this, operators would generally seek to do so, yet situations such as the practical need for temporary removal for works (as just discussed) show the power to be useful.

10.35 (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?*

35.1 In principle, this regime should simply be part of the replacement for paragraph 20. It would be one test for the design of that replacement that it met such owners' needs. If that regime cannot accommodate the practical concerns of railways, canals and tramways, it may not be fit for other affected owners seeking alterations.

35.2 We note that railways, canals and tramways also have powers as statutory undertakers under Paragraph 23.

10.36 (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?

36.1 While temporary removal may perhaps properly be considered under the heading of alteration, permanent removal should have its own separate and distinct regime. Some present confusion and complexity arises from the dual regime of Paragraphs 20 and 21.

36.2 The issues here – in what the Consultation Paper appropriately calls "security" - are intimately linked with the question of the renewal of agreements and the problems landowners find in dealing with operators over this. As such this is also inter-related with our response to Question 10.58 regarding the interaction with Part 2 of the Landlord and Tenant Act 1954 in England and Wales.

36.3 While the public's need warranting some such protection is understood, the accumulation of experience suggests that any Code right for an operator to retain apparatus on land after the agreement protected by the Code has expired should not be an absolute right, but a qualified one which may lapse if the Code operator does not join with the landowner in settling a new agreement or taking paragraph 5 action to require a new agreement in a timely and practical way. We suggest below a framework to drive prompt action in doing this.

36.4 Paragraph 21 of the Code restricts the ability which the landowner would otherwise have under statute and common law to require the removal of any apparatus installed on his property. This is the root of the Code's entirely individual regime for providing operators with security of tenure, as this restriction applies even where the contractual agreement has expired and the parties cannot contract out of it. In practice, this means that operators are secure on the site and that has the undesirable effect of diminishing their incentive to negotiate new terms with the landowner on the expiry of an agreement.

36.5 If a landowner seeks to have apparatus removed from his site after the lease has been terminated, he must serve a notice on the operator. The operator then has 28 days to serve a counter-notice setting out the steps that it intends to take to secure a right to keep the apparatus in situ and, having stated that intention, it seems that the operator need then do very little save set out the proposed terms for a new agreement. The only action then open to a landlord who wishes to follow his action through (even if both parties intend there to be a new agreement) is to obtain a court order to enforce his notice to remove. The court can enforce the order if the operator is found to be "unreasonably dilatory" in taking steps to secure the right to keep the apparatus on site, but there is no definition of what that means. In practice, it can take many months or even years to progress negotiations on a new lease.

36.6 Since this is an undesirable state of affairs, we propose that the Code should specify a limited period in which operators must take the steps set out in their counter-notice for it to be effective. Elsewhere in the Code, the period of 28 days is allowed for a landlord to accept terms under paragraph 5 and for a counter-notice objecting to tree lopping under paragraph 19, as well as for the service of the counter-notice in paragraph 21 itself. We suggest that 28 days would also be a suitable period for operators to begin to take the steps set out in their counter-notice and any delay beyond this could be considered to be "unreasonably dilatory" by the courts.

36.7 We strongly recommend that delays of more than 28 days by operators in starting to take the steps set out in their counter-notice under paragraph 21 should be evidence that the operator is being "unreasonably dilatory" and that the onus of proof that any delay is reasonable then shift from the landowner to the operator. Requiring payments to be back-dated might also encourage operators to be more active.

36.8 In this thinking, we refer to the body of case law on the reasonable time allowed under the Landlord and Tenant Act 1988 for a response by a landlord to a tenant's application for consent to assignment. 28 days has been found to be reasonable and ten weeks not. Core principles were set out in *NCR v Riverland* (in which 23 days was found to be a reasonable period) and offer a template for development in this context:

- a landlord owes a duty to a tenant to give a decision on an application for consent within a reasonable time: section 1 (3) of the Act.
- what will amount to a reasonable time will depend upon all of the circumstances of a particular case
- the assessment of whether a reasonable time has elapsed in which the landlord has to give a decision will be made at the time at which it is claimed that a reasonable time has elapsed, and in the light of the facts at that time … Amongst the factors that will be borne in mind in assessing whether a reasonable time has elapsed is that the purpose of the Act is to "enable there to be fair and sensible dealing between landlords and tenants [and] a state of certainty to be achieved at the earliest sensible moment"
- if, within a reasonable time, a landlord gives notice refusing consent, reasons must be given for the refusal: see section 1(3) (b) (ii) of the Act.
- the burden is on the landlord to show that it was reasonable, by reference to the reasons given in the notice, to refuse consent. "… [I]t is not now open to a landlord to put forward reasons justifying the withholding of consent if those are reasons which were not put forward in accordance with section 1(3)(b), that is they were not reasons which were put forward in writing within a reasonable time…"
- once a notice has been given by a landlord, that landlord cannot subsequently justify a refusal of consent by referring to reasons which are not set out and relied upon in that notice.
- an unreasonable refusal of consent renders a landlord liable to pay damages to a tenant for breach of statutory duty as a tort - see section 4 of the Act.
- a failure to give a decision within a reasonable time will be treated as equivalent to a refusal of consent without reasons. This conclusion necessarily follows from the fact that it is the landlord's obligation to make a decision within a reasonable time – whether to consent or refusing consent with reasons.
- it also follows that a failure to communicate a decision on a tenant's application within a reasonable time, will also make a landlord liable to pay damages to a tenant. That liability will not be avoided or mitigated even if a landlord is able subsequently to show that there were reasonable grounds for withholding consent.
- a landlord will discharge the burden of proving that a refusal of consent is reasonable if it can show that some landlords, acting reasonably, might have refused consent for the reasons given, even though some other reasonable landlords might have given consent.

36.9 Interaction with the 1954 Act – For England and Wales, the conflicting regime of Part 2 of the Landlord and Tenant Act 1954 allows a landlord to resist the renewal of a tenancy where, among other grounds, the property is needed for his own occupation or for

development (ground (g)). If the tenant opposes this, then under s.64 of the 1954 Act the tenancy continues on an interim basis until three months after the final decision. That is taken to mean that a landlord can only serve a paragraph 21 notice at that point. While the Courts may allow the landlord a "reasonable time" for ground (g), it is far from clear that the time often needed for the Code's procedures to operate falls within this. That makes it perhaps logically impossible for the landlord to mount a successful argument under the 1954 Act that the land is needed for development if the apparatus (and the operator's security) is the obstacle to the development.

36.10 In the present circumstances, the natural answer for a landlord is to move as best as he can to court action under the Code, whatever the other issues or options. There should be a better answer.

36.11 The alternative route offered by paragraph 20 has, as shown above, so many limitations that it may not really be regarded as available in many situations.

36.12 Where parties are amenable to a new agreement, there is no mechanism (as there is in the Landlord and Tenant Act 1954) for a landowner to apply to the disputes forum for the determination of the terms that should apply.

36.13 At its most basic, one regime or the other should be disapplied for either to be effective unless the parties actively co-operate with each other in the processes.

36.14 Since the practical answer to the interaction between the two regimes is for the agreement to have been contracted out from Part 2 of the 1954 Act, this points again to the proposal (which we support) that tenancies franked as subject to the Code are excluded from Part 2. However, it would be useful to review the grounds available to landlords under Part 2 in preparing a successor to Paragraph 21, most particularly the need for re-development as a ground on which to resist renewal. At present, it is possible for Code rights in an established cable to block a shopping centre.

36.15 Not only practical logic but experience suggests that, with this statutory background, operators can serve their counter notices under paragraph 21 and then take no action, having enough to do elsewhere and confident that their interests are protected. There is no countervailing force against this bias to inertia. This is unsatisfactory in both operational and contractual terms and is essentially an artefact of the present drafting of the Code.

36.16 In a normal contractual relationship, an operator would have an incentive to take matters in hand before the agreement expires to protect its interest. However, where an agreement is under the Code, the protection afforded by the provisions of Paragraph 5 is a stimulus to procrastination.

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

36.18 Thus, the provisions of Paragraph 21 should make it clear that the operator is liable for exemplary damages to the landowner if it fails to progress matters timeously. Requiring payments to be back-dated might also encourage operators to be more active.

36.19 Finally, in considering the list of those who could seek removal set out in 5.26, it seems unreasonable for the fourth category – landowners on whose land apparatus has been installed by mistake – to be bound by the Code at all. That apparatus will not have been properly installed under an agreement or an order but by ineptitude and is a trespass which should not of itself be protected by the Code and so should simply be subject to the ordinary remedies for trespass.

10.37 (5.48) *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?

37.1 With little practical experience of the issue at stake here, we suspect this recommendation is right, in part because of the larger and other public interests that may be involved (including compliance with the planning system) for which the development control system is one forum.

37.2 With the developing skein of environmental regulations governing the use of land, it may be that this is not just a right for planning authorities but other bodies with relevant statutory powers. The discussion of tidal waters has flagged such concerns.

37.3 In essence, Code operators should not be immune from such enforcement action just because they are Code operators. That larger principle should apply where the Code operator is in breach of its licence or the agreement as well as the planning system. We have heard that the Code has been used to trump forfeiture proceedings.

10.38 (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?*

38.1 In practical terms, it must usually be for the landowner to act to seek removal of Code operator's apparatus. In a straightforward position, it is hard to see how a Code operator should have that imposed on it.

38.2 The exception to that is where (as perhaps in a situation where there is site sharing) the Code operator may be the landlord or licensor of another Code operator whose apparatus it wishes to have removed. In that context, the dominant Code operator could rely on the onus of the landowner.

38.3 If a Code operator wishes to remove its own apparatus during the course of an agreement that is subject to the agreement and any necessary landowner's consent. If it wishes to remove apparatus on the end of an agreement, that it is freedom (and possibly its obligation under the agreement).

38.4 There are, of course, particular problems for a landowner where an operator leaves but does not remove its apparatus – or fails financially.

38.5 Interaction with Renewal - However, this issue which might ordinarily be expected only to arise where an operator had ceased operations on the expiry of the agreement has, in practice, become necessarily conflated with the problems landowners face in securing the renewal of agreements for continuing operations, hence the procedure needs a strong regime to encourage operators to engage with owners.

38.6 As proposed above, we suggest that, working on the basis of the present regime, the operator has 28 days from its paragraph 21 counter notice to take the steps outlined – which by contrast to the contents of many present counter-notices must be specific and precise actions - on pain of being found "unreasonably dilatory" in which case the landowner can then go to the tribunal for a determination and enforcement of the terms of the agreement.

10.39 (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.*

39.1 In this context, it is not quite clear what is meant by the date Code rights expired? Is it when the operator ceases to use the apparatus rather than when the Code agreement expires? If the former, then abandoned equipment is indeed a problem and there should be power to require its removal and to enforce some form of mesne profits in the interim.

39.2 More generally (and depending on what is meant by expiry of Code rights), we return to the practical interaction between Paragraph 21 and renewal of agreements which needs reform.

39.3 The model of the Landlord and Tenant Act 1954 could suggest the ability to seek an order to set an interim rent or payment once an agreement has expired. That might be supplemented by penalties where the operator can be shown to be unreasonably dilatory.

10.40 (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?

40.1 We endorse freedom of contract on this. As contracting out of security is possible outside the Code (statutory for leases and with no restriction for easements, wayleaves and licences), it is hard to see why that it cannot be voluntarily done within the Code.

40.2 So far as development is to be the ground for this, it will need a definition. Without further reflection we could not say that the definition used in planning legislation is necessarily to be adopted without review.

40.3 That would also apply to a voluntary agreement that Code security would not apply in only specified circumstances which need not just be limited to development. That is freedom of contract.

40.4 We would go further and see no reason why, on finding appropriate circumstances, a tribunal considering a Paragraph 5 application might not be able at its discretion to contract out of this security provision. It seems unreasonable to fetter the freedom of the tribunal given the range of circumstances that may come before it. If the tribunal could not do this, it would limit the ability of parties to agree this but, for whatever reason, seek the approval of the tribunal for such an arrangement. This would fit with the direction of travel seen with the 1954 Act.

10.41 (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 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?*

41.1 Such revised provisions for alteration or removal should apply to all agreements under the Code whether made before or after the new Code is applied.

41.2 Where apparatus was installed outside the Code regime, it should not be protected by the Code until the Code is applied to it whether because the installer becomes licensed under the Code or because conditional criteria for the Code to apply (such as Paragraph 2's requirement for a written agreement or the various other points suggested in this response) are satisfied.

Consultation Paper – Part 6
Financial Awards Under the Code

10.42 (6.35) *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?

42.1 We understand the Consultation Paper to recognise "compensation" as recompense for loss as opposed to "consideration" as a price. Thus, this question is understood to be about the various current provisions (and possible future provisions) for compensation as distinct from the consideration addressed in questions 10.44 and 10.45. We hope the two have not been conflated in this question.

42.2 We are not really clear what is intended by the Consultation Paper's 6.33's proposal for a *single* entitlement for compensation and so find it difficult at this point to comment with precision. We wonder if this has been an undue reading across from the main compulsory purchase regime with its conventional emphasis on one-off payments rather than agreements for continuing relationships with rent (consideration being one of the hallmarks of a tenancy) and other periodic payments. In this context, any assumption of a full and final settlement accompanying the grant of the right would be a misunderstanding of how this sector operates.

42.3 With that uncertainty, we have to oppose a single entitlement thinking that compensation events may arise on a continuing basis.

42.4 As the Consultation Paper shows, there are various potential claimants and various potential heads of claim which may arise at various times in relation to the installation of the apparatus. It does not seem right that claiming in one capacity at one time under one head should absolutely preclude later potentially justifiable claims for other losses.

42.4 If the proposal is simply saying that a claimant should make all claims available to him at one time as part of one claim rather than potentially submitting multiple claims, that may be sensible and potentially avoid the risks of double counting. If that is to preclude other and later claims which could not be established at that earlier date or the cause for which had not arisen at that date then that seems wrong. Even so such an approach may require some practical care over any time limits that may be imposed.

42.5 This becomes the more critical if the Consultation Paper's proposal on consideration essentially opens up a compulsory world in which all those points, currently hidden in price, are then to be claimed by landowners and occupiers.

10.43 (10.36) *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.*

43.1 While strongly proposing that Code rights should not affect those who are not directly bound by them, insofar as they do then a payment regime should be available to them.

As this question is again understood to be about compensation, all loss or damage arising from a Code operator's actions as a Code operator should be the potential subject of a claim.

43.2 Again not intending to imply any easy, ready or sensible analogy with compulsory purchase, an equivalent to a Part I claim for those affected but who do not lose land should, in principle be available. The logic that drove the enactment of Part I of the Land Compensation Act 1973 could apply (with its limitation to physical factors) to communications apparatus but would obviously have to be proven by claimants. An obvious example of a case in this context would be the cutting of a 1,200 metre line through third party woodland on Jura to protect the link between masts that was discussed in answering question 10.14.

10.44 (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' views on the practicability of this approach, and on its practical and economic impact.

44.1 ***Please see our attached answer to this question on the assessment of payment for consideration.***

44.2 We reject the proposal outlined for a no-scheme market value basis, rather preferring to retain the historic understanding of "consideration" on a "fair and reasonable" basis – essentially, the value that would be expected in the market between the landowner and the operator when both are willing to effect the transaction in their circumstances, but excluding ransom value.

44.3 We do not see that the analysis derived from the recent decision in the non-Code case of *Bocardo* applies to the Code as currently drafted.

44.4 If that or the special assumption of a no-scheme approach (particularly one as broadly defined as is proposed) were applied it would be radically disruptive of an existing established system covering 50,000 masts and hundreds of thousands of miles of cable that has successfully delivered successive major communications revolutions. The consequence would be for landowners no longer to see apparatus as a benefit, but rather as an unwanted imposition. We do not see that the operators are actually prepared psychologically or in staff terms to handle the work associated with a move from a market basis to what would essentially be a compulsory purchase regime. The present regime with its essentially commercial approach has seen little litigation; the proposal could lead to more complexity, conflict and dispute.

44.5 As noted at points through this response, importing such an unreal assumption into what is necessarily a continuing relationship between the operator and landowner is then disruptive of sensible answers to the issues that then arise between them. The reality of looking for the value of the agreement in the market place maintains the logical fabric.

10.45 (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).*

45.1 We do not believe that statutory uplifts as an attempt to ameliorate the consequences of moving to a no-scheme valuation are likely to be effective. The sheer difference in values that the proposal is foreseen to create is such that the multipliers or uplifts would have to be very substantial to have any real world effect. The consequence of using the very large multipliers that would be needed would be to create considerable variations out of small differences. It is far better to stay with the present basis and, as necessary, make arrangements for inhibitions to its operation to be tackled.

45.2 These issues are discussed further in our detailed answer to 10.44.

10.46 (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?

46.1 We agree that the same fair and reasonable consideration basis regime that we propose should be applied equally to "linear obstacles". That is the logical consequence of bringing railways, canals and tramways into the generality of the code.

46.2 In any event, we share the views of the Consultation Paper in its paragraph 6.77 on the logical oddities left by the Court of Appeal's decision in *Geo Networks v Bridgewater*.

10.47 (10.83) *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?

47.1 This proposal should only be relevant where the payment made for the Code rights was (as in the example used by the Consultation Paper at this point) a capital one which is relatively rare. Overwhelmingly, the payments for Code rights are annual periodic payments, whether as rent or payment for easements and wayleaves. [redacted]

47.2 While (following the logic of that example) it may well be right for the proposed facility to exist it can be observed that, in principle, the original grantor would have received his payment under his agreement and the burden of the Code rights would then have been reflected in any subsequent transaction in the property. It may be the new holder of that interest in the land who is the person who should first be considered.

47.3 It appears that all this works much more easily where the original payment made is on the current commercial basis rather than the proposed one.

Consultation Paper – Part 7
Towards A Better Procedure

10.48 (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?

48.1 We strongly agree with this. The County Court (Sheriff Court in Scotland) is an inappropriate forum, being neither effective nor proportionate. We noted that enormous efforts had to be made in our capital city to ensure that *LIDI* was heard properly. Full account should be taken of Judge Hague's trenchant remarks on his role and the problem of the county court having jurisdiction in that first case under the 1984 Code to reach a court:

> "Presumably Parliament thought that cases under the Code would be relatively straightforward and could be accommodated in the normal county court listings without difficulty. The hearing before me extended over seven full days. The papers are contained in eight lever arch files, some of them quite bulky. As well as considering the several reports from each expert and hearing their oral evidence, I have read statements from seven other persons and four of them also gave oral evidence. Counsel made their submissions to me with economy, but their written outline submissions together covered 60 pages. Further, the valuation issues which I have considered are of the kind which are familiar to the Lands Tribunal, but not to most county court judges."

Few County Courts could have delivered the quality and thoroughness of judgement in such a case as he delivered in *LIDI*.

48.2 The scale of litigation is also illustrated by the application for a costs capping order in *Petursson v Hutchinson 3G* in which Hutchinson expected its overall costs to be over £250,000. The evident danger with such a forum as the County Court is that (as in *Cabletel v Brookwood Cemetery* and *Geo Networks v Bridgewater*) parties are then likely to feel compelled to appeal. It is known that Bridgewater then wished for leave to appeal to the Supreme Court and understood that the costs of that case may have been in the region of £500,000. A recent case concerning Arqiva is thought to have cost at least £100,000.

48.3 That this is not a new concern is supported by our understanding that when the Communications Bill was making its way through Parliament in 2003, efforts were made to persuade the then DTI to transfer jurisdiction for Code matters to the Lands Tribunal. However, as the Bill was running to a very tight timetable the government's reaction was there was no prospect of securing agreement to additional provisions while there had been so little use of the existing provisions that there was not enough evidence to prove that it did not work satisfactorily. Not only are there now signs of more cases as all markets are under greater pressure but there now seems general support for this change.

48.4 The variety of tribunals invoked at various parts of the Code simply reflects its conflation of several much older regimes in 1984 and earlier. That removes the need to perceive any unifying logic to procedures that have also over the years also included juries and the Railways and Canals Commission.

10.49 (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.

49.1 The disputes forum has to be effective, appropriate, proportionate and accessible. Experience of agricultural law shows that an appreciation of what may well be determined by an available forum (generally arbitration) leads parties to arrive at their answer by agreement. That is a very important role and indeed may be one measure of a disputes procedure – that it is sufficiently accessible and understood that it is not used. The behavioural issues in this sector are such that this is a fundamentally important consideration in putting the Code onto a sound basis for the future.

49.2 The discussion has not only to consider the grant of Code rights but also the settlement of disputes under Code agreements.

49.3 We do not believe that the courts with their associated costs, however appropriate, efficient and effective some (such as the Technology Court) may be, are proportionate to the quantum generally found in Code disputes. Their costs and procedure would make justice inaccessible to most cases, perhaps especially those where better behaviour needs to be encouraged very strongly.

49.4 However, rights in land are important, especially where they are to be imposed upon by statute. That leads us to the view that the body that is both available and appropriate, best meeting the tests, is what was the Lands Tribunal (with its continuing equivalents in Scotland and Northern Ireland).

49.5 It is an existing forum with substantial property and valuation skills. While some commending it have done so because it is the disputes forum for the main compulsory purchase regime, it carries many other responsibilities, including market value assessments for taxation and the issues and valuations involved when restrictive covenants are challenged. The Law Commission's report Easements, Covenants and Profits a Prendre has noted the Lands Tribunal's expertise.

49.6 The Lands Tribunal is suited to hearing such substantial cases over valuation issues and rights in land as can arise under the Code.

49.7 It operates with a variety of procedures according to the needs of the case in hand and the wishes of the parties and so simplified and written procedures are available as well as a hearing.

49.8 It carries the confidence of the property world.

49.9 The changes to the Tribunal in England and Wales lead to the question of the right level – First Tier or Upper Chamber. The real answer is for the Tribunal to ensure that it has the necessary pool of skilled members. The level may then matter less. It is noted that the First Tier (Lands Chamber) may not have powers to award costs.

49.10 Disputes under Code agreements should, by default, go to arbitration (unless the agreement expressly provides otherwise). Where the agreement makes no provision or the arbitrator cannot be agreed, either party should be able to require the President of any one of a range of professional bodies (on the model of the arbitral appointments referees under the Arbitration (Scotland) Act 2010) to appoint or nominate an arbitrator.

49.11 In considering the options offered in the consultation paper, arbitration seems much more widely understood as a basis than references to the party walls procedure which appears to mimic unnecessarily the probable process of those cases that would reach a dispute. Ordinarily, landowner and operator would each have advisers who should be negotiating with each other to achieve a settlement. Where necessary an arbitrator can then be appointed. That does not need the imposition of the formal structure of the Party Walls Act 1996.

49.12 There may be a case that arbitration might also be used for renewal of agreements in the same way that lease renewals under the Landlord and Tenant legislation can be referred to PACT, the Professional Arbitration on Court Terms facility offered by the Law Society and the RICS.

49.13 Such forums may allow greater expedition in determining cases. This is particularly important for operators anxious to meet commercial imperatives.

49.14 While current legal trends are for an initial use of ADR, we are sceptical of its virtues:
- for disputes with a relatively small quantum where it may simply add cost without an outcome
- since, as it is by definition not guaranteed to produce a final and binding outcome, it may simply offer an opportunity to delay reaching a hearing that will give a decision.

The critical need here is for a dispute process that encourages sensible and more active behaviour and that requires the prospect of swift answers.

10.50 (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?

50.1 No. It is very important for the credibility of the regime that the twin issues of the grant of rights and the payment for them (and indeed the other terms of the grant such as those relating to development) remain dealt with together. Operators can (perhaps understandably) lose interest in further discussions once they have achieved their commercial objective of installing their apparatus.

50.2 The two issues must not be separated unless both parties have so agreed.

50.3 We acknowledge that the Consultation Paper rightly rejects at its 7.29 the model of the Water Industry Act's s.159(4) procedure but do not believe the proposed two stage process suggested in 7.30 offers adequate assurance to those affected.

10.51 (7.32) *We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay.*

51.1 With a straightforward mechanism and a positive approach by the parties, simple commerciality should see an appropriate resolution of issues over the settling the terms of an agreement for the installation of apparatus.

51.2 Issues arising thereafter do need a more formal structure of risks or sanctions to stimulate a party who would otherwise be unreasonably dilatory.

10.52 (7.37) *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.

52.1 All reasonable costs incurred by the landowner in connection with the acquisition of the right from him should always be met in full by the operator as the acquirer imposing itself on the landowner.

52.2 Beyond those acquisition costs, the costs of disputes should generally follow the event as part of an appropriate regime to influence behaviour.

52.3 In saying that, we note that the First Tier (Lands Chamber) may not have the general power to award costs and acknowledge that that might remedy a potential landowner's (or indeed a very small operator's) concern as to costs that a major opponent might be willing to assume in a case, with the deterrent effect that could have on an individual. That would make the dispute forum more accessible and so more effective in casting its shadow forward to influence the behaviour of the parties. Such an approach could be mitigated by a practice of disallowing unnecessary costs. It is noted that the costs of opposing a CPO are not recoverable but in that case there is prior public scrutiny of the development merits of the proposal, while under the Code, Paragraph 5 is the whole of the procedure and so it is reasonable that costs at that stage be met.

10.53 (7.32) *We also ask consultees whether different rules for costs are needed depending upon the type of dispute.*

53.1 Developing the thinking in answering the previous question, it may be reasonable for the first Paragraph 5 type reference to be deemed to be part of the acquisition costs with the usual judicial approach to costs applying thereafter. That too might require some means for the operator to have costs taxed to remove any incentive for unwarranted action or 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?

54.1 We agree entirely that notice procedures under the Code should be consistent and with standard rules as to their service. Again, it is a measure of the Code's composite history that there is such a variety today. Such a change would be a great improvement for users of the operation of the Code.

10.55 *Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how?*

55.1 We have no comment on the forms of notices available to operators.

55.2 However, with the widespread ignorance of the Code, the operator should serve on the landowner a clear and accurate summary of the effects of the Code on a landowner. Indeed (and as with the present procedure for contracting out of Part 2 of the 1954 Act), having that statement, if identified in respect of the specific apparatus concerned, signed and returned by the landowner might be an effective way of affirming that the agreement is subject to Code rights.

55.3 It might also be prudent for the operator to protect itself by using the initial notice to prompt the landowner that he may wish to take advice on the matter as would be conventional in the acquisition of any other legal right affecting property. It is thought that perhaps 60 per cent of mast owners are unadvised.

55.4 We agree it is unrealistic to require landowners to use standard forms of notice. However, their notices must be clear as to their intent for them to be effective.

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

56.1 All communications by operators should be certified as being in plain English and accompanied by a relevant information pack. Landowners should be clearly told that the notice could have significant consequences for their property and their use of it so it they may wish to act swiftly to take such advice as they choose before responding.

10.57 (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.*

57.1 With the great variety of rights created by the agreements that can be governed by the Code, we doubt that standard agreements are desirable.

57.2 However, we believe that the Code could usefully provide a checklist of points that should be reviewed when the dispute forum is considering the terms on which an agreement is to be imposed. They would then in turn influence parties drafting agreements but that could be done more directly by requiring consideration of the points.

57.3 More generally, it appears helpful for there to be default requirements for an agreement that allows the installation of equipment (current para 2(1)(b)) as it is this that is most likely to create a continuing relationship between the operator and the landowner affecting the land.

57.4 We suggest that to be an agreement protected for the purposes of the present paragraph 2(1)(b) of the Code, the agreement should:

- be in writing
- invoke the Code
- provide for its term
- provide for consideration, its payment and review
- include necessary conditions regarding access, maintenance, sub-letting, assignment and sharing use of the apparatus
- provide for disputes to be referred to arbitration.

57.5 Where an agreement is so imposed, it is for the dispute forum to determine the terms and conditions for its order. It is suggested that they should, as a minimum, include provisions on the following terms:

- a fixed term for the agreement (the electricity industry has 15 year terms for its Necessary Wayleaves but it would be for the tribunal to determine the term according to the case)
- during that term, protecting the tenant's interests in the equipment installed including access for maintenance
- recognition of liability for issues arising from the apparatus and its use, potentially including insurance for this
- the consideration for the agreement, whether rent for tenancy and the payment for a wayleave or other arrangement
- provision for review of that consideration at regular intervals (and, in the absence of other agreement, the default presumption to be on a market value basis)
- recourse to dispute resolution
- a break clause in the operator's favour if the site becomes impossible to operate for technical reasons but not other
- assignment of the lease (and, in the absence of agreement, prohibiting it)
- sub-letting and site sharing. The arrangements between operators for this now frequently bypass those envisaged by the drafting of most mast leases and so many landowners perceive no benefit where more than one operator now shares a single mast.

It is suggested these be viewed as standard rather than mandatory so as to allow the court direction as to the circumstances before it in varying the use of the above headings or supplementing them.

Consultation Paper – Part 8
Interaction with Other Regimes

10.58 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?

58.1 There is a major practical problem over the renewal of Code agreements which does not seem to be touched in any of the other questions. The issues of the interaction of Code procedures with Part 2 of the 1954 Act in England and Wales are but a part of that problem.

58.2 We agree that where an agreement clearly invokes Code security, it should be automatically excluded from Part 2 of the Landlord and Tenant Act 1954. That would simplify the security regime and the procedures for the parties but these still then need further reform.

58.3 One of the greatest areas of confusion about agreements under the Code is the interaction with the provisions of the Landlord and Tenant Act 1954 giving the contestable right to renew business leases in England and Wales – there is no equivalent legislation in Scotland. Where this applies there are then two structures for the tenant's security of tenure and so two mechanisms for renewal: one for the Code agreement and another for the lease with the result that:

- where the parties have contracted out of the right to renew, the Code operator can still impose itself again on the landowner
- the operator can apply for renewal even if Code powers have lapsed
- most commonly, the operator has both mechanisms and even if the court were to award vacant possession under the 1954 Act, the operator can use Code powers to remain under a new agreement.

58.4 While easements and wayleaves are outside the 1954 Act, the practical operation of the Code poses its own problems. Members report difficulties in practice in securing new agreements for them (and reviewing their terms) as Code operators, having served their counter-notice, then often do nothing, appearing simply to rely on the possession they have. Only court action with its costs can break this inertia.

58.5 Whether for leases or other interests, there is an important practical difference here compared with the original grant of the right. The operator wishing to stay has its equipment installed, operational and earning money. The one key incentive given by the power to deny access no longer exists and the operator has no urgent or practical reason to co-operate, liaise or negotiate with the owner or bring the issues that may exist to any dispute forum if it does not want to. All too often that appears to be the case.

58.6 With an agreement for a fixed term, perhaps the most obvious resolution to this is to provide a single mechanism to apply on the expiry of an agreement under the Code. For it to work, that mechanism must, in this instance, be available to either party so that the operator cannot simply let the issue lie, knowing the equipment is in place. It may often be in the landowner's interest to ensure that a fresh agreement on current terms is put in place when

faced with inertia by the operator. That mechanism would otherwise be a repetition of the initial process by which the agreement was granted.

58.7 Logically, this means disapplying Part 2 of the 1954 Act from agreements under the Code so that a common regime applies to all Code agreements, wherever they are in the United Kingdom. If the renewal is really to be seen for what it is, as the grant of a new lease albeit for equipment already in situ, then the grounds given to the landlord by the 1954 Act for resisting renewal are not necessarily appropriate – and have not been suggested as relevant to the consideration of the original grant. Were the landowner to argue against renewal, he would make his case on the arguments that were pertinent to him, whether they were listed under the 1954 Act or not.

58.8 The corollary of this is that as the agreement is expected to be for a fixed term, the agreement comes to an end unless renewed. Under basic land law, the equipment (unless perhaps if over-sailing) is likely as a fixture to belong to the land and so if left become the landowner's on the expiry of the agreement. This is recognised by the present Code and, of itself, this could become a powerful driver for the operator to promote a new agreement, but it might well be sensible for the Code to protect the operator's interest in the equipment once action had been taken by either party, but make that subject to the process of renewal going forward.

58.9 In this context, we note that the Necessary Wayleave procedure in the electricity sector appears to work quite well and offers a possible model for a solution. There, the apparatus must be removed unless the operator applies for a wayleave within a timetable. That gives the operator an incentive to act. If the owner does not object to the grant of a necessary wayleave, the next step is an application to the Tribunal to fix the payment terms. The only practical problem found with it (which can, of course, be avoided here) is that the payment is not then back-dated.

58.10 It is a logical consequence of this proposal that if an agreement is not adequately expressed in terms of being covered by the Code then Part 2 of the 1954 Act would then apply in England and Wales – as a default regime – and Code procedures do not. That makes it very important that the test for the application of the Code is clear in practice.

58.11 Excluding Part 2 of the 1954 Act from Code agreements would give a common regime for security for all Code agreements across the United Kingdom.

10.59 (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.*

Do consultees agree?

59.1 We have not understood why Code rights that would be registered but for the Code, are not required to be registered and so support the proposal here so that the existence of those agreements is then evident to all interested in the property. The legal uncertainty

analysed in this part of the Consultation Paper as to the true status of rights that have not been registered when they otherwise should be needs resolving.

59.2 We are not clear that the hybrid situation outlined as a result in the Consultation Paper's 8.32 is necessarily the right answer. Where a Code right that should in future be registered is not registered, then it should only bind the party to the agreement and not anyone else not on notice. It is the Code operator's obligation to register leases of more than seven years and easements. Failure to do that should carry a sanction, perhaps after an initial transitional period of grace for systems to be put in place. The alternative is that registration will be required but there will be no reason to do it and so it may, in practice, be largely overlooked – possibly the least satisfactory outcome.

59.3 We are concerned to hear that where some Code agreements are registered this has been with the consideration blanked out. It may be that is possible because of the current exclusion of registration but in the large context of a public registry and the benefits of wider market knowledge this would be reprehensible if true.

59.4 We understand the position in Scotland to be sufficiently similar for the same answer to apply. The main exception is that if Scottish leases of 20 years or less do not need to be registered that would mean most mast leases would not be registered when they would be in England and Wales, but that would be consistent with each jurisdiction's registration regime.

59.5 We are conscious that issues can arise where the registration is inaccurate and provision should be made for rectification.

59.6 Where, as with a short lease, the agreement is not required to be registered it might still be good practice to encourage its entry on the relevant local land charges register.

Consultation Paper – Part 9
The Electronic Communications Code (Conditions and Restrictions) Regulations 2003

10.60 (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;
(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?

60.1 We are aware that Code operators have failed but have no knowledge that these funds that are supposed to exist do exist, are adequate or have ever been called on. We note the reference in footnote 12 to the Consultation Paper's 9.11 to one case of enforcement action by Ofcom.

60.2 In practice, operators resist requests for reinstatement bonds from landowners and have been successful in doing so even though they are usual in wind farm agreements.

60.3 Noting the wording of (2) of the Paper's 9.8 our concern is to ensure that a defaulting operator does not leave a landowner with an expensive liability. It will cost money to remove a redundant mast or a cable – perhaps £15-20,000. Until it is removed, the apparatus may attract empty rates. As noted elsewhere in our response, cables can cause other problems. We are anxious to understand that Regulation 16(10) does actually cover that situation.

60.4 Code operators should be required to demonstrate that sufficient funds are available and ring-fenced to at least to ensure the decommissioning and removal of the apparatus.

60.5 Again, the point should be made that to an extent such issues can be reflected in the unencumbered market price for an agreement, but are quite expressly not covered if the special assumption of a no-scheme world is applied to that valuation.

10.61 (9.39) *We ask consultees for their views on the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. Is any amendment required?*

61.1 Planning – The issues discussed in the light of Regulation 3(1|) touch on the issue of the weighing of the possible wider prejudice where an operator wishes to install apparatus.

61.2 Depth of Underground Installation – Regulation 3(2) is important in an agricultural context both for the landowner to retain freedom of operations and as a matter of practicality for the operator.

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LAW COMMISSION CONSULTATION

ELECTRONIC COMMUNICATIONS CODE REVIEW

RESPONSE BY THE CENTRAL ASSOCIATION OF AGRICULTURAL VALUERS

PART 3 - BASIS FOR PAYMENT FOR RIGHTS GOVERNED BY THE CODE

October 2012

1. **Summary**
2. **Agreement and Market Value**
3. **The Current Basis – "Consideration"**
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Annexes

A. What is Market Value?
B. Fair Value
C. Communications Masts – Market Rents and Rent Reviews
D. Communications Masts – Capital Values
E. Cables – Market Payments

The Question

At its paragraphs 6.73 and 10.44, the Law Commission's Consultation Paper on the review of the Electronic Communications Code asks the question:

> *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.*

This paper forms part of the response of the Central Association of Agricultural Valuers (CAAV) to that Consultation Paper and specifically responds to the question at 10.44 and also the related question at 10.45.

As much as any of the other questions, this is where legal analysis meets and has practical consequences and economic effects which we have explored in this response. As with all other matters in our response to the Consultation Paper, we are very happy to review these matters further with the Law Commission if this would be of assistance.

The other questions in the Consultation Paper are answered in a separate section of the CAAV's overall response.

1. Summary

1.1 This question is about consideration for rights granted and not about compensation.

1.2 The fundamental and longstanding principle of the Code is and should be that Code rights are presumed to be given by agreement. The natural corollary of that is that payment should be assessed on the basis of the value it would be expected to have in the market place – in this case, an annual value rather than a capital value. That is almost tautological as the definitions of market value, hammered out over the centuries (and used here at this stage without capital letters), assume willing, informed parties unconstrained but committed to the transaction. Market value is the valuation consequence of an agreement on willing terms. It is what the Code's present requirement for "fair and reasonable" terms implies. It would be what an informed observer would reasonably expect to be agreed at the relevant date between parties, willing but not over-eager, taking into account all relevant factors. An agreement that, when taken in the round, is not at market value is not a fair agreement.

1.3 With the very, very many existing agreements for masts, cables and other apparatus and the long history of the successful development of successive waves of communications systems, changing to any other basis (such as that suggested) would be destabilising and likely to provoke conflict in what has generally worked well and consensually with little litigation.

1.4 The presumptions of agreement and value in the market exclude ransom value in this transaction as the seller is presumed to be willing to transact.

1.5 Requiring the special assumption that the proposal for the apparatus itself is to be disregarded makes the willing seller into a forced seller, so moving away from the core concept of market value. Not only does it look to remove much of the rental value for masts on agricultural land, but it also appears to create significant problems in identifying the alternative use to be presumed for many roof-top locations. No amount of adjusting the results would be as proper as simply using unconstrained market value from the beginning.

1.6 Such a reduced payment is not compatible with an agreement that conveys full Code rights. Were that to be the basis that is imposed, then all agreements paid for on that basis should not be subject to the operators' powers currently in paragraphs 20 and 21. Instead, they should include the equivalent of lift and shift clauses during the currency of the agreement and no power to stay beyond the agreed term.

1.7 While it is understood that a case has been put forward that the Supreme Court's majority decision in *Star Energy v Bocardo* could be applied to the present Code to change its long understood basis for valuation to a no-scheme basis, that is not accepted. As this is as yet untested for the Code, this is a speculative interpretation which it is considered anyway fails on grounds of basic construction of the present Code which (by contrast to the Mines (Working Facilities and Support) Acts) does make specific references to the main compulsory purchase compensation legislation and does expressly distinguish between "consideration" and "compensation". The Code review is though not an opportunity for that retrospective speculative interpretation to be tested, but rather the chance to review and recommend the right basis for the future – in our view, the present understanding and so the value in the market between the parties is that right basis.

1.8 The proposed change is seen as likely to lead landowners to view communications apparatus, especially masts, no longer as a benefit, but as a burden and so incline them to resist its imposition both when it is proposed (and so through the planning system and becoming more sensitive to the public health arguments) and in seeking such compensation as the revised basis may allow, together with full compensation under all the other heads of claim allowed under compulsory purchase law beyond the value of land taken. We note that compulsory purchase has seen much more litigation and dispute than has happened under the Code. We doubt that operators, who have been reducing their costs in all parts of their business, are staffed to handle this outcome. The widely reported inability of major operators to handle negotiations within agreements and renewals of agreements in a practical way makes this a serious consideration.

1.9 In the context of the Code as proposed legislation, it may not be irrelevant to note that the European Union's State Aid rules expect transactions to be at market value if they are to withstand challenge as a distortion of competition.

2. Agreement and Market Value

2.1 Introduction
2.2 A Technical Definition
2.3 A Statutory Definition of Market Value
2.4 The Actual Parties
2.5 No Further Assumptions
2.6 Ransom Value
2.7 Fair Value
2.8 The Wayleave Approach – Compensation for Benefit Taken Not Loss
2.9 EU Issues

2.1 Introduction

2.1.1 Code operators are allowed rights over private property by agreement. If no agreement is forthcoming, the court can impose those rights on the basis of an assumed agreement on fair and reasonable terms. This is fundamentally different in its assumptions and consequences from the main regime for compulsory purchase. The Code's provisions on these terms, including payment, are directed to the terms that a disputes forum would impose but that then does, in practice, bear on the negotiations between the parties.

2.1.2 Market value is, by the various definitions used for it, the valuation expression of an unconstrained agreement, neutral between the parties. It is the expectation as to what willing parties in a competitive framework would agree. The underlying idea can best be seen as a common law concept which then manifests itself it in various more precise definitions for particular purposes but all with that basic common theme in this context. This is illustrated in the following exploration of the valuation standards for Market Value and Fair Value, a typical approach under statute, the compensatory or restitution basis developed by case law for wayleaves and also the definition for EU State Aid rules.

2,2 A Technical Definition

2.2.1 The formal definition of Market Value (with the parallel Market Rental Value applying it to rental value) reads:

> "The estimated amount for which the asset should exchange on the valuation date between a willing buyer and a willing seller in an arm's-length transaction after

proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion."
(European Valuation Standards 2012, EVS 1)

2.2.2 The attached Annexe A explores this technical definition in more detail. It represents and summarises the accumulated conclusions of judicial decisions and professional exegesis over a great many years. As will be seen, it may for some practical purposes sometimes be a little too idealised and a little too exacting in its assumptions, which leads to consideration of Fair Value.

2.3 A Statutory Definition of Market Value

2.3.1 Before that, it is instructive to consider that statute defines market value for a variety of purposes. One example is in s.160 of the Inheritance Tax Act 1984 which reads:

> "Except as otherwise provided by this Act, the value at any time of any property shall for the purposes of this Act be the price which the property might reasonably be expected to fetch if sold in the open market at that time; but that price shall not be assumed to be reduced on the ground that the whole property is to be placed on the market at one and the same time."

2.3.2 The tax case, *IRC v Clay*, crystallised the spirit of market value, albeit in the days when the definition turned on the willing seller:

> "the seller is not to be assumed to be making a forced sale at any price he can get, however low. He must be willing to sell, not demanding compensation for a forced sale, but he is not required to exclude the principal bidder from his market, because that principal wants the house more than anyone else and will therefore give more for it."

2.3.3 The decision in *Lady Fox* observed that the sale was a hypothetical one in the open market and described the hypothetical vendor as

> "anonymous but reasonable… prudent man of business, negotiating seriously without giving the impression of being over anxious or unduly reluctant."

The hypothetical purchaser was described as

> "slightly less anonymous… embodies whatever was actually the demand for that property at the relevant time."

2.4 The Actual Parties

2.4.1 The Inheritance Tax definition has led to litigation, most importantly in the agricultural tenancy case, *Walton*. Agricultural tenancy agreements almost always forbid assignment, yet interests in them may be valuable assets for assessing Inheritance Tax. In the absence of a market, the assumption is made of a hypothetical sale to a purchaser who would be bidding for a non-assignable tenancy. In *Walton*, the leading case on this, the House of Lords made it clear that this hypothetical sale is one that is in the real world with the real world characteristics of the landlord and the other real parties in play. The relevance of this is that the tighter formal definition of Market Value is one with hypothetical parties yet *Walton*, applying the s.160 market value definition, made it a common sense practical valuation with the parties that existed in their circumstances.

2.4.2 Compulsory purchase has followed a very similar path (albeit constrained by its statutory special assumptions, most particularly the no-scheme assumption). The place of the

purchaser was considered in the compulsory purchase case, *Raja Vyricheria Narayana Gajapatiraju v Revenue Divisional Officer Vizagapatan* ("the Indian Case"):

> "… upon the question of the value of the potentiality where there is only one possible purchaser, there are some authorities to which their Lordships will have to refer. But dealing with the matter apart from authority it would seem that the value should be the sum which the arbitrator estimates a willing purchaser will pay and not what a purchaser will pay under compulsion. It was contended on behalf of the respondent that, at an auction where there is only one possible purchaser of the potentiality, the bidding will only rise above the "poramboke" [roughly, bare land] value sufficiently to enable the land to be knocked down to that purchaser. But if the potentiality is of value to the vendor if there happen to be two or more possible purchasers of it, it is difficult to see why he should be willing to part with it for nothing merely because there is one purchaser. To compel him to do so is to treat him as a vendor parting with his land under compulsion and not as a willing vendor. The fact is that the only possible purchaser of a potentiality is usually quite willing to pay for it."

2.4.3 It can be taken as the common law consequence of an agreement.

2.5 No Further Assumptions

2.5.1 Market value, pure and simple, does not require any further assumptions beyond those in its definition. Additional assumptions may lead to different values – as most obviously in the case of forced sale value in which the period for marketing is constrained and the seller is compelled rather than willing.

2.5.2 Market value is not seen as entitling the landlord to a share of the tenant's turnover or profit any more than it does for a shop, house, or farm rent. Market value is simply where the aspirations of hypothetical willing parties to a transaction coincide. The commerciality of the operator's need will frame its approach as also will other market settlements. Equally, the landlord's approach will bear his economics and other market settlements in mind, alongside any hope value that the market may see in the site.

2.5.3 Imposing the special assumption of excluding the proposal in question would still be a market value but not the unencumbered one that would result from an agreement. It was seen in *London and India Docks* that taking no account of the proposal would commonly mean that:

> "… the vendor or grantor would sell or let at only a nominal or very small figure, without regard to the value to the purchaser or grantee. In my view, on that basis he would plainly be a driven or forced seller or grantor and not a willing one."

2.6 Ransom Value

2.6.1 In considering this, we have been anxious to carry forward the present understanding that the "fair and reasonable" basis should exclude ransom value such as might be particularly conceivable as significant for a cable requiring a particular access route – in *London and India Docks*, this was seen as excluding a share of the income derived by the operator. That is seen as necessarily flowing from the principle of agreement that has long informed the Code since, as noted in *Logan v Scottish Water*, ransom value would only be relevant if the seller had a power of veto. The presumption of fair and reasonable agreement removes that veto and so the question of ransom value. Each party though still has its bargaining position within that framework of commitment to the transaction.

2.6.2 Such ransom value was expressly excluded in the analysis in *London and India Docks*. Analysis would see this excluding the ransom value for the project rather than any other ransom value that the land might independently possess (see, for example *Chapman, Lowry & Puttick Ltd v Chichester District Council* where the site could unlock other non-statutory projects).

2.6.3 As noted in *Re Lucas & Chesterfield Gas and Water Board* (as cited by Lord Brown in *Bocardo*), it would not in the context of a reservoir site exclude the situation:

> "… when the special value exists also for other possible purchasers, so that there is, so to speak, a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration … [if] its situation and peculiarities create a market for it as a reservoir site for which other possible bidders exist ...".

2.6.4 Thus, the basic approach to market value is one which excludes specific ransom value.

2.7 Fair Value

2.7.1 Valuation standards have also developed the concept of Fair Value alongside the formal definition of Market Value. This is more relaxed in its assumptions and considers the value in the circumstances between the parties just as the House of Lords found could be done with the s.160 definition of market value. Again, it is reviewed in more detail in Annexe B.

2.7.2 The formal definition reads

> "The price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between willing market participants possessing full knowledge of all the relevant facts, making their decision in accordance with their respective objectives."
> (EVS 20912, EVS2)

2.7.3 EVS 2012 opens its commentary on fair value (in EVS 2) saying:

> "Fair Value may generally be used as a basis of valuation for real estate as between specific participants in an actual or potential transaction, rather than assuming the wider marketplace of possible bidders."

2.7.4 This means that there are many situations where fair value is a useful concept by which to address the value of a property. Just as it can be used for specific situations such as landlord and tenant, so it can be used between Code operator and landowner.

2.7.5 Similarly, the International Valuation Standards Council (International Valuation Standards 2011 and adopted by the RICS) has defined fair value as:

> "The estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties that reflects the respective interests of those parties".

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

2.7.7 Fair Value also sits well with the approach by HHJ Hague in *LIDI* as reported in the Consultation Paper's 6.47 as it is a subjective assessment between the parties rather than the objective (even platonic) approach required by the assumptions for the concept of Market Value.

2.7.8 In the interests of clarity, there are sub-species of Fair Value grouped together as Special Value which consider ransom and marriage value situations but these are not inherent in the underlying looser concept of Fair Value between the parties.

2.8 The Wayleave Approach – Compensation for Benefit Taken Not Loss

2.8.1 In *Bocardo,* Lord Walker suggested that the parties had by their agreement on the basis of valuation excluded the approach to assessing wayleave payments reviewed in *Field Common Ltd v Elmbridge Borough Council*, referring to that High Court decision as a "comprehensive and scholarly judgment". Like *Bocardo*, this is a wayleave case and much of the following few paragraphs is drawn from it. Describing the law in this area as "developing", this decision reviewed the measure of damages as what would be paid on a hypothetical negotiation between the parties for a grant of the necessary rights – that being the alternative to compensation for loss.

2.8.2 It had been recognised by the House of Lords in *Attorney General v Blake* that "there are commonplace situations where a strict application of the conventional principle [compensation for loss] would not do justice to the parties" in which case it is "measured by the benefit received" by the user. The word "compensatory" was historically used in the wayleave cases in the distinct sense that the owner was entitled to payment for the use of land even where he had not suffered loss from the use. This was not just a nineteenth century principle, but used in 1963 where a floating dock had not been removed:

> "The test of the measures of damages is not what the plaintiffs have lost, but what benefit the defendant obtained by having use of the berth." (*Penarth Dock Engineering Co Ltd v Pounds*)

This was applied in *Swordheath Properties Ltd v Talbot* while cases about wrongful detention of property (rather than trespass) showed it was the full market rate of hire that was due, not the profit made by the user (*Strand Electric and Engineering Co Ltd v Brisford Entertainment Ltd*). That basis would also be applied to the assessment of damages in lieu of an injunction (*Jaggard v Sayer* and *Bracewell v Appleby* – both cases resulting in permanent rights for the user). The wayleave and injunction strands of analysis were brought together in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd.*

2.8.3 This alternative basis was expressly identified as such by the House of Lords in *Ministry of Defence v Ashman*, using "restitution" as a word in juxtaposition to "damages" The point was made in *Inverugie Investments Ltd v Hackett* that:

> "It depends how widely one defines the "loss" the plaintiff has suffered".

2.8.4 The common thread in the application of these cases is that the compensatory value of the benefit is assessed as what would be expected to be the result of a hypothetical negotiation for the right in question as the most obvious means to identify the reasonable payment for the benefit. The analysis in *Field Common* made it clear that the issue is the value of the benefit to the individual, not that between hypothetical parties, but that benefit is distinguished from "the fruits of the enjoyment". It is for the use, not the profit – what the user would pay, not what it would earn.

2.9 EU Issues

2.9.1 Alongside these British approaches, the European Union uses market value as the basis for its rules on regulating potential state aid cases in the interests of fair competition.

2.9.2 In this:

> "Market value shall mean the price at which land and buildings could be sold under private contract between a willing seller and an arm's length buyer on the date of valuation, it being assumed that the property is publicly exposed to the market, that market conditions permit orderly disposal and that a normal period, having regard to the nature of the property, is available for the negotiation of the sale."
> *Commission Communication on State aid elements in sales of land and buildings by public authorities II.2.(a) (last paragraph))*

3. The Current Basis – "Consideration"

3.1 Introduction
3.2 The History of Consideration
3.3 Judicial Consideration of "Consideration"
3.4 The *Bocardo* Critique
3.4.1 Introduction
3.4.2 The *Bocardo* Decision
3.4.3 Untested for the Code
3.4.4 A Response
3.4.5 A Further Point
3.4.6 Lord Clarke's Arguments

3.1 Introduction

3.1.1 The payment for the Code right is either:

- that which has been agreed between the parties who are thus assumed to be content with it or
- assessed on the "fair and reasonable" terms in the deemed agreement imposed by the Court under paragraph 5. In the shorthand of the Code, this is called "consideration".

That latter basis is expressly defined by paragraph 7(1)(a) which requires the court to specify:

> "such terms with respect to the payment of consideration in respect of the giving of the agreement, or the exercise of rights to which the order relates, as it appears to the court would have been fair and reasonable if the agreement had been given willingly and subject to the other provisions of the order".

3.1.2 Paragraph 7(1)(b) deals separately with the matter of "compensation" which is due for "any loss or damage sustained by them [persons bound by paragraph 2] in consequence of the exercise of those rights".

3.1.3 Paragraph 7(1)(a) is the current formulation of a principle that has long applied in this sector, particularly to private land as distinct from highways, and on which the present communications infrastructure, notably in recent years masts, has developed. Its principle has been the one that has seen the successful development of two major universal communications systems – telephony and mobile communications.

3.1.4 One very striking point about communications apparatus is that, by contrast to compulsory purchase, there has been very little litigation over the payments to be made for it. Whole texts have been written and rewritten on compulsory purchase and compensation – the CAAV's paper "*Telecommunications Masts*" (2010) still appears to be the only published text focussed on the Code and few other texts do more than note it in passing. Perhaps only two cases have directly considered the assessment of consideration: *London and India Docks Investments v Mercury* (*LIDI*) and *Cabletel v Brookwood Cemetery*. The decisions in *Geo Networks v Bridgewater* did not take the opportunity to review what "consideration" might be had it been found to apply.

3.1.5 One moral in this is that if Code rights are paid for on a basis that is "fair and reasonable" with no other limitations qualifying the basis, that is not only consistent with free agreement but innately associated with it. It is the widely understood basis of market value as what freely negotiating parties would be expected to agree. So far as a Code right is an imposition, it has been paid for.

3.1.6 By contrast, compulsory purchase's compensation has seen vastly greater direct use of statutory rights and litigation at all levels, partly because it is an imposition which – for policy reasons - is not properly paid for. It was the knowledge that the acquirer was then exploiting the property's market value that was one factor in the political potency of the Crichel Down case as a cause célèbre and the subsequent rules.

3.2 The History of Consideration

3.2.1 It is worth a brief review of the history as far as we have been able to establish it.

3.2.2 The expectation of the Admiralty (Signal Stations) Act 1815 – enacted on Napoleon's escape from Elba - was that where private land was used (whether by purchase or rent) for infrastructure for semaphore purposes (referred to as signal or telegraph stations), the parties were to treat and agree, with disputes referable for determination – at that time by jury. Part of the background to this approach may have been that the previous semaphore line from London to Deal had been achieved in 1795 entirely by negotiation with no compulsory powers. It is noteworthy that these were urgent war-time works, reliant on specific sites and sight lines and yet relied on agreement.

3.2.3 Thereafter, electric telegraphs, as essentially linear ground-based systems, then seem to have developed along the lines of railways, canals and highways (all largely the creation of statute) rather than crossing the generality of private landowners' property.

3.2.4 Telephony then began to develop in major cities from the mid-1870s. The case *Attorney-General v Edison* found that the Telegraph Acts did apply to this previously unforeseen technology. Of necessity, telephony required not only long trunk lines (like the electric telegraph) but also local networks crossing private property, including private property it did not benefit.

3.2.5 The regime for private land was formalised by the Telegraph Act 1892 as the first (and arguably belated) response to the need to develop a network of lines, not only throughout the country (as for the semaphore and electric telegraphs), but directly to (and so across) private properties, this being done by a number of private companies.

3.2.6 As the network began to spread across rural Britain in the first decade of the twentieth century, so a payment of one shilling per pole on private land seems to have established itself as the norm, each ordinary pole contributing to the network. In a non-inflationary age, it is assumed that no thought was given in agreements to its review and so the value of this has generally remained unchanged but seriously reduced by the last seventy years of inflation (its value might now be equivalent to some £8). However, its origins lie in a fair value, not a compensation value.

3.2.7 This basis continued to apply to wireless masts as they were developed in the twentieth century.

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

3.2.9 Agreements for masts have become more contentious as the mobile communications market became mature and the emphasis of operators shifted from expansion to cost control. It may be that further technologies will lead to a new expansion.

3.2.10 The nature of the markets in masts is reviewed in Annexes C and D.

3.2.11 The same regime has seen the development of cable networks and then fibre optic cable with its greater ability to carry communications. The nature of the market for cable is considered in Annexe E where operators have had to operate in a framework where the statutory requirement for fair and reasonable consideration has a practical bearing but the market is, for reasons that may be technological as well as behavioural, much more opaque. Nonetheless, a failure to offer payments seen as "fair and reasonable" has seen schemes founder until better payments were offered.

3.2.12 If the grant of Code rights was accompanied by a prohibition on confidentiality clauses in agreements, the market would be more evident and transparent – a public benefit for a statutory privilege.

3.3 Judicial Consideration of "Consideration"

3.3.1 The meaning of "consideration" had been relatively little tested in the courts but cases such as *London and India Docks* and *Brookwood Cemetery* now point to it meaning a market value excluding any ransom element. In *London and India Docks* (affirmed by the Court of Appeal in *Brookwood Cemetery*), the judge analysed the approach to be taken in applying paragraph 7(1)(a):

- while "given willingly" applied to the grantor, a grantee willing to take the agreement on "fair and reasonable" terms had also to be assumed
- what was fair and reasonable had to be considered between the actual parties, not hypothetical ones
- the amount of the payment was obviously critical to this, as whether the grantor was willing would depend on it.

- that involves "an element of subjective judicial opinion, for there can be no proof or objective determination of what is "fair and reasonable" ".
- this was therefore not the objective assessment of market value and so the assessment would not be "the same as what the result in the market would be if the grant had been given willingly"
- however, the market value was the "obvious starting point; and in most cases it will come to the same thing as what is "fair and reasonable", because prima facie it would be neither fair nor reasonable for the grantor to receive less than he would in the market or for the grantee to have to pay more than he would in the market"
- there might be circumstances "of which the absence of any real market may be one, in which a judge could properly conclude that what the evidence may point to as being the likely market result is not a result which is "fair and reasonable"."

3.3.2 On this basis, he excluded from the assessment:

- the ransom strip value which had been argued on the basis of a share of profits arising
- any consequent uplift in the development value of the property as that was only right where there was purchase and the benefit to the developer could be quantified.

Deeming the nearest analogy to the agreement required to be a wayleave (the problem of understanding what a Code agreement is in other terms) and then looking for a wayleave rent, the judge determined that the payment:

> "should in my view reflect the anticipated use of the right and thus its importance and the value to the grantee".

3.3.3 In the circumstances, he found he that could only work from the evidence of comparable transactions.

3.3.4 Both parties in *Brookwood Cemetery* followed this approach (including the distinction between "consideration" and "compensation") and comments by the Court of Appeal added to the exclusion of ransom value, the exclusion of other elements of value in comparable transactions which reflected the concession by the grantee of "a high value for pragmatic reasons" such as:

- time constraints
- the expense or uncertainty of litigation
- the small size of the works and any payment.

3.3.5 While ready comparison has been made with the main compensation regime for compulsory purchase:

- the judge in *London and India Docks* held the principle of compulsory purchase did not apply under the Code, not only because they had not been incorporated, but because the principles to be used were those derived from the express use of the phrases "given willingly" and "fair and reasonable".
- Code agreements can be distinguished in their practical effect from almost all compulsory acquisitions. General compulsory purchase involves the acquisition of a freehold interest in land rather than carving out a leasehold interest. Whereas with gas and water, the compulsory purchase is of an easement that is for a one-off payment rather than for recurrent payments – only electricity wayleaves resemble this. Agreements under the Code, whether leases, easements, wayleaves or longer term licences, establish continuing long term relationships between the parties making it sensible for the agreement to be as near to a commercial arrangement as is possible.

3.3.6 The exclusion of ransom value directly addresses the concern that for linear services such as cables (the subject of both *London and India Docks* and *Brookwood Cemetery*) landowners along the projected line might be seen to have an unreasonably strong position.

3.4 The *Bocardo* Critique

3.4.1 Introduction

3.4.1.1 The analysis in *LIDI* has come under criticism in the wake of the Supreme Court decision in *Star Energy Weald Basin Ltd v Bocardo* which concerned an exploration shaft for oil (a nationalised asset) deep under Mohammed Al Fayed's Bocardo Estate in Surrey. This was held to require a wayleave for which a payment should be made.

3.4.1.2 That case was decided by a majority of 4 to 1 though with members of the majority giving differing analyses. Parts of the decision concern analysis of the "fair and reasonable" provision of Mines (Working Facilities and Support) Acts. It has since been suggested that this interpretation can be read across to analysis of the current Code in a way that would import a no-scheme approach to the assessment of the payment for a Code right.

3.4.2 The *Bocardo* Decision

3.4.2.1 In bare summary, the Supreme Court held that compulsory purchase principles applied to the payment for the statutory right to drill for oil with the effect that the combination of Rules 2 and 3 with the Pointe Gourde principle led to a no-scheme basis for valuation.

3.4.2.2 While the actual case concerned a trespass, it was agreed that the damages for the trespass were to be determined against the background of the payment due under s.8(2) of the Mines (Working Facilities and Support) Act 1966, which re-enacted the provisions on this of the previous 1923 Act.

3.4.2.3 The effect of the 1966 Act in this context is that, if someone licensed to drill for oil could not secure permission from relevant landowners to drill, the issue of consent could be referred to the Secretary of State and the courts.

3.4.2.4 As regards payment, s.8(2) reads:

> "The compensation or consideration in respect of any right … shall be assessed by the Court on the basis of what would be fair and reasonable between a willing grantor and willing grantee".

The Act makes no mention of the longstanding compulsory purchase rules.

3.4.2.5 The majority in the Supreme Court found that compulsory purchase rules did indeed apply to assessing payments under the 1966 Act. Oil had been nationalised in 1934 and allowing any basis for compensation would undo the removal of that value from landowners. Two of the speeches also took comfort from the Act's express addition of a 10 per cent uplift in the payment to allow for the compulsory nature of the consent – an uplift excluded by the 1919 compulsory purchase legislation. The majority then applied the *Pointe Gourde* decision.

3.4.2.6 There were differences in approach between those in the majority, as noted in Lord Hope's leading decision.

3.4.2.7 A substantive, argued dissenting speech was given by Lord Clarke while an enigmatic opening comment by Lord Walker, offered as a footnote on Lord Brown's judgment (rather than the leading decision by Lord Hope), implied that the majority conclusion flowed from the position agreed between the parties:

> "It is common ground (see para 2.2 of the Statement of Issues) that if damages are to be assessed on a "wayleave" basis, the measure of damages is the price that reasonable persons in the position of the parties would have negotiated for a grant of the appropriate contractual rights, against the statutory background …. I am inclined to think that that starting-point might have been open to argument, on the lines indicated in the comprehensive and scholarly judgment of Warren J in *Field Common Ltd v Elmbridge Borough Council* ... But I put that aside." (Para 47)

This alternative is reviewed above in section 2 of this response.

3.4.2.8 It has since been suggested that the majority decision applies to the present wording of the Code with its structure of paragraph 5 powers for a court to impose an agreement on terms that are to be "fair and reasonable" under paragraph 7. This argument has then been brought forward in the review process. The CAAV does not accept it.

3.4.2.9 It has been argued that the approach rejected in *Bocardo* was similar to the "ransom" approach rejected in *LIDI*. On this view, both cases turned on rejecting assessing consideration on the basis of a share of the profits to be derived by the operator from the apparatus.

3.4.3 Untested for the Code

3.4.3.1 At one level, the potential for this decision under different legislation to be applied to the Code is simply an argument to be tested in litigation, yet to happen, under the Code which may or may not be found to be a correct interpretation. It is not the way the Code has been understood or practised and, as with the broader picture, the Code is not being reviewed in an unknown landscape within the context of a vast array of existing and established agreements.

3.4.3.2 As we now have a review of the Code – ahead of the application of the *Bocardo* decision being tested – and as the use of and judicial decisions under the Code have been as reviewed in the previous section, the Code review can simply recommend that the new Code simply states the present position as it has been understood in a way that makes it clear. On that view, the entire argument is one about the present Code, not a future one.

3.4.4 A Response

3.4.4.1 However it also seems right in responding to the consultation with its references to this argument to address the *Bocardo* critique.

3.4.4.2 It is not accepted that compulsory purchase powers can be read into the Code in same way as has been done for the 1966 Act by *Bocardo*. This was considered in the thorough review of the issues by HHJ Hague in *LIDI* (and affirmed in *Cabletel v Brookwood*) in which this question was argued and in which he rejected the larger contention and the application of *Pointe Gourde*. The reasons identified in *LIDI* were:

- the way the Code is expressed with references to the compulsory purchase regime
- the approach of preceding legislation to invoking compulsory purchase legislation
- the contrast between the Code and other legislation for acquisition which does refer in terms in compulsory purchase rules.

3.4.4.3 The core argument is basically one of construction; the Code is so drafted that the *Bocardo* decision does not bear on it. This is amplified by the argument that, while it may be easy to suggest an analogy between the Code and compulsory purchase, it is wrong and lazy to assume they are the same – any analogy can be over applied and the consequent insights be misleading.

3.4.4.4 The Code does expressly:

- distinguish between "consideration" (paragraph 7(1)(a)) and "compensation" (paragraph 7(1)(b)) in a way that the 1966 Act simply does not. At all points the 1966 Act uses the two in a combined phrase without further clarification or distinction (save that s.8 is simply headed "Compensation"). The Code uses these words distinctly in separate places and for separate purposes and gives "consideration" alone the "fair and reasonable" basis.
- invoke the concept of "compensation" and the compulsory purchase regime at certain points clearly separate from "consideration". Examples can be seen in
    - paragraph 4 (Effect of rights and compensation) at 4(6), 4(8), 4(10), 4(11) and 4(12)
    - paragraph 16 (Compensation for injurious affection to neighbouring land, etc) at 16(1), 16(4) and 16(5).

  The preceding legislation in the Telegraph Acts themselves made similar reference to the Land Clauses Compensation Act 1845.

3.4.4.5 The 1966 Act offers no parallel to this pattern of separate usages and references and so, as a matter of construction, it appears difficult to accept that the same reading can be made of the Code. In this context, it would be wrong to read compulsory purchase principles into parts of the Code that do not import them when other parts of the Code do expressly import them.

3.4.4.6 This does not deny that there is compulsion under the Code; without it, the Code would just be a code of practice. It is rather to assert that that compulsion is on the terms given by the Code – essentially the terms that would be seen in a "fair and reasonable" agreement. With the points of construction just explored, that compulsion does not of itself invoke the full regime for compulsory purchase - a point also considered in *St Leger-Davey v Secretary of State for the Environment and Orange PCS.*

3.4.4.7 There is compulsion whatever the basis of payment. That is why it seems strange that the 1966 Act's application of a 10 per cent uplift to the payment should be seen as consistent with the adoption of the compensation rather than consideration approach. The older notion of an uplift for compulsion had been expressly abandoned by the 1919 Act and subsequent compulsory purchase legislation and so its inclusion in the 1923 and 1966 Acts appears inconsistent with the main compulsory purchase regime.

3.4.5 A Further Point

3.4.5.1 The decision in *Bocardo* can be read as not to have addressed consideration which on this view may have been seen as a separate matter not before the Supreme Court. Lord Brown (one of the majority) did seek to distinguish "consideration" and "compensation":

> "Quite why the 1923 Act (and, in turn, the 1966 Act) do not incorporate the statutory rules contained in the general land compensation legislation is unclear, but it may be because the 1923 Act (and the 1966 Act) provide not only (as is directly relevant here) for "compensation" for rights over land to win minerals not in the landowner's

> ownership, but also for "consideration", for example for the working of coal whereby the property in the mineral passes from the grantor to the grantee and so calls for a valuation of that property right on an ordinary commercial basis." (para 71)

3.4.5.2 Two points can be drawn immediately from that:

- Lord Brown (one of the majority) thought *Bocardo* was about compensation not consideration
- he thought "consideration" should be valued on an "ordinary commercial basis".

3.4.5.3 Lord Brown's thinking can also be seen in leading majority decision of Lord Hope at para 38. After noting the potential use of "consideration" in a context similar to Lord Brown, he said:

> "In the present case, the relevant word is compensation"

and he proceeded on that basis. That compensation-based approach is then a matter of construction of the 1966 Act that should not be read across to the Code with its different drafting.

3.4.5.4 Lord Brown also cited an extract from *Waters v Welsh Development Agency*. In that case it had been said that:

> "When granting a power to acquire land compulsorily for a particular purpose, Parliament cannot thereby have intended to increase the value of the land. Parliament cannot have intended that the acquiring authority should pay as compensation a larger amount than the owner could reasonably have obtained for his land in the absence of the power."

That simple and powerful statement may well have been apt in its context of land being requisitioned as compensating habitat for the loss of the tidal flats in Cardiff Bay as a result of statutory measures to secure development there. It may well be an apt encapsulation of a principle for the main compulsory purchase regime. However, in the context of the Code, it seems clear that Parliament is, in paragraph 7(1)(a) expressly looking for a fair and reasonable transaction, not one in a no-scheme world. It is looking for a value that would be fair and reasonable when agreed between two parties, not for "value to the owner" alone.

3.4.6 Lord Clarke's Arguments

3.4.6.1 Having shown why the (varied) majority decisions in *Bocardo* may not be applicable to the Code, a review of *Bocardo* should also note the 20 page, 65 paragraph dissenting speech by Lord Clarke.

3.4.6.2 He viewed the assessment of quantum in *Bocardo* as:

> "essentially the same as is deployed by the common law in assessing wayleave damages. Its purpose is, again on the face of it, the same, namely to ascertain what would be a fair and reasonable figure for Star to agree to pay and for the appellant to agree to receive for the use of part of the appellant's land …"

It was not relevant that Bocardo suffered no loss but rather (and subject to the statutory framework)

> "the correct measure of damages for trespass on the facts here would be to award the appellant user or wayleave damages and assess them by reference to a hypothetical negotiation of the kind referred to by Lord Walker in para 49 of the Board in *Pell Frischmann*."

3.4.6.3 That reference is to a Privy Council decision which described the process as:

> "a negotiation between a willing buyer .. and a willing seller .. Both parties are assumed to act reasonably. The fact that one or other of the parties would in practice have refused to make a deal is therefore to be ignored."

That looks like a re-invention of market value.

3.4.6.4 In addition to comments specific to the position for oil (in which he considered that the 1934 nationalisation of the mineral itself did not alter the landowner's rights in wayleaves to work it), he also worked from construction of the legislation. There was no reference in the 1923 or 1966 Acts to any of the extensive standard statutory provisions that would have applied the rules for compulsory purchase to them. He noted that the provisions of the main compulsory purchase regimes had clearly not been imported into these Acts and so:

> "I can see no principled basis for applying the provisions of the latter Acts [compulsory purchase] to the assessment of compensation under the former [the Mines Acts]".

He noted that the adoption of the 10 per cent uplift was an express deviation from the main rules of the 1919 and 1961 regimes. He then expressly endorsed the approach taken in *LIDI*:

> "I agree with the reasoning".

3.4.6.5 S.8 should be given its

> "ordinary and natural meaning, it postulates a negotiation in which it is assumed that both parties are willing to reach agreement and that they both act reasonably. In such a negotiation, the seller will naturally stress the value of the right being sold (here the wayleave) to the purchaser. … On this approach, the figure agreed at the postulated negotiation would be the same as it would be at common law."

His opinion was that, on this reasoning, it would be the same figure whether it was called "consideration" or "compensation".

3.4.6.6 It was then a matter of construction whether the Pointe Gourde principle applied to s.8(2). He cited comments in *Rugby Joint Water Board v Shaw-Fox* that it could not be described as a common law principle since it flowed from statutory provisions. After reviewing judicial comments, he found that:

> "The question is whether these principles apply to compensation under section 8(2) of the 1966 Act. It is difficult to see how they do as a matter of construction of the Act."

He felt reinforced in that view as:

> "There is no reference to "value" in that sub-section. In those circumstances, although it is a compensation provision, as Lord Pearson put it in the passage approved by Lord Collins in para 128 of his speech in *TFL* [*Spirerose*] quoted above (and thus by the House), the Pointe Gourde principle involves an interpretation of the word "value". Since the word "value" does not appear in section 8(2), it is difficult to see why it should be construed as though it did."

4. The No-Scheme Approach

4.1 Whatever the view of *Bocardo*, the Consultation Paper proposes a no-scheme market value basis for payment which at the least bears some similarities to compulsory purchase and so the two are reviewed together in this section. The mainstream regime for compulsory purchase operates from the principle that there is publicly warranted expropriation for which the person whose property is being acquired should receive compensation for loss.

4.2 Before reviewing these approaches, it must be observed that it is very different from both the law and the practice of the successful development over the last two centuries of

communication rights over private land and successive communication revolutions over the last two centuries. This has been on the premise of agreement and of market value. As a result, the rights have been established with little confrontation and little recourse to dispute resolution, even where, as is most often the case in the countryside, the rights being agreed give no communications benefit to the person from whom land is being taken.

4.3 Changing the basis to one that landowners on whom the apparatus is being imposed would see as being to their disadvantage would destabilise existing agreements where there was a possibility of re-negotiation (as where an agreement has a break clause or an imminent expiry date) and be a reason for more resistance to future rights – an outcome that, with the costs of formal procedures, would tend to increase transaction costs.

4.4. The main compulsory purchase regime establishes the assumptions for this assessment in the six rules of s.5 of the Land Compensation Act 1961. While the Law Commission proposal does not set these out, it appears to follow their practical effect closely. Rule 2 states:

> "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".

On the face of it that appears to mean market value, including hope value. Rule 3 serves to exclude ransom value in excluding consideration of any special suitability of the land for a purpose that could only be pursued with statutory powers.

4.5 S.6 and Schedule 1 of the 1961 Act then excludes consideration of any increase (or decrease) in the value of the land due to development under the proposed scheme unless it would be likely to have occurred anyway. That no-scheme provision has then been developed by case law, notably the *Pointe Gourde* principle that "compensation on compulsory purchase of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition". In essence, any premium value of the site that is entirely due to the scheme must be disregarded.

4.6 The Consultation Paper's proposal at 6.64 is very similar:

> "We are of the view that consideration could be assessed on the basis of the market value of the right, but without taking into account the value of the right to the Code Operator."

The consultation paper then expresses the no-scheme assumption more comprehensively in its broadest form by the definition of the "scheme" canvassed in 6.66:

> "we would exclude the value to the Code Operator and to any other Code Operator by treating the national electronic communications network as "the scheme" to be disregarded."

In short, the suitability of the site for any communications regulated by the Code is to be excluded.

4.7 The canvassed definition of the scheme that is to be disregarded appears broader than that for compulsory purchase which disregards the specific project, which in this context would be the individual mast, cable or apparatus rather than an operator's network or here, the national network. It is noted that, in *Bocardo*, Lord Brown approved the statement by the Court of Appeal that the scheme there was "The exploitation of the petroleum licence in the specified area". It was not anything wider than that.

4.8 Indeed, it is not clear that there is an actual definable national communications network. It may, instead, be better understood as the overall effect of many specific networks interacting and not as a network in its own right. Some operators' apparatus may never interact with another operator's apparatus being used for their own purposes – are communications facilities for the fire brigade really a part of the same national network as Vodafone's apparatus?

4.9 The breadth of the proposed wording could preclude any effect on the negotiations of an owner offering the site to a rival operator to test or secure value.

4.10 That hypothesis would then operate as a Special Assumption on which the market value would then be assessed. It would generally lead to radical reductions in valuations (and consequent probable changes in market behaviour) which are explored in more detail below.

4.11 That might be expected to be more dramatic for the great majority of mast sites than for cables since there may be relatively few uses for mast-sized plots and few equivalent potential users but, while the occasion might only arise sporadically, there are many conceivable reasons why an alternative cable might be run across someone's land and so the right to do that negotiated between parties.

4.12 At this stage, it may simply be noted that:

- a typical greenfield rural 15 metre mobile communications mast may have a rental value of some £5,000-£6,000 per annum, which would remain unchanged or increase on market based rent review
- the alternative "no-scheme" rental value of the site would generally be for agricultural use. A mast site only takes a small fraction of an acre (say less than 2 per cent) for which, with the general level of agricultural rents, the pro rata rent would be of the order of £2 per annum.

4.13 Such a change in the rent to be might be expected to have a marked effect also on those companies, such as WIG and Shere, that specialise in seeking to create and acquire sites for apparatus, leasing them to operators.

4.14 Closer review prompts the thought that, while an agricultural site can always be imagined as potentially forming part of an agricultural tenancy, it is hard to imagine what would be:

- the alternative rental use for a mast site on a church tower, roof of a grain store or building, or
- the alternative use requiring an easement or wayleave on that line

to establish that no-scheme value. It becomes a hypothetical exercise, technically difficult for both parties. As an example, it may be difficult to think of any usual letting alternative for space in a city church bell tower, yet four antennae in it can yield that church £24,000 a year in rent. At that point the mast would be purely an imposition which owners will resist at all stages in the proposal.

4.15 Any such use may only arise during the course of the Code agreement when it could be frustrated by the present paragraphs 20 and 21. It seems wrong that since no payment has been made for that, those powers should still exist. Rather, were such a payment approach to be the one adopted, there should then be no powers equivalent to those paragraphs – under-

payment means under-purchase and so no Code security in the face of a higher value alternative use than the uses used for the assessment of value.

4.16 Of course, any alternative use that was evident at the time of the original assessment of value would have been reflected in the no-scheme market value.

4.17 The example of the green field agricultural site (with its unforced assumptions) – never mind the roof top site - shows the consultation proposal to be a worse outcome for the landowner than would be achieved under the application of the full compulsory purchase code as Rule 6 provides that Rule 2 "shall not affect the assessment of compensation for disturbance or any other matter not directly based on the valuation of the land". In a farming context, that would include damage, loss of crops, injurious affection, severance and professional fees.

4.18 There is also the prospect of subsequent claims in such circumstances as:

- underground damage caused by the cable laying becomes apparent. This might most obviously be to drainage schemes or other services but can be to trees and other facilities.
- subsequent access for further work whether of maintenance or splicing new links onto a cable.

4.19 Perhaps the only positive difference is the absence of Rule 1 with its requirement that "No allowance shall be made on account of the acquisition being compulsory". That rule was intended in 1919 to exclude the then conventional payment of a proportionate supplement (commonly 10 per cent) to acknowledge the compulsory nature of the acquisition. Such a supplement would though be of little consequence on the basis of such low values.

4.20 The obvious comparator under a compulsory purchase rules is an electricity pylon. The Electricity Supply Industry, the NFU and CLA agree recommended rates each year for electricity infrastructure on farmland. Under this year's table, a farmer would ordinarily receive, depending on the area taken by the pylon:

- an owner's payment of between [redacted] and [redacted]
- an occupier's payment of between [redacted] and [redacted] to reflect the agricultural disturbance not only for lost production from land that cannot be farmed but the disturbance of cultivations around the pylon. There are arguments that the basis for the calculation of these figures no longer reflects the impact on farming practices with the use of larger machinery.

That, too, is though much lower than is currently being paid as rent for masts. It is noted that there has long been resistance by owners to new overhead pylon lines, whether 15 years ago in the Vale of York or now to the new lines proposed across and out of mid-Wales or currently underway in Scotland on the Beauly/Denny line over the Grampians from the Highlands to central Scotland.

4.21 Of course, it may be that such a change would then draw landowners' and practitioners' attention to the Code's paragraph 7(1)(b) as a basis for compensation claims alongside the no-scheme rent, generally adding to the complexity of the transaction in a climate that will be the more difficult for the effects of the change in the valuation basis.

4.22 The Consultation Paper's Question 10.45 asks for views about statutory uplifts. With the changes in values that would flow from imposing a no-scheme special assumption and the

likely practical effects of that change, we have indeed heard some protagonists of using a no-scheme basis for valuation then muse about mitigating the impact of that by, for example, applying multipliers (rather in the manner of those under the Landlord and Tenant Act 1954 where compensation is due to the tenant on losing an application to renew). Not only is that seen to be out of character with today's less prescriptive legislative style, but it falls inadequately between two stools in that this approach fails to remedy the losses imposed by the no-scheme basis.

4.23 Taking the example offered above of a mast where the valuation basis proposed would strip out almost all of the current rental value, only very large multipliers would be seen to do anything very much to ameliorate matters and they would magnify minor differences unreasonably.

4.24 It also seems to have been implied by some protagonists that while the Code with the no-scheme proposal would say how the value should be settled in any dispute, the parties are obviously free to agree on any basis that suits them. While that may to an extent be a real world observation, it seems both a fudge and improper for legislation to be promoted on the basis that it is not meant to set a standard for commercial deals under the Code, especially in markets where operators have so much more power than landowners.

4.25 In a final point on what is essentially a compulsory purchase approach, the widely reported difficulties operators show in attending to the renewal of agreements and negotiations with existing landlords bodes ill for their ability to handle the complexity, work and disputes that will go with an answer based on compulsory purchase that delivers substantial losses for landowners.

4.26 Distortion of Competition - The change foreseen seems likely to create a two-tier market with markedly lower rents for those who can impose themselves under the Code compared with non-Code operators seeking cables and mast sites. Not only would that distort competition but it could be vulnerable under the EU's state aid rules just as BT and Virgin Media are currently challenging Birmingham's superfast broadband scheme under State Aid rules.

4.27 Subsequent Liability – While an unconstrained market value approach to assessing payment can be seen as the deal that would be expected between willing parties at the time and so in broad principle to encapsulate future issues arising from it, the no-scheme special assumption cannot pretend to do that in respect of issues that may arise from the project itself. To a large extent those can often be tackled by the terms of the agreement but in the last resort those are only as good as the standing of the tenant both during and at the cessation of the agreement. If appropriate decommissioning can be enforced at the tenant's expense, not only may that then fall as a liability on the landlord, but longer term issues may be left for future decades.

4.28 Such contingent liabilities are now emerging with today's growing web of environmental regulation where long-lost Second World War cables, now decaying, are found with the consequent inclusion of the land in question on contamination registers.

5. Assessment of Value

5.1 A significant part of the discussion appears to concern the practical point as to whether market value (or indeed any other basis of value) can be sensibly assessed for rights

to install communications apparatus. Indeed, Code operators assert they cannot assess market value so it is not a sensible basis – a point presumably reflected in the opening sentence of the Consultation Paper's paragraph 6.57:

"The main problem with consideration under the Code is the lack of certainty."

(though it is not understood from the Consultation Paper that this is meant to reflect also the views of those who act for landowners).

5.2 The philosophical objection to that is if market value is the right basis then it should not be rejected just because it may be hard. This has not been seen as a convincing argument against moral precepts elsewhere.

5.3 In practical terms, our experience in the rural world does not even suggest that it is hard to establish market values. It is always likely that individual properties will require individual negotiations. Property values are not like share prices where the price of a quoted share can be read by anyone from the financial press. Property is individual in its characteristics, exists in specific markets and requires individual valuation. The importance of that role to owners, vendors, purchasers, tenants, mortgagors and others is why there is work for valuers in the markets in which they are experienced and knowledgeable. Valuers can legitimately disagree and not all facts may be equally evident to both parties at the same time. Owners and purchasers have differing interests, not only by those definitions but because they are different individuals with different characteristics. That is why it is perfectly reasonable for there to be negotiations, which may not only be about price but also terms and ancillary and accommodation works. That is to do justice to the concerns of the parties and the property that is at the heart of the issue in arriving at the agreement between the parties.

5.4 With some 50,000 communications masts, there is a well established functioning market with texture and depth for mast sites – indeed one that creates secondary markets in reversions to masts transferring at significant values, releasing capital for landowners.

5.5 On occasions, that includes mast operators where they hold mast sites that can be sold or assigned. Last month T-Mobile agreed to sell the rights to lease or operate a portfolio of 7,200 masts in the USA for 26 years (and with an option then for outright acquisition) to Crown Castle for $2.4 billion (an average of some £200,000 for each mast). That lease and leaseback released funds to be re-used in strengthening its network.

5.6 It has not, to our knowledge, been suggested at any arbitrated rent review for mast site that there is not the evidence to make a determination as to the rent. The rent for a mast will, in principle, reflect the value of the site in its network and so its height and the equipment allowed on it, often with supplements for site sharing or sub-letting (sometimes called "pay away"). The market also shows evidence for the rents achievable for the addition of extra antennae to a mast.

5.7 That market allows direct resort to the rents for comparable sites without the need to consider other ways of arriving at a value. The rental value of masts is naturally at the heart of the current appeals by a range of major operators against the assessments for rating of some 19,500 masts.

5.8 The growth and nature of that market for masts is illustrated in Annexe C to this response with capital values for reversions reviewed in Annexe D.

5.9 It is recognised that operators' arguments seem to be more usually founded on the assessment of the market value for easements and wayleaves for communications cables and to which the arguments adduced from *Bocardo* might apply. It is noticeable that the limited case law has concerned cables rather than masts. However, valuers are called on to value such rights in non-statutory contexts and do not object that is impossible in those cases.

5.10 A more serious problem is that, in practical distinction to the generality of masts, many significant agreements for communications cables are subject to confidentiality clauses, so that it is only when the negotiators of such an agreement meet again that they have a mutual (if unspoken) knowledge of that evidence to inform other negotiations. Such clauses thus mask the existence of the market and it may be that the public interest justifying the Code should prohibit confidentiality clauses.

5.11 Much of the discussion here has tended to focus on medium or higher value transactions for which the market can be expected to be more differentiated. The leading case (*London and India Docks Investments v Mercury*) concerned Canary Wharf. *Cabletel v Brookwood Cemetery* took it that the standard rates for bare agricultural land were not relevant even to a barely commercial copper cable along a private road. Yet those standard rates themselves tell a story.

5.12 [redacted] began the development of a network of fibre optic communications cables using existing electricity apparatus [redacted]. Following their practice to assist members with utilities' schemes, the NFU and CLA agreed standard rates [redacted] However, these rates failed in the market place as landowners would not accept them. Fresh, higher rates were negotiated by landowners' agents in the field that enabled the scheme to go ahead. These rates were also unrelated to the earning capacity of the cables but a mutual recognition of what was felt to be sensible between the parties. Thus, even on something as standard as a fibre optic cable strung on a power line across bare farmland, the market drove an outcome that was agreed and displaced rates that were not mutually accepted.

5.13 A subsequent agreement was reached with [redacted] for 48-fibre cables (12 reserved for utility use which could be secured under the Electricity Act) [redacted]. We understand that in current negotiations [redacted] have quoted comparables.

6. Conclusions

6.1 A straightforward and unqualified market value basis is the approach that should be retained with its exclusion of special ransom value. It is the basis that is consistent with the underlying fundamental and historic premise that Code rights over private land are obtained by agreement or, if necessary, a deemed agreement imposed on fair and reasonable terms. It would be logically inconsistent to retain the fabric of agreement but then to pay on an alternative, and apparently much lower, basis.

6.2 Abandoning both agreement and the intimately associated market value approach (as interpreted in the relevant cases) would overturn a clearly successful history and open the way to new conflict and transaction costs.

6.3 We do not see the case for the landlord to have a formal share of the profit or the turnover of the apparatus or for that to be the prescribed basis for assessing the payment for the Code right. Not only is that likely to be very hard to assess and possibly of questionable importance for apparatus that is part of a larger network, but it is the prerogative of the operator to seek a return on its business within the changing market place. What is due from the operator is a mutually agreeable price for the right in question.

6.4 The right answer is to remain within the family of that common law understanding of market value and to do so in a way that recognises the real parties to the agreement. In seeking to value that agreement, it is wrong both:

- to import special assumptions (such as to assume the scheme away) that reduce value below what is fair for the agreement in the circumstances, and
- to include scheme-specific ransom value that would increase the value above what is fair for the agreement in the circumstances.

That is what the established case law and practice for Code agreements has done in interpreting the requirements of paragraph 7(1)(a) and "consideration".

6.5 With the apparent strength of the *LIDI* decision (reviewed below), there would be a good argument for leaving the matter as it is currently defined in order to avoid new litigation on new drafting. However, it seems probable that the arguments based on *Bocardo* (see below) would then be advanced anyway in subsequent litigation, making the meaning of the current words contingent on the outcome of that action. Thus, the revised Code needs to be clear and should affirm the principle of what would be expected to be agreed between the parties with no assumptions excluding the proposed use.

6.6 Carrying the present approach forward in this way would have the benefit of maintaining the developing thread of case law, rather than opening the way to new litigation. It would also avoid the perverse effects of any change that might lead operators to consider the wholesale repudiation of present agreements and rely on Code powers to seek new agreements on terms that landowners would see as adverse – that would lead to litigation.

6.7 The one reform that would aid the application of market value, especially for cables, would be to provide that where Code powers apply to an agreement that should preclude confidentiality clauses. Greater disclosure of information would aid transparency. The use of a statutory privilege should carry with it an obligation to make the market less opaque.

6.8 Such a change would not only affect the parties to agreements but have wider consequences. For example, the present regime has sustained significant investment in telecommunications infrastructure by companies (such as WIG and Shere) with capital values reliant on the income streams from consideration. They do not only buy reversions to masts but actively seek to develop sites to let to operators. It is assumed that a sharp reduction in the income from sites would reduce their interest in seeking new ones, if not threaten their current business model.

7. Economic Effects

7.1 General

7.1.1 The Law Commission has asked for submissions on the economic effects of the proposals in play.

7.1.2 It may be that we can only comment, as above, on limited parts of this with any confidence but the following observations may offer some thoughts.

7.1.3 To set the context, Ofcom's 2012 Communications Market Report states that the total revenue reported by operators in 2011 was £39.7 billion. It is understood that a typical individual mast may have a marginal gross income of some £60,000 from pay-as-you-go users with calls originating in a cell (and perhaps £250,000 in busy urban areas). That is before the income (assumed to be greater) from users on contracts which cannot be so allocated but accrues to the network of which the mast forms a part.

7.1.4 The most obvious quantifiable effect of imposing a no-scheme special assumption on the assessment of payments under the Code appears to be on masts though even for this there are probably large tolerances needed for any estimates.

7.1.5 At its most basic, there are some 50,000 communications masts (Ofcom) which will overwhelmingly be let at around £5,000 per annum, since the higher value masts will be only a fraction of that total and there will be other masts on historic or otherwise lower terms. That gives a rental income to landowners (and a cost to operators) in the broad region of say £250 million. Much of this will be income to the rural economy. The proposed basis could, over the years required for existing agreements to fall in, extinguish much of that value albeit perhaps with only a limited effect in the earliest years of any change.

7.1.6 It may not be possible for us to offer any estimate of the overall value of cable rights. We might guess that in general, they might not drop by the same fraction as seems likely for rents for masts. Some landowners with higher value agreements might be more exposed. However, the removal of some of the special regimes might introduce new occasions for payments. Any fall in rates might also alter some marginal choices about crossing private land rather than using the highway. Taking all this into account, one basis for comparison could be that between the NFU/CLA rates for fibre optic cables and those for electricity cables and perhaps other utilities (excepting high pressure gas with its other risks). Since mast rents might generally form a higher fraction of farm incomes than wayleave and easement payments, that could suggest this overall effect is much less.

7.1.7 On that basis, the final figure for payments for rights that is at stake might be very loosely in the region of, say, £300 million a year. That is on the assumption that the proposed change in the legal basis for payments does actually happen in practice and to the full extent analysed. If, for whatever reason, payments did not actually follow the trajectory implied by the words used and the outcome was moderated in the field then that apparent figure would not materialise over any timescale. Such an outcome might arise if the commercial needs of operators led them to deal on a more commercial basis with owners than that proposed in the consultation paper. While that might be a practical outcome, if it happened on any scale it could be seen as legislative failure or one that created difficulties according to whether cases were dealt with pragmatically or by the disputes forum. Either this aspect of the revised Code will then have broken or its effect might appear capricious to owners, varying with the temperament and needs of individual operators.

7.1.8 However, that gross saving (if feasible and say 0.75 percent of 2011 turnover) could only materialise over, say, some 10 or 15 years as, subject to break clauses, existing agreements fell in or could be ended. In default of more precise assumptions, that might be assumed to accrue at the rate of perhaps £20 to £30 million each year – say at a rate of 0.05

per cent of 2011 turnover per annum. That is perhaps not more than a twentieth of 1 per cent annual growth in earnings in this sector which (with its history and performance) does not suggest that the present basis represents an impossible impediment to growth in the economy. While no saving is to be disregarded, facilitating the earnings growth in a sector with such potential technological development that may be more easily secured by a more positive relationship with landowners appears an alternative strategy worthy of consideration.

7.1.9 That is the more so as that reduction in payments is not thought to be cost-free as attention will focus more on:

- the greater effort needed to secure and renew rights
- the greater cost in handling more complex compensation claims both at the time of the agreement and as issues arise thereafter
- the greater number of more formal disputes arising from a shift to a compulsory purchase basis with the attendant delay and risk.

Again, these factors will be hard to quantify but are likely to be noticeable in terms of cost, time to deliver schemes and failure in delivering some schemes. The costs will be those of more in-house staff and the use of outside solicitors and valuers for jobs not currently arising and the management of these processes. In this, we doubt that many communications operators actually have much extensive experience of compulsory purchase compensation, its procedures and requirements.

7.1.10 These increased costs seem likely to arise much earlier than the reduced payments as they will arise in the usual course of agreements turning over and in addition as the networks are expanded as may be driven by 4G or further services.

7.1.11 It may be that, as with some of the more commercially pragmatic utilities, operators may yet prefer to pay on a simple but more generous basis than to be mired in the consequences of the proposals and so more swiftly secure the service they wish to provide and the income stream they wish to earn.

7.1.12 The reduction in payments will also affect those who have invested in reversions to masts. Such investors include operations like WIG and Shere – and have offered a source of capital for landowners who can sell freeholds in mast sites – as well as those, such as pension funds, for whom this type of investment may have seemed attractive. If the fall in payments is as analysed, it will effectively close this market.

7.2 A Macro-Economic Effect?

7.2.1 Clause 7 of the newly published Growth and Infrastructure Bill directly concerns the Code and proposes the amendment of s.109 of the 2003 Act by requiring that among the matters to which the Secretary of State must have regard is:

> "the need to promote economic growth in the United Kingdom"

7.2.2 It is accepted that high quality broadband and the general availability of mobile communications to a contemporary standard are aspects of a modern economy. It is interesting that the longer and more numerical perspective of economic historians can find that new communications technologies may have made less of a contribution to GDP growth than thought once the dynamic nature of economic development is considered rather than just a static "with and without" analysis (see, for example, Fogel's *Railroads and American Economic Growth*).

7.2.3 In this context, there seem to be several points in considering what are the effects of such a reduction in payments were it to materialise. While it is appreciated that this can only a very general commentary and that this exercise is for us limited by time and resources, these might be thought of in the following terms:

- operators would have marginally lower costs both for their current network and in expanding it
- that cost is though understood to be only a relatively small part of the cost of the infrastructure so the benefit in terms of it being cheaper to extend a service is more limited than it might appear. New masts have to be built, connected and maintained and, as necessary and possible, upgraded. Cables have to be laid and maintained. Delays in securing access might be as or more important than the cost at stake.
- even in a static network, that reduction in costs does not mean lower charges to users which if they arise at all will be through operators' subsequent ability to lower charges under competitive pressure. In practice, the effect might well be too small to be noticeable amid all the other factors and forces in play. The first benefit of any reduction will be to the operator's accounts and so its shareholders, many of them international.
- that reduction would, of course, be lost income to landowners (including small charities such as churches, village halls and schools) for which this may be a major source of discretionary spending and so a reduction in their spending power, much of which is in the countryside. As this is income that has little cost attached to it, a large part of this loss can be expected to feed directly through into spending, investment or debt servicing (indeed, this income will have been part of the owner's ability to service loan charges that will have been assessed in a decision to lend him money).

Overall (and while it has not yet proven possible to quantify this from the Farm Business Survey or other sources), the assumed reduction in costs is likely to be a greater proportionate loss to owners' spending power than it will be a gain to operators and the effects are more likely to be felt locally.

7.2.4 There are also taxation effects relevant to government:

- as rents are due overwhelmingly to private owners and small businesses, that income will be subject to domestic taxation and as marginal income that will be at marginal tax rates. Only a relatively small minority of farm businesses (albeit often larger ones) are incorporated and so payments for rural apparatus will generally be subject to tax at Income Tax rates, much of it at 40 per cent. If after taking account of assessments to Corporation Tax (much at smaller company rates) and basic rate Income Tax, the overall rate is, say, 30 per cent, that is £90 million of tax income a year on the long run view.
- so far as any such change improves operators' profits, it appears that such large companies may often pay relatively little in Corporation Tax, while dividends will be paid to an international base of shareholders.
- as noted above, masts (and also cable networks [redacted] are liable for rates. A typical mast might have a liability for perhaps £1,300 each in rates, and so some 50,000 masts might overall contribute £65 million in Non-Domestic Rates. So far as such a change reduced the assessments underpinning that liability, it would be an outright loss to the Exchequer.

7.2.5 Changes in Income and Corporation Tax yields would be phased as overall rental levels changed. Rateable values would presumably change completely as of the subsequent revaluation.

7.2.6 Looking more widely, a market economy works and evolves by using prices set in the market as signals to encourage the successful allocation of resources. The greater the complexity of the economy, the more it is important that prices are free to adjust in response to supply and demand, stimulating new opportunities, encouraging new resources to come forward, discouraging unproductive projects, leading to substitution and offering returns for new technology. Artificially distorting prices (as is proposed) tends to lead to a mis-allocation of resources which is of itself a restraint on growth.

7.2.7 Stepping back, this issue is not significant for the growth debate. In so far as communications are concerned, there are much more significant issues under the control of the government and operators. A sharp reduction in this element of the cost of communications infrastructure is not seen as a noticeable stimulus to growth nor the removal of a practical impediment to it. The removal of income from farms and estates will have a more focussed impact.

ANNEXE A

WHAT IS MARKET VALUE?

A1. General - Market value is a key concept in establishing an informed expectation as to the price for something, one that is neutral as between buyer and seller. The nature of the market in which that value is determined will differ according to the subject of the trade, while market conditions will vary with the changing balance of supply and demand, changing knowledge, fashion, rules, expectations, credit conditions, hopes of profit and other circumstances.

A2. It is an estimate of the amount that could reasonably be expected to be paid, the most probable price in market conditions at the valuation date. While the asset in question may have different values for different individuals who may be in the market, its market value is the estimate of the price in the present market on assumptions that are deliberately neutral to achieve a standard basis of assessment for both buyers and sellers. These assumptions are explored below.

A3. Definitions – Market value is defined by European Valuation Standards 2012 (EVS 2012 – the "Blue Book) prepared by The European Group of Valuers Associations (TEGoVA) for valuations of real property and related property rights as its EVS 1:

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

A4. As a corollary and applying the definition of market value to leasehold interests, the TEGoVA approved definition of **"market rent"**, usually expressed as an annual figure, is:

> "The estimated amount of rent at which the property should be leased on the valuation date between a willing lessor and a willing lessee on the terms of the tenancy agreement in an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion."

A5. These definitions are for all practical purposes identical to those in the International Valuations Standards (the "White Book") definition for assets (financial as well as real property) more generally and adopted by the RICS in its "Red Book".

A6. Identical or similar definitions appear widely in UK and EU law. Alongside its deep common law roots, it may be noted that the EU's State Aid rules also focus on market value as the valuation basis for determining whether a transaction in an asset amounts to a subsidy that distorts competition and so requires scrutiny and potential rejection.

A7. Review of the Definition - The definition clearly sets out the key concepts involved, namely:

- the result
- the real property being valued
- the transaction
- the valuation date
- the nature of the hypothetical parties as willing and competitive

- the necessary marketing
- the consideration by the parties
- other matters.

Each phrase of the definition is now taken in turn to explore its meaning in seeking the market value of real property.

A8. The Result - *"The estimated amount …"* - This refers to a price expressed in terms of money, payable for the asset in an arm's-length market transaction. Market value is measured as the most probable price reasonably obtainable in the market at the valuation date in keeping with the Market Value definition. It is the best price reasonably obtainable by the seller and the most advantageous price reasonably obtainable by the buyer.

A9. This estimate specifically excludes an estimated price inflated or deflated by any special terms or circumstances such as financing which are not typical, sale and leaseback arrangements, special considerations or concessions granted by anyone associated with the sale, or any elements of Special Value (considered below).

A10. The Real Property Being Valued - *"… an asset …"* - This is where the property itself with its legal, physical, economic and other attributes is to be analysed with all its actual opportunities and difficulties. This is introduced into the definition of Market Rent by the need to consider the terms of any tenancy agreement.

A11. The market value of an asset reflects the full potential of that asset so far as it is recognised by the market place. It may thus take account of the possible uses of the asset that may be unlocked by changes affecting it, whether new development control permissions, relevant infrastructure, market developments or other possibilities.

A12. "Hope value" (also sometimes called future value) is used to describe an uplift in value which the market is willing to pay in the hope of a higher value use or development opportunity being achievable than is currently permitted under development control, existing infrastructure constraints or other limitations currently in place. It will reflect an appraisal of the probability that the market places on that higher value use or development being achieved, the costs likely to be incurred in doing so, the time scale and any other associated factors in bringing it about. Fundamentally, it will allow for the possibility that the envisaged use may not be achieved. While descriptive of that uplift, it does not exist as a separate value but helps explain the market value of the property which must be judged from the available evidence just as much as any other part of the valuation. Hope value is not a special value as it represents the market place's reasonable expectations as to the opportunities offered by the property.

A13. As a factor reflected in market value, hope value does not include any element of special value that may be available from particular purchasers.

A14. Unless instructed otherwise, it is the valuer's task to determine the market value of the land or property in accordance with the full analysis of market value in EVS1. The hypothetical seller will accept no less for his property and the hypothetical buyer will not want to offer more than he would pay for an equivalent asset of similar usefulness to him.

A15. The Transaction - *"… should exchange …"* - It is an estimated amount rather than a predetermined or actual sale price. It is the price at which the market expects a transaction to

be completed on the valuation date that meets all the other elements of the Market Value definition.

A16. The use of "should" conveys that sense of reasonable expectation. The valuer must not make unrealistic assumptions about market conditions or assume a level of Market Value above that which is reasonably obtainable.

A17. The Valuation Date - *"… on the valuation date …"* - This requires that the estimated Market Value be time-specific to a given date and this is normally the date on which the hypothetical sale is deemed to take place and is usually, therefore, different from the date the valuation is actually prepared. As markets and market conditions may change, the estimated value may be incorrect or inappropriate at another time. The valuation amount will reflect the actual market state and circumstances at the effective valuation date, not at a past or future date. The valuation date and the date of the valuation report may differ, but the latter cannot precede the former. The definition also assumes simultaneous exchange and completion of the contract for sale without any variation in price that might otherwise be made in a Market Value transaction.

A18. The Parties – Hypothetical, Willing and Competitive - *"… between a willing buyer …"* - This assumes a hypothetical buyer, not the actual purchaser. That person is motivated, but not compelled, to buy. This buyer is neither over-eager to buy nor determined to buy at any price.

A19. This buyer is also one who purchases in accordance with the realities of the current market and with current market expectations, rather than on an imaginary or hypothetical market, which cannot be demonstrated or anticipated to exist. The assumed buyer would not pay a higher price than that which the market requires him to pay. The present owner of the asset is included among those who constitute the market.

A20. Equally, the motivated buyer cannot be presumed to be reluctant or unwilling. He is attending to this as a practical man of business.

A21. *"… and a willing seller …"* - Again, this is a hypothetical seller, rather than the actual owner and is to be assumed to be neither an over-eager nor a forced seller who is prepared to sell at any price, nor one prepared to hold out for a price not considered reasonable in the current market. The willing seller is motivated to sell the asset at market terms for the best price obtainable in the open market after proper marketing, whatever that price might be. The factual circumstances of the actual owner are not part of this consideration because the 'willing seller' is a hypothetical owner.

A22. Thus, while the asset to be valued is to be valued as it is in the real world, the assumed buyer and seller are hypothetical parties, albeit acting in current market conditions. The requirement that they both be willing to make the transaction creates the tension between them in which Market Value can be assessed.

A23. Market Value is thus independent of and uninfluenced by the objectives of the client instructing the valuation.

A24. *"… in an arm's-length transaction …"* - An arm's-length transaction is one between parties who do not have a particular or special relationship (for example, parent and

subsidiary companies, or landlord and tenant) which may make the price level uncharacteristic of the market or make it inflated, because of an element of special value. The Market Value transaction is presumed to be between unrelated parties, each acting independently.

A25. The Marketing - *"… after proper marketing …"* - The asset would be exposed to the market in the most appropriate manner to effect its disposal at the best price reasonably achievable in accordance with the Market Value definition. The length of exposure may vary with market conditions, but must be sufficient to allow the asset to be brought to the attention of an adequate number of potential purchasers. The exposure period occurs prior to the valuation date.

A26. These factors, testing the general range of bidders that may come forward, should (subject to the market conditions that anyway frame the market value) bring out the qualities required of the hypothetical buyer.

A27. The Parties' Consideration of the Matter - *"… wherein the parties had each acted knowledgeably ..."* - This presumes that both the willing buyer and willing seller are reasonably well informed about the nature and characteristics of the property, its actual and potential uses, and the state of the market at the valuation date.

A28. The parties will thus appraise what might reasonably be foreseen as at that date. In particular, the hypothetical buyer may be better informed for this assessment than some or all of the real bidders. This does not just involve knowledge of the property but also of the market and therefore the evidence (including such comparables as may be available) on which to judge the value of the property.

A29. *"… prudently …"* - Each party is presumed to act in their own self-interest with that knowledge, and prudently to seek the best price for their respective positions in the transaction. Prudence is assessed by referring to the state of the market at the valuation date, not with the benefit of hindsight at some later date. It is not necessarily imprudent for a seller to sell property in a market with falling prices which are lower than previous market levels. In such cases, as for other purchase and sale situations in markets with changing prices, the prudent buyer or seller will act in accordance with the best market information available at the time.

A30. *"… and without compulsion …"* – This establishes that each party is motivated to undertake the transaction, but is neither forced nor unduly coerced to complete it.

A31. Transaction costs and taxes - Market Value is to be the estimated value of a property and so excludes the additional costs that may be associated with sale or purchase as well as any taxation on the transaction. Market Value will reflect the effect of all the factors that bear on participants in the market and so reflect such influences as transactions costs and taxes may have but, if they need to be recognised, this should be as a sum in addition to the Market Value. These factors may influence the value but are not part of it.

A32. In particular, Market Value will be the value before any taxes which may apply to any real transaction in the property being valued. The fact of transaction taxes or Value Added Tax as they may affect some or all potential parties will be part of the wider framework of the

market and so, along with all other factors, influence value, but the specific taxation due on a transaction is over and above its Market Value.

A33. Overall - The ultimate test for market value, however determined, is whether parties in the market place could really be expected in practice to pay the value that has been assessed.

A34. In marked distinction to many financial instruments, real property is commonly more individual in both its legal and physical nature, less frequently traded, has buyers and sellers with varied motives, faces higher transaction costs, takes longer to market and buy and is more difficult to aggregate or disaggregate. These features make the valuation of real property an art requiring care, experience of the specific market, research and the use of market evidence, objectivity, and an appreciation of the assumptions required and judgement – in short, professional skills.

A35. EU State Aid Rules – These issues are also brought out in the EU's State Aid rules which highlight the role of market value as a concept that is key to fair competition. The *Commission Communication on State aid elements in sales of land and buildings by public authorities (OJ C 209, 10/07/1997, p0003-0005 – 31997Y0710(*01*))* states that:

> "Market value shall mean the price at which land and buildings could be sold under private contract between a willing seller and an arm's length buyer on the date of valuation, it being assumed that the property is publicly exposed to the market, that market conditions permit orderly disposal and that a normal period, having regard to the nature of the property, is available for the negotiation of the sale."
> *State Aid Communication II.2.(a) (last paragraph))*

A36. In the State Aid Communication, where a value in question was achieved by a "Sale on Unconditional Bidding" this is to be after:

> "a sufficiently well-publicized, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is by definition at market value".

ANNEXE B

FAIR VALUE

B1. Definition - European Valuation Standards 2012, in which The European Group of Valuers' Associations (TEGoVA) sets standards for real property valuation, opens its commentary on fair value (in EVS 2) saying:

> "Fair Value may generally be used as a basis of valuation for real estate as between specific participants in an actual or potential transaction, rather than assuming the wider marketplace of possible bidders."

B2. It defines fair value as

> "The price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between willing market participants possessing full knowledge of all the relevant facts, making their decision in accordance with their respective objectives."

It, thus, has regard to general market transactions but does not, of necessity, arrive at the same answer as the more demanding concept of market value with its more precise and exacting assumptions. In this context, one distinction is that fair value may be assessed as between specific participants, such as landlord and tenant, or in this case Code operator and landowner. This means that there are many situations where fair value is a useful concept by which to address the value of a property.

B3. Similarly, the International Valuation Standards Council (International Valuation Standards 2011 and adopted by the RICS) has defined fair value as:

> "The estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties that reflects the respective interests of those parties".

B4. The evidence for assessing this will (as for market value) differ in quantity and quality between the various sectors of the electronic communications market. A market exists for telecommunications mast sites and rents obtained can vary depending on, for example, location, height of the mast and site sharing arrangements and are quoted as comparables at reviews. It may be harder to discern objective evidence for more specific wayleaves but the fair value approach eases some of the problems of assessment that would be found with market value.

B5. As a footnote and to save possible confusion, it should be distinguished from the accounting concept of fair value, much of the origins of which lie in identifying an accounting value for financial instruments and liabilities rather than the specifics of real property valuation.

B6. The courts have recognised fair value in other circumstances. In *ARC Ltd v Schofield*, the court had to interpret a rent review clause applying a "fair and reasonable market rent". In wrestling with this contradiction, it distinguished between the objective concept of a market rent between hypothetical parties and the more subjective fair rent between the actual parties – and held it to be the same as a "fair and reasonable rent". Similarly, the court was able in *John Bushnell Ltd v Environment Agency* to review the assessment of a "fair and reasonable" charge for a Thames mooring licence under the Thames Conservancy Act 1932.

ANNEXE C

COMMUNICATIONS MASTS – MARKET RENTS AND RENT REVIEWS

C1. Mast Rents – Relevant Factors

C1.1 Some of the issues affecting the value of a site (and so also relevant in appraising comparables for rent reviews) are:

- *Location* – because a mast is part of a communications network and gains value from the entirety of the network, the location of a mast is not as crucial to its value as for other types of property – or as might be imagined by a lay observer. The overall value of a network brings a value to all mast sites wanted by an operator. However, sites close to urban centres or major transport routes tend to command a premium and more remote, rural sites will often lie at the lower end of the range of values.
- *Size of site* – while a mast site is sought for its function rather than its size, very small sites can be less valuable as they restrict the space for a site sharer's equipment and so the commercial potential of the mast. Conversely, a larger site may be no more valuable if its extra space is surplus to requirements.
- *Site-sharing rights* – if the lease includes an absolute prohibition on site sharing, it will be less valuable.
- *Equipment rights* – An operator may normally require the rights to have up to 6 antennae and 2 dishes. Restrictions on this may affect value.
- *Break clauses* – commercial pressures make these valuable to operators.
- *Height of mast* – although there is a general correlation between a mast's height and the rent (partly because planning permission can be harder to obtain for taller masts), some masts have to be tall because of site factors (such as trees or hills) without offering greater coverage.

C1.2 Annual reviews of the market are published in the CAAV Members' Handbook and by Strutt and Parker, Batcheller Monkhouse and others.

C2. The Current Market

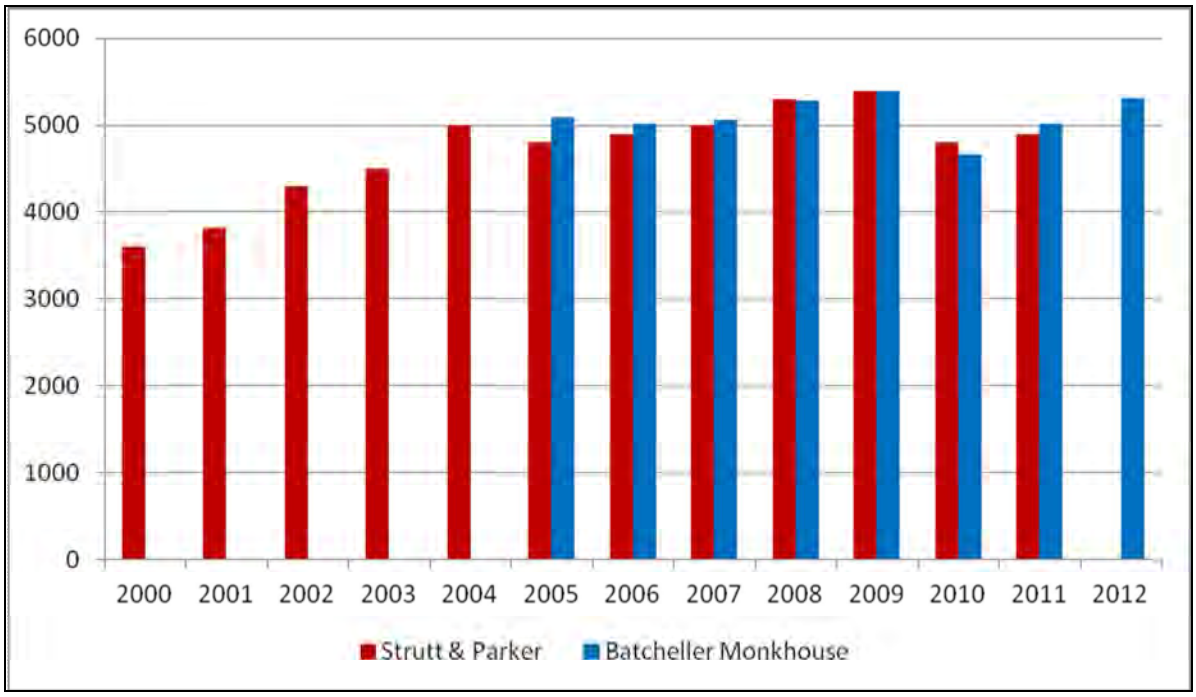
Before the Telecommunications Act 1984 began to liberalise the sector, sites were largely valued on the basis of their existing use. As the market for mobile telephones developed and its income potential became clear, the operators' urgent need for sites to offer the coverage they needed and to offer a service in competition with each other saw rents rise well above inflation. This trend then levelled off as the highly competitive retail market began to mature and operators sought to contain costs across their entire businesses. From 2009, operators began writing to landlords seeking considerable reductions in rents, albeit with little supporting market evidence and without offering any longer term security in return for the reduced rents. They also sought to maximise opportunities to share sites and jointly manage networks with other operators, with the emergence first of the MBNL joint venture and most recently the merger of T-Mobile with Orange to form what is now known as EE – effectively limiting large areas of the masts market now to two consortia. Despite the structural changes, the mass de-commissioning of sites forecast by some operators 3 or 4 years ago has not, in the main, materialised and new sites are being acquired in order to support the increased demand for data services.

C3. Rental Trends

C3.1 Greenfield sites – Chart C1 draws on data from Strutt & Parker's and Batcheller Monkhouse's annual surveys of mast rents to show the overall movements in average rents

for smaller masts. The trend for greenfield site rents was upwards until 2009, when operators began to seek rent reductions. Strutt & Parker survey some 4,800 sites and Batcheller Monkhouse about 3,700.

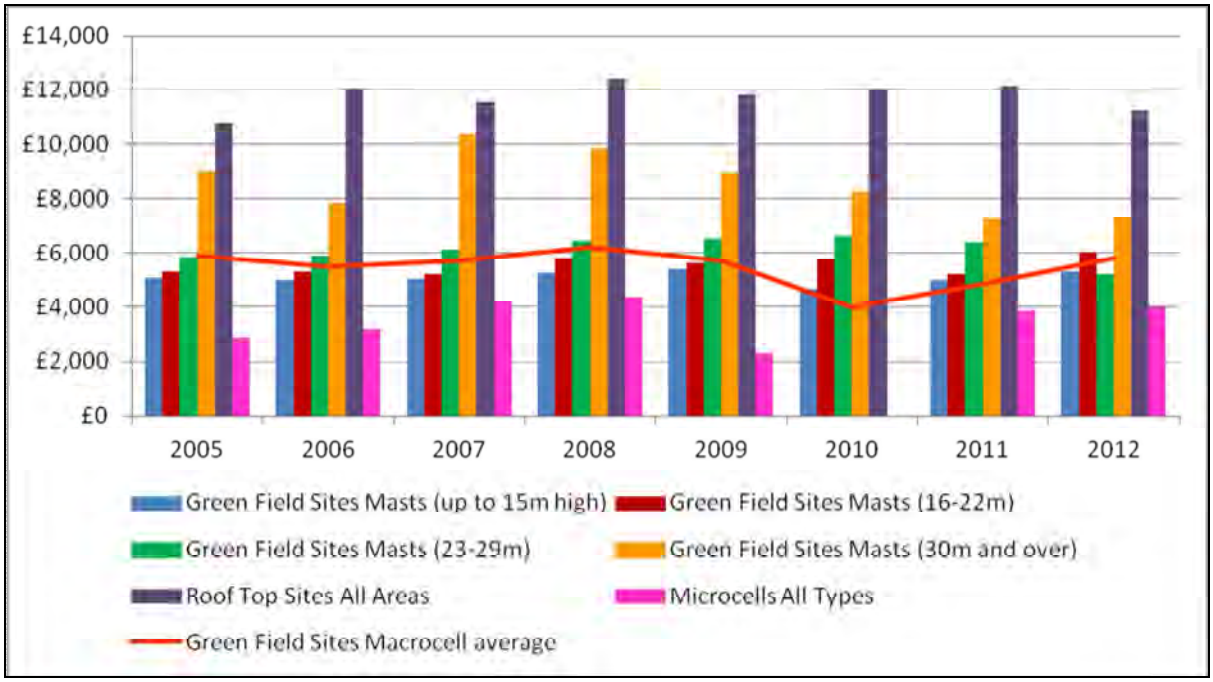
CHART C1



Source: Strutt & Parker Telecommunications Survey 2012 and Batcheller Monkhouse

C3.2 Taller masts, requiring planning consent, can command higher rents, with a direct correlation between the height of the mast and the rent. Strutt & Parker reports that masts of 20–30 metres high can average rents of just over £6,000 per annum and masts of more than 30 metres can command rents of about £8,000 per annum. The Chart C2 below shows rent for masts of different heights and types from Batcheller Monkhouse's records.

CHART C2



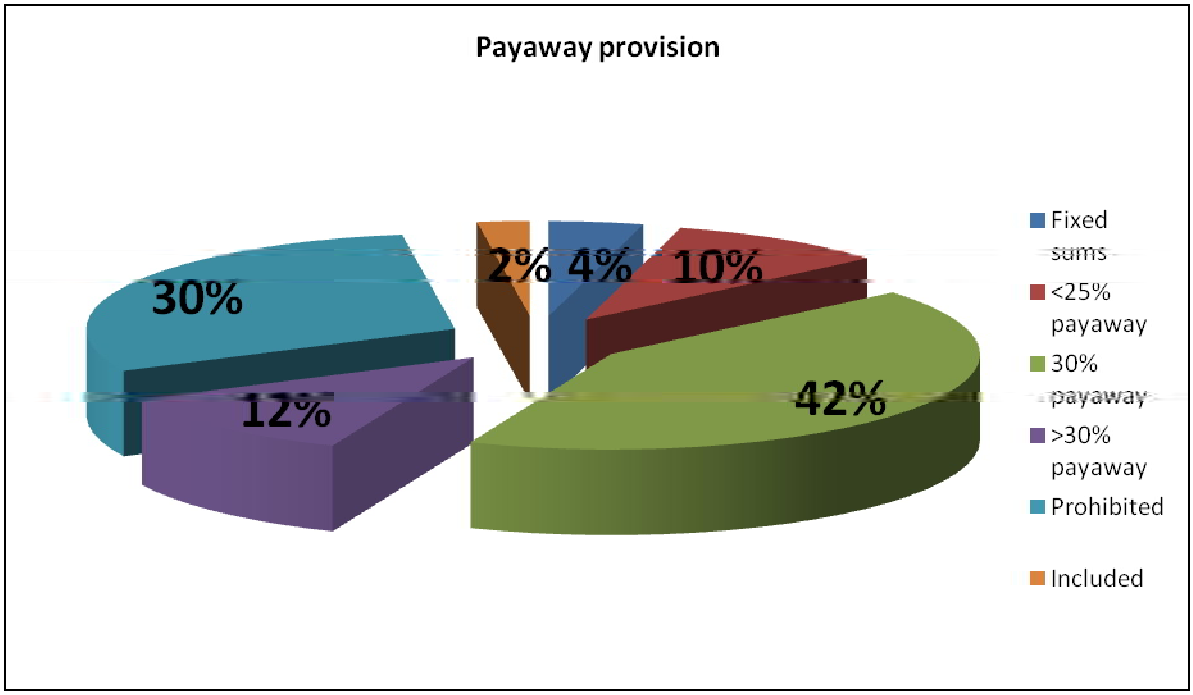
Source: Batcheller Monkhouse

C3.3 Sites on Buildings - The average rooftop rent is significantly higher than a greenfield mast, as shown in the table above. Strutt & Parker found that the average rooftop rent in 2011 was around £12,000 per annum, but rents will vary with both location (London can command higher rents) and the type and scale of equipment installed. Sites with more antennae may see higher rents but microcells markedly lower ones.

C3.3 Rent Change on Site Sharing - Mast agreements have historically given exclusive rights to a single Code operator who has resource to Code powers in respect of that mast. Clauses have then regulated site sharing and assignment which have more recently become of greater interest to operators under pressure from policy and economics.

C3.4 Where site sharing rights have been granted (either in the agreement or by subsequent consent), the market evidence is that this is normally dealt with by a "pay away" whereby the landlord receives a percentage of the site share income. More recently and with the growing number of inter-operator agreements outlined below, an increasing number now see a pay away for a fixed sum.

CHART C3



Source: Strutt & Parker Telecommunications Survey 2012

C3.5 The developing commercial structure of the sector has reduced the transparency on which many pay away agreements rely, often making it either harder to determine the figure on which a pay away fraction is to be assessed, or so shifting value between that there is no basis. If the operator adding a dish or using a service on another operator's mast makes no identifiable payment in that respect, then 30 per cent of nothing is nothing, however much the arrangement may be to the positive mutual benefit of both operators for which value flows in other ways.

C3.6 The major operators now have master agreements between them which set the rules for site sharing on individual sites – effectively an enabling agreement. These agreements are reciprocal (i.e. the same agreement applies to A sharing on B as B on A's mast). There is increasing evidence that operators are entering into reciprocal agreements at consideration less than market value. It is assumed that as such agreements are parts of much larger joint operations, the operators can "value shift" so that value will arise where it suits them, not where it might lie economically.

C3.7 The O_2/Vodafone Cornerstone "guidelines" suggest that third party sharing should be as per the rooftop rate. The guideline rental for rights to install more than six antennae on a rooftop is £5,750 per annum; 30 per cent of this equates to £1,725. Nonetheless the actual reciprocal site share agreement between these two companies appears to be that they pay 50 per cent of the base rent (i.e. unequipped) rent of sites where they share occupation. A landowner under the Cornerstone agreement for a standard 15m mast would therefore receive in the order of 30 per cent of say £2,500 (the average rent for such a site) - just £750. This is in marked contrast to arms' length transactions where values are based on equipped site rentals and the right to install say 6 antennae is in the order of £10,000 pa, for which a landlord would receive £3,000 per annum.

C3.8 Other operators in lease negotiations are currently demanding the right to share free of charge, or at best offering only 30 per cent of an income they control with no transparency to enable landlords to check they are receiving a proper market value.

C3.9 Rent Change on Alterations - Some leases have pre-agreed rates for additional rent to be paid when new equipment is added to a site. Analysis of 85 leases by Batcheller Monkhouse showed a wide range of rental figures agreed for different types of additional equipment:

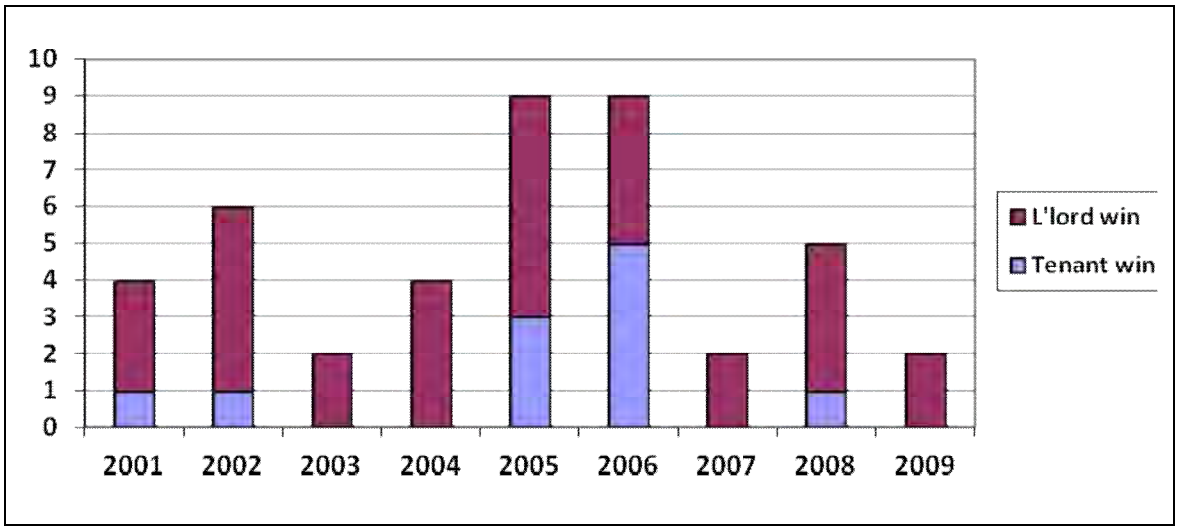
Equipment type	Additional rent (£ per annum)
Aerial	£250 - £500 each
Antenna	£250 - £2,000 each
Cabinet	£100 - £1,750 each
Dish (0.3m)	£300 - £2,000 each
Dish (0.6m)	£400 - £2,500 each
Where simply described as "additional item"	£150 - £750 each

C4. Dispute Determination

C4.1 It appears that, generally and notwithstanding market evidence, operators will not readily accept any substantial rent increase above RPI. In turn, this leads to increasing demand for third party determination which under many mast agreements is by arbitration.

C4.2 An analysis in 2010 of third party determinations over the previous decade illustrated the then position. Working on the basis of the outcome compared with the rental submissions made by the landlord and the tenant in each case, it takes a party as winning if the outcome is nearer to its submitted figure than that of its opponent. For commercial disputes in general, the results would typically be fairly evenly matched, but this research, showing a pattern of landlords' wins in the years reviewed, suggests this has not been true for mast disputes in recent years. Chart C4 illustrates this.

CHART C4



Source: Strutt & Parker Telecommunications Survey 2012

C5. Rent Reviews

C5.1 There is no general pattern either as to the timing of rent reviews or as to the basis on which rents are to be varied or reviewed. In each case, this will follow the provisions of the tenancy agreement in question. In this matter, as with most others concerning mast agreements, tenancy terms can vary widely and may not only be specific as to the basis for the review or variation but also govern aspects of the property to be valued. Many are let on open market rent review terms, others are let on a basis that sees the rent varied by a formula dependent on the RPI.

C5.2 In most telecoms leases the landlord lets a bare site to the tenant. The tenant then improves that site by supplying electricity and erecting a mast, the actual antenna and a cabin, all within a fence.

C5.3 In some cases, issues over renewal of the agreement will see the tenant's fixtures (such as the mast) become part of the landlord's property for rental purposes. Most masts are sufficiently attached to become part of the property. Foundations and brick buildings are certainly incapable of retaining their character upon removal; most radio masts must be unbolted into their constituent parts for removal. It will be a matter for interpretation in each case if this common law position is overridden by the Code's paragraph 27(4). The common law position may most obviously apply where the apparatus was installed before any written agreement was made.

C5.4 Where the equipment has become the landlord's it may have significant effects. The rental difference between equipped and unequipped sites may often be at least 60 per cent and 40 per cent uplifts (as in the non-Code case *Ponsford*) have been established at arbitration in respect of a number of radio mast sites.

C5.5 It may often be relevant here that almost all communications apparatus agreements are drafted by the Code operator (the tenant of the mast site) and so ambiguities will be construed against the tenant (the *contra proferentum* rule).

C5.6 The assessment of the rent will almost always be on the basis of comparables requiring consideration not only of the abve factors but also of the date of the potentially comparable transactions.

ANNEXE D

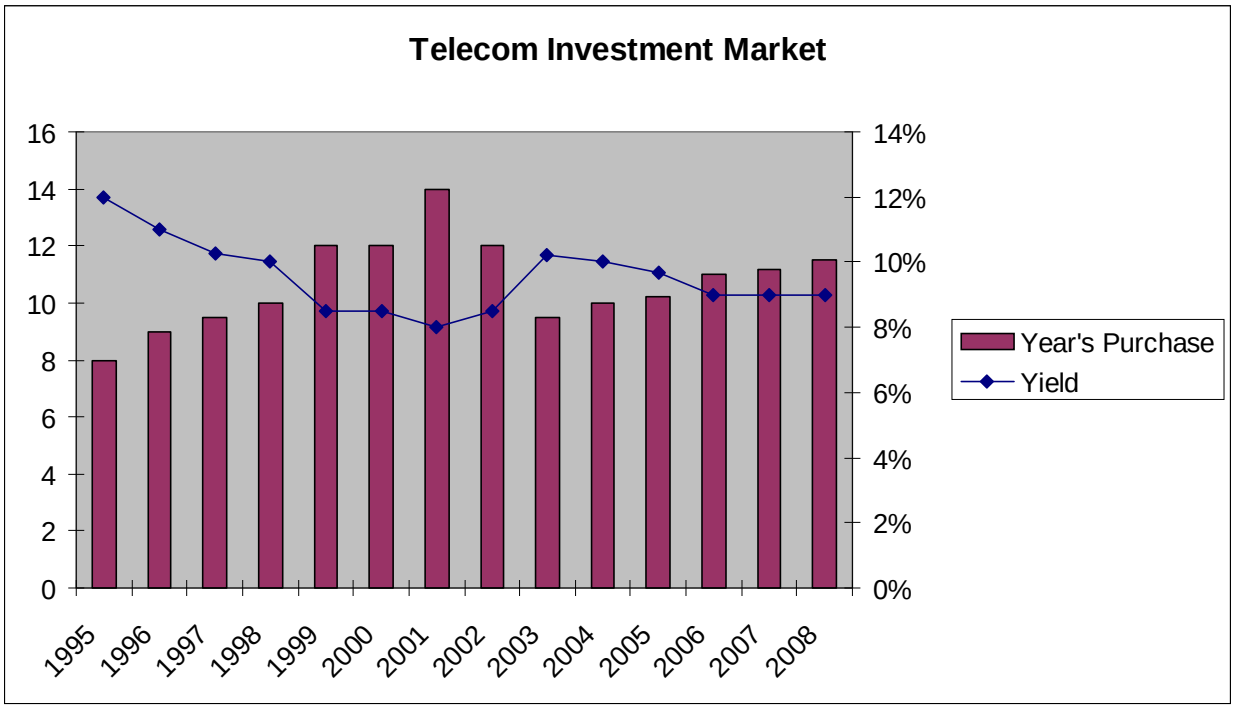
COMMUNICATIONS MASTS - CAPITAL VALUES

D1. An investment market has slowly developed for masts. While analysis can still be constrained by limited transactions, operators such as WIG and Shere have established and acquired portfolios of masts often at substantial values based on the rents passing. Again surveys show the general position but their results are naturally subject to all the cautions expressed above concerning rents. Individual valuations should rest on analysis of the specific site, the market and comparables.

D2. The investment valuation of the landlord's interest in a mast site may usually be based on a multiplier of the rent, based on market evidence from sales and elsewhere, reflecting the expected period in which the rent will be available to the owner. Where the market would recognise the potential for further income from site sharing or other sources, then some element of hope value may be appropriate – that may be equally relevant in analysing comparables. Such valuations might usually be on the basis of market value but if for the internal purposes of an investor, an instruction might be on the basis of worth (investment value).

D3. Where operators own mast sites they may create a lease and sell the reversion to release capital.

CHART D1



Source : Batcheller Thacker Telecommunications Survey 2009

D4. Typical individual masts were valued in 2010 at nine or ten years' purchase of the passing rent. Thus, the reversion to an ordinary mast at a rent of some £5,000 would have a typical capital value of some £45,000-£50,000.

ANNEXE E

THE MARKET FOR CABLES

E1. Perhaps by contrast to masts (with their particular functional need to uphold an antenna at useful height), there are many reasons why one person might wish to run a cable across another person's land and not all of them arise under statutory powers, whether subject to the payment regime for compulsory purchase or not. These occasions have recently been joined by the need for those producing renewable energy to secure access across a neighbour's land to a grid connection or to bring electricity on-shore. Where this arises on a non-statutory basis the relevant lease, easement or wayleave has to be negotiated and agreed, providing work for valuers.

E2. Thus, while the market for communications cables may offer fewer opportunities to seek competitive bids than may on occasion be available for mast sites, there has been an enormous number of transactions in rights for cables of any sort since cables were first needed. There are problems however in obtaining and analysing them. The opportunity of the Code review means that these problems can be addressed.

E3. The market for cable rights exists but is obscured and made opaque by factors including:

- standard agreements on payment rates – the NFU and CLA have historically agreed with operators to recommend standard rates for cables over farmland as an assistance to their individual members facing large companies. This also saves effort for companies. However, not only may these not always settle on the values appropriate to specific situations for all NFU or CLA members, but they may be of little relevance to other settlements (being dismissed in *Brookwood Cemetery*). Some owners with long linear landholdings may again come to "bulk arrangements" for operators to lay cables along their land which may reflect their circumstances but not necessarily other smaller owners. Overall, they may act as a further constraint on outside understanding of this market.
- the prevalence of confidentiality agreements being required by operators for anything more specialist.

E4. These factors have the combined effect of a profound general imbalance of knowledge between the parties, especially where more significant cables are at issue, to the usual disadvantage of landowners, since operators should know the details of the full range of agreements to which they are party. Those comparables exist but may only be forced anywhere near the light by using the discovery procedures available with litigation or arbitration. That can make analysis of comparables more difficult since, where figures do become available, their context may not be fully understood. It also tends to result in weaker negotiation than might be expected by the definitions of market value.

E5. There has also been a psychological background in which parties have simply assumed that communications cables could be seen against a longstanding background of other sectors with statutory powers and assumed conventional patterns of standard rates of annual payment. In that light it is interesting to consider both the possibility that many agreements for cables may actually be leases and the way that agreements for cables can follow the structure that would be found in mast leases with heads of terms such as:

- defining the demise

- the payment
- the user
- arrangements and payments for more fibres
- liabilities for works, maintenance and nuisance with indemnities
- alienation
- inspection by landowner
- disputes
- re-entry

Each of these may have some bearing on value according to the circumstances.

E6. One important reform that would aid the transparency of the market would be to provide that the use of Code powers precludes confidentiality clauses. To an extent that could be seen as a co-relative of removing the exemption of Code agreements from land registration.

E7. A further contrast with masts is that masts are not only physically visible with their antennae and dishes but their locations are shown on public websites. That, combined with the requirement for above ground apparatus to carry the name of the operator, makes it easier to work on securing possible comparables and understand the local context. We know from Ofcom that there are some 50,000 masts and where they are. Cables are not physically obvious, not marked by notices and not on any public register and so there is no ready msn to seek out possible comparables. There must not only be hundreds of thousands of miles of cables but that sweeping figure suggests hundreds of thousands of agreements – by no means all of which are in writing. Such a public register would again aid the transparency of the market.

E8. That market pressures exist nonetheless is, though, shown by the experience of [redacted] began the development of a network of fibre optic communications cables using existing electricity apparatus, [redacted] Following their practice to assist members with utilities' schemes, the NFU and CLA agreed standard rates [redacted] However, these rates failed in the market place as agricultural landowners would not accept them. Fresh, higher rates were negotiated by landowners' agents in the field that enabled the scheme to go ahead. These rates were also unrelated to the earning capacity of the cables, but were a mutual recognition of what was felt to be sensible between the parties. Thus, even on something as standard as a fibre optic cable strung on a power line across bare farmland, the market drove an outcome that was agreed and displaced rates that were not mutually accepted. Those rates then served as a template for rights for other operators' fibre optic cables, adjusted for such circumstances as the number of fibres in the cable.

E9. The cables to be installed under the Code may usually either be:

- fibre optic cables as in *LIDI*
- copper cables as for generality of BT local connections and in *Cabletel v Brookwood Cemetery*.

The need for one rather than the other may reflect the needs of an operator's core network as opposed to local connections or the need of a customer for high quality, high volume service. It may be that fibre optic technology will increasingly be used for both functions, both as customers demands rise and if the price of copper continues to see it stolen to general inconvenience.

E10. Following the analysis in the 1982 Consultation Paper of cables as either "trunk" or "service", the decision in *Brookwood Cemetery* saw a practical distinction made between "main" cables and local cables and so a key factor is the extent to which the cable in question is part of the core or trunk network or more of a local line, nearer or actually the "final mile". In the last few years, that has tended to overlap closely with whether the cable was fibre optic (as in *LIDI*) or copper (as in *Brookwood Cemetery*) but it would now appear that fibre optic cable is being used more widely for both service and practical reasons.

E11. The benefits to be obtained by the operator from a cable were part of the matrix of circumstance informing market value. It had been noted in *LIDI* that a landowner considering a request for a right of way across his land to a cottage would take a different view of its value compared to one for a factory. In considering the underlying issue of function, the County Court judge said in *Brookwood Cemetery* that the suggestion:

> "that a local cable … is as valuable … as a fibre optic cable serving many thousands or even millions … is contrary to common sense".

E12. These cases were decided on the basis of comparable evidence. In *Brookwood Cemetery*, the Court of Appeal said that this process should make adjustments as necessary for any element of the value of comparables that had been driven by "... time constraints, the expense or uncertainty of litigation, or (I might add) the small size of the works and of any payment."

E13. The Court of Appeal found that the judge in *Brookwood Cemetery* "had ample material before him". It looked for the fair and reasonable value that would be set under paragraph 7(1)(a) and specifically advised that:

> "Industrial rates for core or fibre optic cabling with an origin in agricultural negotiations were not, on the evidence, a sound starting point. Across-the-board rates, regardless of location, size, use and importance seem to me the antithesis of the fair and reasonable rate required to be fixed under the code."

E14. Factors that are potentially relevant to analysis of comparables for a case in hand are:

- the extent to which the operator may be able to use other means of access to the intended destination of the cable. That may include use of the public highway which is available *gratis* to operators.
- the interests of other relevant landowners
- the number of fibres or ducts to be installed and who may use them
- whether that number is controlled thereafter by the agreement, a point thought more relevant to ducts given the risks of inserting a fresh glass fibre into an existing duct
- the impact of the cable on the current and future use of the land
- whether the agreement includes a "lift and shift" clause (and its terms) or not.

E15. Thus, rates (especially historic ones) for BT local copper cable may not be relevant to higher volume fibre optic cables. BT may well pay more for newly agreed core cables.

E16. Even in this imperfectly informed market, values agreed between parties vary in patterns that might not be surprising:

- the Crown Estate is understood to secure payments [redacted] for cables within the 12 mile limit and on-shore landing of cables. Its website notes that "up to 95 per cent of overseas internet and telephone traffic is supported by undersea fibre optic cables".

- British Waterways Board and Network Rail are thought to agree figures in the region of [redacted] per crossing
- at the lowest end, the market value for bare open field cable runs can be as low as £1 to £5 per metre unless local circumstances in hand drive a higher figure, but the NFU CLA recommended rates are [redacted]

E17. As elsewhere, problems for landowners in securing the active engagement of operators in negotiations over the renewal of agreements that have expired and the terms and payments for them are widely reported.

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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: Guy Fetherstonhaugh QC
Email address: [redacted]
Postal address: Falcon Chambers, Falcon Court, London EC4Y 1AA
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):**
Falcon Chambers
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 – and we suggest that the drafting to accomplish this in the new Code should make these rights explicit, in contrast to the current drafting (where for example "improvement" is defined in paragraph 20 to include redevelopment, while the word "alteration" is defined (misleadingly, in a completely different paragraph) to include removal.

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.

(1) We are not aware of any call for an extension of code rights.

(2) We do not propose that code rights be reduced – but with the caveat (developed in answer to paragraph 10.8 below) that the procedure for termination of code rights should be simplified in order to prevent code operators deliberately or unintentionally frustrating the development or other rights of landowners.

(3) The Commission may need to consider the effect of current industry practice, which is that electronic communications apparatus may not necessarily be vested in an "operator". We increasingly encounter cases in which that apparatus is in fact vested only in a holding company which is not itself an operator, and which then makes that apparatus available for operators to use. This is a common structure adopted where there has been a merger of electronic communications networks, whereby the shared infrastructure is assigned to a subsidiary company which is not itself engaged in the provision of electronic communications services.

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, but only where code rights are imposed by statute rather than assumed by agreement. In the case of the latter, the parties should be free to agree the nature and extent of the obligations to be assumed by the Operators. In the case of the former, we propose that the obligations should include consideration of the following:

(1) To keep the equipment in repair and decorated;

(2) To access the equipment only upon reasonable notice (save in case of emergency); to repair any damage caused by such access; and to compensate the landowner for any loss thereby occasioned;

(3) Not to assign title to the equipment or the agreement save to another code operator;

(4) To remove the equipment upon expiry of the agreement, and to make good any damage caused;

(5) To site the equipment in the least obtrusive position consistent with optimal performance;

(6) To indemnify the landowner against any damage caused (whether to the land or to the landowner or those to whom it is responsible) by the installation, operation or maintenance of the equipment;

(7) To re-site the apparatus, or undertake preventative measures, in the event that it interferes with the reasonable use of electronic communications apparatus of another operator, or (for example) the reception of television signal by a resident. In this context, we understand that it has been suggested that the switching on of 4G signal may interfere with reception of digital freeview signal.

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 agree with the reasoning set out in the Paper. We suggest however that the current definition should be amended to make clear whether equipment which is ancillary to electronic communications apparatus but owned by an entity which is not an operator is covered. For example, is a transformer owned by an electricity supplier which steps down the electricity supply for a equipment cabinet owned by an operator covered by Code rights?

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.

It is important to stress an anterior point in answering this question. Paragraph 3.29 of the Consultation Paper asserts that "The occupier is the one most likely to want the supply of electronic communications services, and also the most likely to be inconvenienced by the apparatus of Code Operators." While we do not take issue with the proposition that it would be impractical for Code Operators to deal with anyone other than the person in occupation of the land (paragraph 3.30), we would emphasise that it is not our experience either that occupiers necessarily want the supply of such services per se (as opposed to the income stream generated by the Code Operator), or that occupiers are the most likely to be inconvenienced by the apparatus. Typical examples that spring to mind are (a) the tenant farmer who gives over an unproductive corner of the land; and (b) the leaseholder in possession of the roof of an office block. It is often the case that neither class of occupier is interested in the services as such (existing services being perfectly adequate), and neither is particularly inconvenienced by the installation or operation of the apparatus. However, upon expiry of the leasehold interest, the freeholder then has to grapple with adverse statutory rights to which it never consented, which it does not want, and which may well interfere with its own plans (often redevelopment) for the land. This point should be borne in mind when considering the extent to which such rights should bind superior interests in the land (see paragraph 10.9 below). We appreciate that the authors of the Consultation Paper have noted this point (paragraph 3.39), but only in the context of tenants who have had apparatus installed with the purpose of enjoying the supply from that apparatus. In our experience, this is seldom the case: the tenant is usually interested merely in the additional income stream.

Against that background, we propose:

(1) that occupiers (as currently defined) should be able to enter into agreements with Code Operators to create code rights, but not so as to bind third parties who have not given their separate consent in writing (and for the avoidance of doubt, a mere licence to underlet, or to share occupation should not suffice for those purposes);

(2) that Code Operators should be compelled to remove their apparatus upon the expiry of the occupier's interest, unless they have by that time secured the requisite agreement of the owner of the superior interest to the retention of the apparatus, or a court order to that effect.

This proposal will require a degree of forward thinking among Code Operators – but we see nothing wrong with that. It is no more than would have been necessary when the apparatus was installed in the first place.

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 notion of "adequate compensation" imports an objective test, which will usually be answered by considering whether the value of the land is diminished by a particular amount as a result of the installation of the apparatus. Often, however, the landowner's objection will be based upon subjective factors (interference with a view; the desire for privacy; health and safety concerns) that have no impact upon value, but which we consider should be weighed in the balance against the public interest. We therefore suggest that the tribunal should always have to perform the balancing exercise.

(2) The answer to this depends upon the importance ascribed to the "overriding point": it is we feel a matter for government and not us.

(3) We consider that it is for Government first to stipulate exactly how "overriding" is its commitment to more and faster services. The drafting cannot be attempted until that point has been resolved.

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 to paragraph 10.8 above. Our proposal would need a revised set of provisions to deal with this 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.
We are unaware of any problems this has caused.

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 do not consider that the provision allowing objections to be made within a fixed time of installation is just. In many cases (we surmise), the installation may escape the landowner's attention, and may only be noticed once it conflicts with the landowner's proposals, by which time it will be too late to object. We would urge the deletion of the time limit. There should be a right to require the alteration of the route of overhead apparatus (e.g. wires) in the event that they impede development. This will probably best be dealt with by means of a notice procedure.

10.13 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence. Consultation Paper, Part 3, paragraph 3.69.
We can see the sense in the obligation, but do not consider that non-compliance should have a criminal sanction (particularly given the problems identified in Jones).

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. It is often difficult to detect whether growth comprises a tree or a shrub or other vegetation, and we see no logic in the need to differentiate.

(2) No, unless the interference is to a line in respect of which the Operator has installed by agreement or court order. In cases where the line has been installed without notice, agreement or order, the landowner should have the right to object. In the case of an objection, we consider that the court should approach the matter on the hypothetical basis that the line has not been installed, and require the Operator to establish why it should be allowed to fly the line and be given access to lop vegetation, as opposed to installing the line along the street.

(3) No: we think that this would require a far-reaching invasion of rights that would be difficult to draft and expensive to enforce. Is there an expressed need for it?

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) It depends upon the nature of the upgrade. If it involves no additional bulk, but simply requires a more powerful receiver/transmitter, then the only consideration should be one of health and safety – we cannot see that the landowner should be entitled to object purely on the ground that the original apparatus has been upgraded. If it involves additional bulk, and any agreement between the parties does not provide for this, then the Operator should be compelled either to reach agreement to the installation, or prove its need in court.

(2) Subject to (1) above, the question of payment should be approached on the basis: what additional sum, if any (suitably indexed), would the Operator have been required to pay had it installed the additional apparatus at the same time as 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) Yes: as the Paper points out, this can lead to delay and expense. There is also considerable uncertainty amongst landowners as to how many paragraph 20 or 21 notices have to be served, whether there might be multiple sub-tenancies, and so on.

(2) A qualified yes: it makes sense to promote sharing (because this lessens landscape blight and access problems from competing sets of apparatus). However, we have two caveats. First, the ability to install extra equipment should be subject to the constraints set out in the answer to paragraph 10.15 above. Secondly, and importantly, the right bestowed by the revised Code should make it clear that the landowner need deal only with one Operator, and should not be affected by the rights enjoyed by the sharers as against that Operator. This point causes great difficulties in practice under the current regime, where one mast may bear equipment belonging to numerous parties, all of whom assert rights of different kinds (statutory, under licence, under subleases, whether statutorily protected or otherwise) against the landowner.

(3) The sheer fact of sharing without additional equipment should not be a ground for additional payment (although we see the arguments to the contrary), unless there is a greater burden as a result (for example, more frequent access across the land). Where additional equipment is installed, then there should be grounds for the landowner to seek additional payments, as discussed in the answer to paragraph 10.15 above. However, a contrary view may be this. A landowner can often have two operators, A and B, operating on the same roof. He receives £X from each, so that the annual income is £2X. We do not immediately see why A and B should be able to run the same valuable businesses from the landowner's land from a shared mast, with the result that the landowner's income is reduced to £X. This is a serious problem in light of the fact that mobile telephone operators increasingly seek to share infrastructure to cut overheads.

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 find the distinction between different forms of tenure unhelpful in the context of Code rights. We would prefer to see one regime that applies to all forms of agreement, whether described as a lease for however long a term or a licence. This would not of course prevent landowners conferring additional rights upon the Operator if they choose.

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) Not in our experience – but the scope for such difficulties in practice is obvious, particularly where the assignment is to more than one operator jointly. .

(2) Yes. Frequently, Code Operators are subject to takeovers, with the result that the legal identity of the Operator may remain the same, although in substance it will be another operator. The landowner will rarely be able to prevent this. If that is right, then we can see no value (beyond the retention of a bargaining position) in the landowner being able to withhold consent to assignment to another Operator.

(3) No. The landowner will suffer no loss from the transaction other than its ransom position. We do not see why that loss should be compensated. One might see a case for the payment of reasonable costs incurred in relation to any licence.

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 that we have not already set out above.

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.

As we have said, we are not aware of any difficulties in practice. If others have experienced such difficulties, then we could see the sense for a revision of the code to include the suggested rights, for the reasons set out in the Consultation Paper.

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 specific problems (although we can see how such problems might often arise in practice).

(2) The courts' powers to restrain interference with rights are robust. Injunctions are readily granted without notice in clear cases. We therefore suspect that the problems said to be experienced by Code Operators in cases of interference are attributable to their lack of familiarity with the relief available in court, rather than lack of proper enforcement powers.

(3) We do not therefore consider that any further provision is required – and in particular we question the propriety of singling out interference with Code rights as a criminal offence, compared with interference with any other third party rights.

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 in our experience.

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.

In general, the Crown Estate can be expected to behave responsibly in relation to requests concerning its foreshore. However, our experience is that the provisions of the Code are of little assistance in this respect. In particular (and notwithstanding what is said in paragraph 4.18 in the Consultation Paper), it is not clear to us whether paragraph 11(2) imposes a duty on the Crown Estate, either to grant a licence, or to consider an application for a licence. This may depend on whether the words "subject to … the following provisions of this code" (a) refer to the rest of paragraph 11 only, or (b) refer to all paragraphs of the Code following including paragraph 26. This in turn prompts the question whether the paragraph 5 procedure may legitimately be invoked against the Crown, or whether the paragraph 11 procedure was intended to be a special regime (as Lewison J held in relation to paragraph 12 in the Bridgewater case). We suggest that this needs clarification.

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) Given the intensity of possibly conflicting seabed use at the points where submarine cables are likely to be landed, and given the proliferation of other laws in this area (UNCLOS, the Marine and Coastal Access Act 2009, the Crown Estate Act 1961), we consider that there should be a special regime for tidal waters and lands.

(2) The special regime should attempt to balance rights and responsibilities in the same way as the general regime, but it will need to pay regard to the fact that (a) the Operator interest sought to be obtained or facilitated (for example a cable bearing telephone traffic from Ireland) will be substantially more important than the average run of operator cases; and (b) correspondingly, there will be important national interests (navigation, fishing) that will

have to be accommodated.

(3) We can see no case for this.

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, for the reasons given in the Consultation Paper.

(2) Our anecdotal evidence is to the effect that it is greatly used.

(3) We consider that a civil sanction for breach is all that is necessary.

(4) We have seen no evidence to suggest that the existing rights are inadequate. There are, however, difficulties in the definition of “linear obstacles”, in particular how deep they go. It is currently unclear what is the precise extent vertically of a linear obstacle, and at what point it ceases to be a special regime case, and becomes a general regime case.

(5) It is perhaps not sufficiently appreciated by the Code that the linear obstacles which are set out in the Code currently are now private businesses, and we do not immediately see why there should be a discrepancy in the consideration and compensation requirements between the operator of a linear obstacle and the owner of private land.

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. We add that this aspect of the Code has generated the most conflict in our experience. The primary difficulty is the interaction of the Code with contractual rights and rights under Part II of the Landlord and Tenant Act 1954. To remedy this, we suggest (a) that contractual rights should prevail (and that neither landowners nor Operators should be able to use the Code to sidestep their contracts, subject perhaps to the point made above concerning mast and equipment sharing and upgrading); (b) that upon the expiry of contracts, only the Code, and not the 1954 Act, should govern the retention of the apparatus if a fresh agreement cannot be made; and (c) where there is no agreement, the Code alone should govern the parties (and not the 1954 Act). We note that this is also recommended under paragraph 10.58 below.

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

Consultation Paper, Part 5, paragraph 5.12.

We see no need for the constraint that alteration rights should be triggered only where the landowner proposes to "improve". The starting point should be that the landowner should be able to judge for itself what to do with its land, subject only to the overriding principle (however redrafted). Accordingly, if the landowner wishes to move the apparatus from one part of its property to another, and puts in place proposals to ensure that service is maintained and relocation costs are met, we can see nothing wrong in this. Moreover, even where an improvement is planned, it should be made clear that temporary relocation (for example where one building is taken down and another is erected in its place) should be enforceable against the Operator.

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 contracting out should not be allowed, although it will not achieve very much: there will be nothing preventing Operator B seeking Code rights against a property in respect of which there is a contracting out agreement with Operator A.

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 – but subject to the point made in answer to question 10.38 below.	

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

10.38 We ask consultees to tell us their views about the procedure for enforcing removal. Should the onus remain on landowners to take proceedings? If so, what steps, if any, should be taken to make the procedure more efficient? Consultation Paper, Part 5, paragraph 5.49.
The Consultation Paper identifies two problems with the current security provisions: delay and expense. Both these problems have their roots in the procedure whereby the requisite removal notice can only be served at the end of the period. We propose instead that a new procedure be introduced, similar to that set out in the 1954 Act, whereby either party can instigate the termination or renewal procedure up to one year before the end of the period, with a tribunal hearing if agreement cannot be reached. If agreement is reached, to the effect that the rights will not be renewed, then the agreement should include provision for the removal of the apparatus by the Operator within a specified period, failing which the landowner will be entitled to remove it at the Operator's expense. If the tribunal makes an order against renewal, then this should similarly provide for time and cost of renewal. We consider that the Code should make provision for the recovery of compensation where, for instance, a recalcitrant Operator prevents a tenant from delivering up vacant possession in accordance with his own obligations.

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.
Please see the answer to paragraph 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.
Yes – and our view is that the freedom to agree should be unrestricted.

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

We do not agree that the Code should apply retrospectively.

(1) First, there is no reason why a landowner should obtain rights of alteration for which it did not bargain (and which may therefore affect the rent payable to it upon review).

(2) Secondly, the operator who gains Code status will have to bear in mind that it will have to seek Code rights to retain its apparatus, prior to expiry of the lease. The 1954 Act mechanism suggested in the response to question 10.38 above could easily provide for this.

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 are agnostic on this and the other questions in this Part.

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.
See the answer to paragraph 10.42 above.

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.
See the answer to paragraph 10.42 above.

10.45 Consultees are also invited to express their views on alternative approaches; in particular, the possibility of a statutory uplift on compensation (with a minimum payment figure in situations where no compensation would be payable). Consultation Paper, Part 6, paragraph 6.74.	
See the answer to paragraph 10.42 above.	

10.46 We provisionally propose that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle. Do consultees agree? Consultation Paper, Part 6, paragraph 6.78.	
See the answer to paragraph 10.42 above.	

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.	
See the answer to paragraph 10.42 above.	

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. Litigation concerning the Code has been low, but has taken place in county courts with no or no efficient procedure for dissemination of information regarding decisions or procedure. It would make for better sense and consistency were litigation to be consigned in the first instance to a specialist tribunal, as suggested below. However, we would observe that Code litigation can and often does involve invoking coercive remedies (injunctions, possession) which only a Court can impose and enforce.

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 prefer option (1), which combines lawyer and surveyor judges, and has an established track record in procedure and publication of its decisions.

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 do not have strong views – but we regard this as an odd departure from normal practice, where ordinarily the right would not be engaged until the price for exercise of the right has been agreed or determined. If the Code Operator considers the matter urgent, its remedy is to make its application at an earlier stage, surely?

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.
None occur to us.

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 led to or increased the costs incurred; or (2) that costs should be paid by the losing party. Consultation Paper, Part 7, paragraph 7.37
We favour option (1), but as amended in red. Thus in a case where it is obvious from the start that the Code Operator should be granted code rights, the landowner should appreciate that it resists at is peril, and cannot oppose merely to "put the Operator to proof".

10.53 We also ask consultees whether different rules for costs are needed depending upon the type of dispute. Consultation Paper, Part 7, paragraph 7.38.
We are not aware of any cases where different rules would be required.

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, absolutely.

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 do not consider that there is much need for improvement. In practice, operators know to respond to requests to get off site by serving a counter-notice under paragraph 21, and that practice does not seem to us to create real problems. In relation to paragraph 20, the intentions of the person serving such a notice is equally clear. To prescribe a form of notice is likely to lead to technical disputes of an unedifying kind seen in the context of the Leasehold Reform, Housing and Urban Development Act 1993.

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 OFCOM website ought to provide a clear list of operators, and a flow-chart as to what to do. Currently, the provision of information on the OFCOM website is not ideal, and relevant information is hard to find. The OFCOM staff are helpful, but cannot be expected to deal with all issues.

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.
There are already familiar forms of agreement. It does not seem sensible to be prescriptive about the form and content of the agreement, given the myriad types of land and apparatus that there might be.

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 – definitely. This should apply to all tenancies of whatever length. It should also be made clear that a Code protected agreement which is continued by the Code does not create a separate periodic tenancy or tenancy at will. In general we can see a good case for simply stating that a Code agreement is entirely *sui generis*, and that the common law relating to leases ought not to apply to them.	

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.

We have no experience of this.

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

Consultation Paper, Part 9, paragraph 9.39.

We have encountered no problems in practice with these Regulations.

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:
Charles Russell LLP
Email address:
[redacted]
Postal address:
5 Fleet Place, London, EC4M 7RD
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):
Charles Russell LLP. This response reflects discussions at the stakeholder event held at Charles Russell LLP on 1 October 2012. Participants included both landowners and electronic communications operators (fixed and mobile). Inevitably, given the range of perspectives and commercial interests represented, discussions highlighted areas in which no consensus could be found. This response to consultation does not purport to relay the full scope and content of discussions during the event. Rather, it reflects consideration by the Charles Russell technology and communications team of notes taken during the discussion, follow-up conversations with clients and contacts, and the firm's practical experience of acting in relation to electronic communications matters.
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 provisional proposal but suggest adding to the list of rights specific reference to use and operation of the electronic communications apparatus installed and kept on, under or over land.

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.

Adding the concept of use and operation would help to make clear that the rights extend to ancillary equipment (eg power supplies) required to ensure functionality.

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

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

A technology-neutral approach is required both to reflect the range of apparatus within and between networks and to ensure that any revised code is, so far as possible, 'future proof'. While there was some discussion concerning the possibility of different regimes for fibre and mobile, the argument in favour of separate treatment went essentially to questions of valuation, and so could be accommodated within a single revised code.

10.6	Do consultees consider that code rights should generate obligations upon Code Operators and, if so, what? Consultation Paper, Part 3, paragraph 3.19.
It would be useful to include a specific obligation to remove apparatus and to reinstate and make good sites that have been vacated. This could perhaps be linked with an obligation to insure against damage caused by installation, operation or removal. We also consider that there should be an express obligation on code operators to notify those with an interest in a site (freeholder, superior landlord, mortgagee) that the site is affected by code powers. In particular, this point stems from the increasingly common situation arising from site and RAN sharing arrangements in which operators other than the original party to an agreement acquire and/or assert code powers in relation to a site (eg by virtue of paragraph 21, and 21(11)). It can be extremely difficult for landowners to be sure that all relevant code operators have been given notice or joined into other code proceedings. The potential for increased costs and delay when seeking to clear a site for redevelopment is significant. We note the proposal to include entries relating to code apparatus on the register of title maintained by the Land Registry, but consider that a separate register identifying the location of electronic apparatus might be more useful to facilitate appropriate enquiries.	

10.7	We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it? Consultation Paper, Part 3, paragraph 3.27.
The current definition is wide, but may be interpreted as an exhaustive list. Ideally the definition should include all passive and active elements required for network functionality and service provision, and should be capable of extending to new technologies or types of apparatus. The definition should apply to all elements required for the provision of electronic communications services (eg power supplies, all equipment housing and supports). A definition drafted by reference to function is more likely to be future-proof than an attempt to describe different types of 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.
Several participants in the 1 October discussion argued that it should be open to tenants to enter into an agreement with the electronic communications provider of its choice, and that any such agreement should bind the landlord and any mortgagee during the term of the lease. However, that view must be considered in the light of practical issues, such as the capacity of service ducts etc. To the extent that infrastructure is controlled by a particular operator through agreement with the freeholder or landlord, the regulation of access and service provision by other operators is arguably a matter for Ofcom in its broader regulatory capacity, rather than for the code.	

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

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

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

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

Consultation Paper, Part 3, paragraph 3.53.

The 'access principle' is vague and poorly understood. Some attendees at the 1 October event considered that it is not clear whether the overriding principle (that no person should unreasonably be denied access to an electronic communications network or to electronic communications service) is engaged where the person concerned has access to one network, but would like to have a choice of networks. One attendee noted that developers of new properties will often do a deal with one Code Operator. Given that occupiers of the property would have access to an electronic communications network and services, it is not clear whether the Code could be relied on by any other operators in relation to that development.

Similarly it is not clear whether the access principle is engaged where the person concerned has access to a network, but the quality of the network is poor. One attendee suggested building a "quality of access" element into the revised test. It was generally agreed that consumers should have choice and quality. One attendee suggested that adding the words "of their choice" at the end of paragraph 5.3 would be sufficient.

Several attendees expressed the view that adequate compensation can always be arrived at, so the compensation test was not one that, in practice, is failed so as to bring in to operation the public benefit test.

We note that government thinking on this issue may have developed ahead of the Law Commission's recommendations and that clause 7 of the Growth and Infrastructure Bill seems to point towards a recasting of the factors to be taken into account, possibly pointing towards replacing or supplementing the current 'access principle' with explicit regard to the broader social benefits of electronic communications in promoting economic growth. That approach also informs the government's response to the House of Lords Communications Committee report on broadband access.

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.
Context is important when considering this issue. There is a practical distinction to be drawn between (i) apparatus providing an occupier with access to electronic communications networks and services, and (ii) apparatus forming part of an operator's distribution network which may or may not serve or benefit the occupier of the land on which it is located. Where apparatus is installed to serve an occupier (eg a tenant) then it is reasonable for the landlord or the holder of any other interest in the building (eg a mortgagee) to be bound so long as the apparatus is required and in use by the occupier. Once a tenant has ceased to occupy and/or to use apparatus there is no clear need for code protection (and an argument that code protection should fall away) to avoid obstructing reletting, refurbishment or redevelopment. In this context, commercially difficult issues may arise if the landlord (eg in a business park or other multi-let environment) has entered into an exclusive agreement with a particular operator to provide electronic communications services to the development. The extent to which those arrangements ought to be capable of being overridden is a question that goes to issues such as competition and operators' relative market positions. The issues differ somewhat where apparatus is installed on land to serve the operator's network rather than providing access to occupiers of that land. In those circumstances, where a freeholder or superior landlord grants rights there is a strong argument in favour of those rights binding occupiers and successors in title to the land, subject to any revised provisions covering the issues currently within paragraphs 20 and 21 of the code.

10.11 We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused. Consultation Paper, Part 3, paragraph 3.67.
We have not encountered this issue in practice, and it did not feature in discussions at the 1 October event.

10.12 Consultees are asked to tell us their views about the right to object to overhead apparatus. Consultation Paper, Part 3, paragraph 3.68.
We have not encountered this issue in practice, and it did not feature in discussions at the 1 October 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.

We have not encountered this issue in practice, and it did not feature in discussions at the 1 October event.

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.

The current provisions and the possible extensions seem to contemplate interference to signals from base stations. There would be a case for applying the provisions to access to deal with situations in which vegetation causes damage to fibre or cables (eg tree root damage). Rights should enable operators to address issues that affect the operation or functionality of apparatus whether located in, on or under the ground.

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.

'Upgrade' is an extremely difficult term to define, and a broadly drafted right to upgrade could cover a wide range of circumstances, from software changes to the installation of more and/or larger apparatus. This is an area of particular commercial tension between operators and landowners, particularly in view of network consolidation and RAN sharing. Commercial considerations include the extent to which operators either individually or collectively ought to be able to make more extensive or intensive use of a site without incurring an obligation to pay more to the site owner (eg through 'payaway' arrangements).

Conversely, there is a significant risk of agreements that seek to define and limit the permitted apparatus locking a site into technology or specifications that quickly become obsolete or redundant. Given that sites must function as part of a broader network, that approach has the capacity to cause problems extending beyond the site itself.

Some participants at the 1 October event suggested that upgrades should be permitted provided that they could be effected within the parameters of the existing apparatus (eg within the same cabinet). However, that would not take account of the possibility that an 'upgrade' effected within

the existing housings might introduce new operators to the site, each having separate and independent code rights (eg under paragraph 21 due to paragraph 21(11)). Consequently, there would be a case for permitting upgrades within the existing parameters and provided that they do not involve use of the site by other operators without creating an opportunity for the landowner to secure additional payment.

As a matter of drafting, there is a risk that any reference to an 'ancillary' right to upgrade would result in arguments intended to identify and closely define the primary rights to which any right to upgrade could properly be described as 'ancillary'. The argument would be that if 'ancillary' upgrades could be carried out without payment then there must be something beyond a strictly ancillary upgrade for which payment might be required. The proposal may shift, rather than eliminate, the scope for dispute.

10.16 We ask consultees:

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

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

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

Consultation Paper, Part 3, paragraph 3.83.

Positions on this issue were sharply divided at the 1 October event. Both landowners and code operators expressed strong views, reflecting their respective commercial interests. Consequently, it must be a matter for government policy to determine whether contractual provisions should be overridden and, if so, whether that measure would be to any extent retrospective. If retrospective application were to result in the loss of rights or previously negotiated revenue entitlements then there ought to be a measure of compensation.

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 section 134 being used in practice. We have considered it in a number of matters, along with paragraph 8 of the code, but its limited scope and judicially untested effect militated against its use.

10.18 We ask consultees:

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

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

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

Consultation Paper, Part 3, paragraph 3.92.

A general right to 'assign code rights' or to assign 'the benefit' of agreements would create potentially significant issues for landowners. The central difficulty is that each code operator has separate and distinct rights in respect of a site. Whether other operators come onto a site by virtue of a sharing agreement or by taking an assignment of rights or of the benefit of an agreement, the result is to present the landowner with the need (a) to identify all operators with rights in respect of the site, and (b) to ensure that all are joined into and bound by code proceedings. That difficulty could be magnified by a general right to assign, particularly if framed in terms that refer to the 'benefit' of agreements. As with a chose in action, it may be necessary to provide that any assignment must be absolute (ie a complete passing from one code operator to another) rather than a 'partial' assignment which would, in substance, amount to a sharing of 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.

N/A

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

Consultation Paper, Part 3, paragraph 3.100.

We have encountered situations in which the need to seek and obtain third party consents to cross land have significantly delayed and increased the costs of access to electronic communications services. The current mechanisms (eg seeking an order under paragraph 5 in terms that bind a third party, or seeking to use paragraph 8 of the Code or section 134 Communications Act 2003) are cumbersome and uncertain in scope and effect. In practice, parties have sought alternative solutions and routes rather than pursuing legal arguments.

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.
Views expressed at the 1 October event suggest that operators would resist any provision compelling them to use code powers unless it made clear provision for costs to be met by the landowner or occupier triggering that requirement. It is rare for there to be no reasonable alternative method of providing access and service to one that would require compulsory use of code powers.

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

10.23 We ask consultees: (1) to what extent unlawful interference with electronic communications apparatus or a Code Operator's rights in respect of the same causes problems for Code Operators and/or their customers; (2) to what extent any problem identified in answer to (1) above is caused by a Code Operator having to enforce its rights through the courts or the nature of the remedy that the courts can award; and (3) whether any further provision (whether criminal or otherwise) is required to enable a Code Operator to enforce its rights. Consultation Paper, Part 3, paragraph 3.106.
We are not aware of any specific examples, and none were raised at the 1 October event. However, if unlawful interference were to result in service interruption or loss then, whether that interference was by the landowner or a third party, it would be reasonable to regard entry to repair damage or disruption as justification for emergency entry. A scenario sometimes discussed in seminars/conference sessions is whether the code prevents landowners from, eg, switching off power supplies or barring access to apparatus following expiry of a contractual agreement. That point could be addressed by adding a right to use and operate electronic communications apparatus, as suggested above.

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 of any.

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 paragraph 9 should be carried into a revised code, but suggest removing the current distinction between highways that are maintainable at public and private expense. We have encountered situations in which short stretches of 'private' highway have created ransom situations. Provided that code operators are required to reinstate and make good, there ought to be no distinction between the rights applicable to highways maintainable at public and private expense. Both are highways.

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 do not necessarily agree with the conclusion expressed at paragraph 4.18 of the consultation paper that the Crown Estate has the power to bar the exercise of paragraph 11 rights by withholding agreement. That conclusion follows logically enough from the points identified at paragraph 4.16: (i) that there is no mechanism for dispensing with the need for agreement, and (ii) that there is no provision for settling the terms of an agreement in the event of dispute. However, we consider that paragraph 11 of the code must be read and interpreted in the light of other relevant laws and international obligations. For example, where the inshore stretch of an international submarine cable requires Crown Estate agreement to cross seabed and foreshore, we consider that the Crown Estate's ability to withhold agreement under paragraph 11 is at least limited and may be ousted by the UK's obligations set out in the UN Convention on the Law of the Sea (UNCLOS). We also note that the opening part of paragraph 11 confers rights. Crown Estate agreement is required for the exercise of those rights, not for their existence. Consequently, we consider it arguable that Crown Estate agreement may go to the manner of exercise (eg imposing requirements to address impacts on other legitimate uses) but may not wholly preclude exercise. We consider that there is a strong case either for ending the special regime for tidal waters and lands held by the Crown Estate (or other Crown entities) and/or for revisiting paragraph 11 to clarify its scope, intention and effect and its interaction with other laws.

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 consider that there is a compelling case for a special regime in relation to tidal waters and lands, or for distinct treatment of Crown interests. Many of the points suggested as giving rise to a need for a special regime (eg protecting the marine environment, navigation, fisheries and other legitimate uses) are now within the marine licensing regime. Given that statute has conferred specific functions and responsibilities on the marine licensing authorities throughout the UK, there are significant and arguably unnecessary overlaps between that regime and the Crown Estate's functions. If the Crown Estate's role is justified by reference to public interest in the revenue opportunities arising from the marine estate then there ought to be no need for differential treatment between tidal waters and lands held by Crown interests. Assuming that the marine licensing regime deals adequately with environmental issues and potentially conflicting uses, the sole remaining issue would be one of valuation.

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.

The principal issue arising from the need to cross linear obstacles (mainly railways and canals) is the level of payment demanded by their undertakers. *Geo v Bridgewater Canal* questioned the nature and extent of the payments that could be awarded by an arbitrator given that the opening of paragraph 12 confers rights on code operators so that there ought to be no element of consideration relating to the conferring of those rights. Railways and canals were, historically, authorised by special Acts with strong elements of compulsory acquisition of land and rights reflecting their social and economic utility. Government policy statements assert that electronic communications have a similarly important role to play in creating a modern, competitive economy and in closing the digital divide. To pick up a point from Lewison J's judgment in *Geo*, it is difficult to justify a situation in which a key enabling technology of the first industrial revolution should be able to create a ransom situation in respect of the enabling technologies of the current information revolution. Consequently, there is a place for a specific provisions to prevent excessive payment being required to cross short distances.

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.

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. However, we consider that paragraph 23 could usefully be amended to reflect the assurances and undertakings sought and agreed in relation to major infrastructure projects (eg Crossrail) to address the practical difficulties that would be presented by strict implementation of paragraph 23. Examples include extending the notice period required before works are commenced, which left unamended would not allow time for workable alternatives to be put in place.

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.

The principal issue raised at the 1 October event was the difficulty arising from the overlap between paragraphs 20 and 21 given that 'alteration' includes removal. There was a strong view that a distinction ought to be drawn between alterations that leave apparatus in place, or that involve only temporary removal, and a requirement for permanent removal. Any revised code could usefully address matters in that way rather than adhering to the current distinction between paragraph 20 (which is a default right available to the landowner) and paragraph 21 (which restricts a landowner's ability to enforce a right to require removal of apparatus).

In practice, the main concerns are (i) landowners' concerns relating to the time, cost and uncertainty of securing vacant possession of sites or buildings required for redevelopment, and (ii) code operators' concerns about the time required to ensure continuity of service and network coverage. It would also be useful to make specific provision to address the cost of any alterations, relocation or permanent removal of apparatus.

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.

Paragraph 20 is little used in practice. The 'necessity' test is considered to be a significant barrier to its operation. Parties have tended instead to include contractual 'lift and shift' provisions which allow sufficient time for network planning, deal with costs and can be operated without resort to the court.

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

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.13.

If this proposal were to be implemented then it should not be retrospective in effect. Existing 'lift and shift' provisions should retain their validity and enforceability.

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.
If retained, paragraph 14 should be amended to qualify the trigger ('interferes, or is likely to interfere with' the operation of the railway or canal). If the question is one of public safety (particularly arising from the operation of a railway) then there is clearly an imperative for alterations. If, by contrast, 'interference' were construed more generally so that, for example, discretionary works to and wholly for the convenience of the railway were considered to fall within paragraph 14(1)(b) as 'anything done or to be done for the purposes of that undertaking' then the mechanism might reasonably be regarded as draconian.

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.
Paragraph 21 currently restricts the landowners' ability to enforce rights to remove apparatus. The principal area of concern relating to paragraph 21 has for many years been the difficulty of securing vacant possession of sites required for redevelopment. In practice, operators have been willing to accommodate landowners' requirements if given sufficient time and certainty on costs to ensure that network planning can be carried out and continuity of service assured. It ought to be possible for landowners and operators to agree to a workable contractual regime to cover redevelopment, with the code serving as a fallback mechanism to cover any gaps in the contractual arrangements (eg providing for assessment and recovery of costs if the contract does not).

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.
While we broadly agree with the proposal it would be useful to ensure that the interaction of any revised code and the planning regime is clear so that (i) apparatus can be retained while any retrospective planning application is made and considered or an appeal pursued, and (ii) that time limits allow for network planning and for the securing of an alternative site and/or apparatus to allow continuity of service.

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.
Under paragraph 21 in its current form service by an operator of a counter-notice often freezes the situation in that if the landowner is not prepared to incur the cost and risks of issuing court proceedings the operator may simply remain in place (in some cases making no payments). One possible approach, discussed at the 1 October event, would be to adopt an approach similar to that applied to adverse possession in Land Registration Act 2002. In that context an initial application for registration by a 'squatter' may be resisted by the registered proprietor unless one of the specified grounds applies – none of which benefits a person relying solely on adverse possession. The registered proprietor then has two years within which to regain possession or to regularise the situation (eg by negotiating and granting a lease). If the registered proprietor fails within that period to take the necessary steps then a renewed application by the squatter will succeed. By analogy, if a code operator were to serve the equivalent of a paragraph 21 counter-notice then it ought to have a finite period within which to (i) secure a new agreement or (ii) to either initiate proceedings to dispense with the need for the landowner's agreement or to require the landowner to initiate proceedings to enforce its right to require removal. If the code operator has taken no such steps within the prescribed period then the landowner's right to require removal ought to apply without restriction. Another possible approach would be similar to the lease renewal procedure under Landlord and Tenant Act 1954, allowing for service of a landowner's notice that would either oppose or accept renewal of the code operator's agreement, with the right to oppose renewal requiring reliance on specified grounds (eg redevelopment).

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.
Rather than 'the expiry of code rights' we think this question relates to the period between expiry of an agreement (eg a lease) and removal of apparatus as paragraph 21 protection would continue to apply. During that period it would be reasonable for the rent/fee payable under the expired agreement to continue to be payable, possibly subject to an interim rent arrangement derived from Landlord and Tenant Act 1954.

10.40 We provisionally propose that Code Operators should be free to agree that the security provisions of a revised code will not apply to an agreement, either absolutely or on the basis that there will be no security if the land is required for development. Do consultees agree? Consultation Paper, Part 5, paragraph 5.51.
We are aware that code operators have concerns relating to the possibility of 'absolute' contracting out becoming the market norm with potentially significant risks for network planning and service provision. However, a more limited ability to contract out to facilitate redevelopment, providing sufficient time and certainty on costs, would be a useful means of protecting electronic communications apparatus while removing the risk to the economic use and development of 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? Consultation Paper, Part 5, paragraph 5.56.
Complete application of the code as suggested would be clearer and less prone to complications (eg where a single site included apparatus installed at different times). The test should relate to the status of the operator, not to individual items of apparatus. We are aware of landowner concerns that terms negotiated and agreed with an operator without code powers might subsequently be overridden if the code is applied to that operator. However, that is an issue that can be addressed by transitional periods and legal advice (as, for example, occurred with the phased application of 1954 Act protection to licensed premises)

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.
There is a strong case for bringing code issues more clearly and comprehensively into line with the provisions and procedures applicable to other forms of compulsory acquisition of land. However, it was clear at the 1 October event that landowner and code operator perspectives on this vital commercial issue differ sharply. We understand that those divergent views are likely to be addressed in detail in other responses to consultation (eg by the RICS Telecoms Forum). Consequently, rather than seeking to distil the 1 October discussion we leave it to those with specific valuation expertise to set out the arguments.

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.
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.
Disputes under the Code generally fall into two categories: (i) the access rights available under the Code and (ii) valuation issues in connection with the consideration payable by an operator for those rights. <u>Problems with the current system</u> The vast majority of participants at the 1 October stakeholder event considered that the current system of bringing such disputes before a County Court judge is inappropriate because of (a) the time it takes for such matters to reach trial (usually a year or longer) and (b) the costs involved with such proceedings. It can also be unhelpful that County Court judges tend to lack experience in dealing with the Code and it was particularly felt that valuation issues under the Code should be determined by a specialist valuer rather than by a judge. One participant noted that the general public may feel better able to deal with a Code dispute before the relatively easy access of a local County Court rather than before a London-based forum, although it was generally agreed that the Upper Tribunal (Lands Chamber) ("the Lands Chamber") is regarded as accessible because of its relative informality. <u>Importance of simplicity, speed and minimising costs</u> In order to help ensure that property owners are able to have their say without being deterred by the complexities and/or costs of dealing with the Court, any new system for resolving disputes under the Code needs to be as simple as possible. This is particularly important because the legal costs currently involved in dealing with the Court process will nearly always be significantly more than the fees received by a property owner in respect of any particular site. A streamlined procedure should also help to ensure that disputes are resolved more quickly, which is in the interests of both operators and property owners. In relation to concerns about the slow pace at which disputes are currently resolved before the

County Court, it was suggested that it might be sensible to have a specific window in which the first hearing of any Code dispute must take place – similar to the period currently provided under CPR Part 56 for the hearing of a possession claim against squatters. It was recognised that, in order for any such system to work, sufficient resources will need to be provided to the relevant forum in order to allow it to list hearings promptly.

In view of concerns about costs and speed, it was noted that it may be preferable to avoid any two-stage process to deal separately with access and valuation issues. There was also concern that a two-stage process would allow operators to get onto a site swiftly but that they might then be slow to progress the procedure to deal with the price to be paid for such access. It was also noted by operators that they will generally want to know the likely cost of a site before they decide to install apparatus there.

Appropriate forum

In response to the Consultation Paper's suggestion that disputes under the Code might be more appropriate to be heard by the Lands Chamber, there was generally confidence that its expertise would be appropriate for valuation disputes. However, there was suggestion that the valuer members of the Chamber should have specialist training regarding the specific valuation issues which arise with Code apparatus, especially if the Code is amended to permit automatic upgrades of equipment etc.

There was some concern as to the Lands Chamber's ability to deal with the legal issues which arise under the Code in connection with access rights. It was agreed that – if such matters are to be heard by the Lands Chamber - these would need to be heard by its judges. In view of the complex nature of the Code, it was felt that it may be sensible for a limited number of judges to receive specialist training concerning the Code and for only those judges to hear the relevant cases. There was discussion regarding the possibility of Code disputes being heard by the Technology & Construction Court – which is an efficient forum able to hear cases reasonably quickly if necessary – but there was little experience of this Court amongst the majority of the participants.

Alternative dispute resolution process

It was generally agreed that including some provision within a new Code for parties to resolve valuation disputes via a formal alternative dispute resolution mechanism might work well to address parties' concerns about costs and speed. It may be that valuation disputes under the Code could be dealt with in a similar manner to disputes under the Party Wall etc. Act 1996, provided that there are no legal issues between the parties or that any legal issues have been determined first.

It was noted that the system provided under the 1996 Act generally works reasonably swiftly and involves significantly lower costs than Court proceedings. Participants particularly liked the fixed (and reasonably short) timetable provided for under the 1996 Act and the fact that disputes are dealt with by appropriate specialists. Those participants who were familiar with the 1996 Act felt that providing a similar system for dealing with valuation matters under the Code may work better than a hearing before a tribunal. Alternatively, the new Code could simply include an option for parties to agree to opt out of a hearing before the Lands Chamber and to follow an alternative dispute resolution process similar to the one provided under the 1996 Act.

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.

As noted in response to 10.49, it may be preferable to avoid any two-stage process to deal separately with access and valuation issues. A two-stage process would allow operators to get onto a site swiftly but they might then be slow to progress the procedure to deal with the price to be paid for such access. It was also noted by operators that they will generally want to know the likely cost of a site before they decide to install apparatus there.

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

We do not consider that characterisation of either than landowner or the code operator as the 'losing party' is necessarily appropriate in code proceedings. For example, if a landowner were to withhold agreement to installation of electronic communications apparatus then code proceedings might conclude (on the basis of the current 'access principle' or on the government's proposals relating to economic growth as a factor in decisions) that the landowner's interests should be overridden for public benefit. That process is not necessarily truly adversarial as it involves the weighing by a tribunal of private rights against public benefit. It would be iniquitous for a landowner to be faced with liability for costs in circumstances where a decision has been taken, on balance, to override rights the existence of which would not be in doubt.

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. We consider that any revised code should adopt a similar approach to the Landlord and Tenant Act 1954 with prescribed wording for notices and counter-notices, but flexibility as to the precise form. We note that the forms currently on the Ofcom website are sometimes overlooked and have not been consistently labelled and maintained. It would be preferable to have forms prescribed directly in conjunction with the legislation. Rules for service would be extremely useful, and could greatly assist landowners faced with the need to identify and effect service on multiple code operators in respect of a site.

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.
Landowners – and sometimes their lawyers – are not aware of the notices available from the Ofcom website. Given the significance of the rights conferred by the code we consider that an approach based on the Landlord and Tenant Act 1954, which requires clear understanding of the consequences of taking steps such as 'contracting out', would be desirable. Code rights affect a wide range of landowners, and commercial sophistication and understanding can be assumed no more readily than in the case of commercial tenants. Prescribing the information to be provided within or alongside the legislation would be more effective than directing it to be placed on the Ofcom website.

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.
The wide range of apparatus (fixed and mobile, backhaul, FTTP etc) required for the provision and operation of electronic communications networks and the broad range of participants in the sector, whether as operator or landowner, militates against the creation of standard terms. Rapid technological and organisational changes in the sector also make it difficult to formulate standard terms. It would perhaps be more productive to focus on a requirement for clear explanation and understanding of code rights through prescribed notices/counter-notices.

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.

A problem with the current regime is that, depending on the nature of the agreement, a site may be affected both by code rights and 1954 Act protection. They provide separate forms of security. Clarity may be achieved by a single regime, which could be either (i) code protection excluding 1954 Act protection, or (ii) protection achieved through revisions to the 1954 Act.

Of those approaches, the first would be preferable given that code apparatus is by no means always installed under a lease. Wayleaves and other contractual approaches are widely used. A single, cogent, code for electronic communications apparatus would aid understanding and negotiation.

However, any such revisions would have to be capable of accommodating mixed use premises (eg where only part is used for electronic communications apparatus). It would also be necessary to address issues such as the terms of any renewal (eg incorporating something akin to the *O'May* test applicable to Landlord and Tenant Act 1954 Act renewals).

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 are not sure of the benefit in this approach. While the objective would seem to be to facilitate identification of sites affected by code rights, it seems that any notice entered on the register of title would be subject to the revised code rather than to the land registration regime. Generally, a notice confers priority on the interest to which it relates, but neither validates nor confirms the validity of that interest. Inclusion of a notice that is governed by a regime other than the land registration legislation would not provide certainty or clarity. A better approach might be to create separate, searchable, registers to establish the location of electronic communications apparatus and to facilitate the raising of enquiries.

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.

NORTHERN TRUST COMPANY LIMITED

Our Ref: JRH/Telecoms/00.Gen

Your Ref:

22 October 2012

Tel: [redacted]
Fax:
e-mail

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

By post and email

E-mail:
propertyandtrust@lawcommission.gsi.gov.uk

Dear Mr Linney

THE LAW COMMISSION CONSULTATION ON THE ELECTRONIC COMMUNICATIONS CODE (THE CODE) – RESPONSE ON BEHALF OF NORTHERN TRUST COMPANY LIMITED

Please accept this as an individual response to the above consultation on behalf of Northern Trust Company Limited (NTCL).

NTCL 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 NTCL) 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,

Jonathan R Houghton
Property Portfolio Manager

[redacted]

Date: 19 October 2012

Leicestershire Constabulary

Police HQ
St. Johns, Enderby
Leicester
LE19 2BX

[redacted]

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 LEICESTERSHIRE POLICE AUTHORITY

Please accept this as an individual response to the above consultation on behalf of Leicestershire Police Authority.

The Authority owns communications towers and masts, initially from the development of its own communications requirements. More recently this has been from outsourcing the management to commercial organisations to maximise the best use of these assets.

This communications infrastructure property generates substantial income from licenses and leases to mobile phone network operators, vehicle security networks, broadcasters (including BBC and independent local radio) and other public and private sector organisations. The value of these licenses and lettings makes the retention and operation of the infrastructure worthwhile. The property assets have a value of several million pounds. Some of the licensees benefit from statutory powers under the Code. Some of them don't.

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 Leicestershire Police Authority) 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 infrastructure properties. This will vastly reduce their capital values as well.

.....cont

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

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 in Leicestershire. If operators were only obliged to pay compensation based sums for installing apparatus on our land, masts, towers 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 managing agents, Cell:cm Chartered Surveyors.

Yours sincerely

Andrew Wroe
Head of Estates
Leicestershire Police

Aberdeen

22 October 2012

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

By post and email
E-mail: propertyandtrust@lawcommission.gsi.gov.uk

Dear Mr Linney

THE LAW COMMISSION CONSULTATION ON THE ELECTRONIC COMMUNICATIONS CODE (THE CODE) – RESPONSE ON BEHALF OF ABERDEEN ASSET MANAGEMENT

Please accept this as an individual response to the above consultation on behalf of Aberdeen Asset Management (AAM).

Investment funds managed by AAM 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 AAM) 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.

Aberdeen Asset Managers Limited
123 St Vincent Street Glasgow G2 5EA
[redacted]

Aberdeen

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

Louise Greenan
Associate Director – Fund Management

[redacted]

Aberdeen Asset Managers Limited
123 St Vincent Street Glasgow G2 5EA
[redacted]

Consultation Response
October 2012

Law Commission consultation on 'the electronic communications code (the code)

WM Housing Group Consultation Response

WM Housing is a mutually supportive group of six housing associations organised on a federal basis, sharing resources and expertise for the benefit of its customers and to facilitate the effective delivery of services and new homes.

The Group consists of the parent organisation WM Housing Group, West Mercia Homes, Optima Housing, Nexus Housing, Kemble Housing and Whitefriars Housing.

The Group manages more than 26,000 homes across the West Midlands, Herefordshire and Worcestershire.

The Group is a large regional organisation and in addition, operates as the partner lead for the Spectrum Development Partnership, which works to utilise its strength in diversity to be able to deliver the provision of affordable housing across the whole West Midlands region.

Whitefriars owns numerous highrise housing blocks across Coventry. 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. Optima also owns highrise blocks, in Birmingham, with communication equipment installed.

WM Housing Group
Barnsley Hall
Barnsley Hall Road
Bromsgrove
B61 0TX
[redacted]

For further information on this response, please contact:

Trevor Passingham,
Assistant Director – Asset Management
[redacted]

Consultation response

Section 6

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 Whitefriars and Optima) 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 Coventry. 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 detailed response to the consultation made by our agents, Cell:cm Chartered Surveyors.

bruntwood

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

By post and email
E-mail: propertyandtrust@lawcommission.gsi.gov.uk

Dear Mr Linney

THE LAW COMMISSION CONSULTATION ON THE ELECTRONIC COMMUNICATIONS CODE (THE CODE) – RESPONSE ON BEHALF OF BRUNTWOOD

Please accept this as an individual response to the above consultation on behalf of Bruntwood.

Bruntwood 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 in excess of ten 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 Bruntwood) 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.

In the last two decades since Bruntwood started to offer space for electronic communications occupiers, our experience has been quite the opposite of that outlined in the Law Commissions' Consultation Paper. Most notably, terms (including rental levels) have always been agreed swiftly and amicably. The catalyst in reaching expedient and mutually acceptable agreements with electronic communications occupiers is the open availability of comparable transactional evidence on both sides. There are few property sectors, especially in recent years, where good comparable evidence is as freely available as in the electronic communications market.

We therefore believe it essential 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.

bruntwood

Bruntwood Limited
City Tower
Piccadilly Plaza
Manchester M1 4BT
[redacted]
bruntwood.co.uk

We fully endorse the response to the consultation made by our agents, Cell:cm Chartered Surveyors.

Yours sincerely

Andrew Butterworth
Sales Director

[redacted]

Leeds CITY COUNCIL
Asset Management Division
The Leonardo Building
2 Rossington Street
Leeds LS2 8HD

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

[redacted]

By post and email
E-mail:
propertyandtrust@lawcommission.gsi.gov.uk

Your Ref:
Our Ref:EM/NAR/Property Services

Date: 23 October 2012

..

Dear Mr Linney,

THE LAW COMMISSION CONSULTATION ON THE ELECTRONIC COMMUNICATIONS CODE (THE CODE) – RESPONSE ON BEHALF OF LEEDS CITY COUNCIL

Please accept this as an individual response to the above consultation on behalf of Leeds City Council (LCC).

LCC owns numerous highrise housing blocks across Leeds. 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 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 LCC) 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 Leeds. 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

C J Gomersall

C J Gomersall
Head of Property Services

NOTTINGHAMSHIRE POLICE
ESTATES DEPARTMENT
Sherwood Lodge
Arnold
Nottingham
NG5 8PP

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

24 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 NOTTINGHAMSHIRE POLICE AUTHORITY

Please accept this as an individual response to the above consultation on behalf of Nottinghamshire Police Authority.

The Authority owns communications towers and masts, initially from the development of its own communications requirements. More recently this has been from outsourcing the management to commercial organisations to maximise the best use of these assets.

This communications infrastructure property generates substantial income from licenses and leases to mobile phone network operators, vehicle security networks, broadcasters and other public and private sector organisations. The value of these licenses and lettings makes the retention and operation of the infrastructure worthwhile. The property assets have a value of several million pounds. Some of the licensees benefit from statutory powers under the Code. Some of them don't.

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 Nottinghamshire Police Authority) 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 infrastructure properties. This will vastly reduce their capital values as well.

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 in Nottinghamshire. If operators were only obliged to pay compensation based sums for installing apparatus on our land, masts, towers 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 managing agents, Cell:cm Chartered Surveyors.

Yours sincerely

Philip Ellis
Senior Building Surveyor
Estates and Facilities, Nottinghamshire Police Authority

Central Scotland Police
Together for safer communities

Derek Penman
Acting Chief Constable

Police Headquarters,
Randolphfield,
Stirling FK8 2HD

[redacted]

25 October 2012

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

Dear Mr Linney

THE LAW COMMISSION CONSULTATION ON THE ELECTRONIC COMMUNICATIONS CODE (THE CODE) – RESPONSE ON BEHALF OF CENTRAL SCOTLAND POLICE

Please accept this as an individual response to the above consultation on behalf of Central Scotland Police ("the Authority").

The Authority owns communications towers and masts, initially from the development of its own communications requirements. More recently this has been from outsourcing the management to commercial organisations to maximise the best use of these assets.

This communications infrastructure property generates substantial income from licenses and leases to mobile phone network operators, vehicle security networks, broadcasters (including BBC and independent local radio) and other public and private sector organisations. The value of these licenses and lettings makes the retention and operation of the infrastructure worthwhile. The property assets have a substantial value. Some of the licensees benefit from statutory powers under the Code. Some of them don't.

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 Central Scotland Police) 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 infrastructure properties. This will vastly reduce their capital values as well.

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 in Central Scotland. If operators were only obliged to pay compensation based sums for installing apparatus on our land, masts, towers 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 managing agents, Cell:cm Chartered Surveyors.

Yours sincerely

Allan Gow CMgr MCMI CPFA
Finance Manager

RICS Professional Groups and Forums

24 October 2012

RICS response to:

LAW COMMISSION CONSULTATION PAPER NO 205

ELECTRONIC COMMUNICATIONS CODE

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

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

The Royal Institution of Chartered Surveyors (RICS) recognises the importance of the Law Commission's consultation on the Electronics Communications Code and welcomes the opportunity to comment.

RICS is the leading organisation of its kind in the world for professionals in property, construction, land and related environmental issues. As an independent and chartered organisation, RICS regulates and maintains the professional standards of over 93,000 qualified members (FRICS, MRICS and AssocRICS) and over 50,000 trainee and student members. We regulate and promote the work of these property professionals throughout 146 countries and are governed by a Royal Charter approved by Parliament which requires members to act in the public interest.

A significant proportion of our members are involved in valuation practice on a wide range of assets. RICS regulated valuers and chartered surveyors work within the context of our current valuation standards "RICS Valuation – Professional Standards" effective from 30th March 2012. These standards are commonly known as "the Red Book" and contain mandatory rules and best practice guidance for valuations of real estate and other assets.

The RICS supports the view that the electronic communications industry and associated infrastructure is essential both in terms of economic and social benefit and we fully endorse the Government aim of:

'…[ensuring] that the UK has the best super fast broadband network in Europe by 2015, with 90% of homes and businesses having access to super fast broadband and for everyone to have access to at least 2 Mbps.'

The RICS also supports the Government ambition to establish the UK communications and media markets as amongst the most dynamic and successful in the world. *Department of Culture, Media and Sport, Open letter on A Communications Review for the Digital Age - 16 May 2011, P1, http:///www.culture.gov.uk/images/publications/commsreview-open-letter_160511.pdf

The RICS Telecoms Forum board is made up of property and legal professionals from a wide spectrum of telecommunications practice. RICS members represent and work within nearly all telecommunications sectors, often focusing on core property related issues such as valuation, landlord and tenant, mediation and negotiation,

dispute resolution, wayleaves, access rights, lease and contractual issues and equipment removal.

In the attached questionnaire, the Telecoms Forum Board have endeavoured to focus on core RICS strengths and have tried to find consensus where possible. RICS Telecoms Forum Board has also consulted widely within the RICS membership and has sought sectoral views and commentary from commercial property, valuation, rural management, planning and development, RICS policy panels and numerous other groups. The Telecoms Forum Board has incorporated as many viewpoints as possible and has, we believe, distilled the views of our members into a balanced and in-depth response.

However, in some cases it was not always possible to find common ground and in these cases we have made sure to highlight sectoral viewpoints.

Chartered Surveyors are often in a unique position of understanding the professional needs of both landlords and operators and with that in mind we have commented extensively on section ‘towards a better procedure’. We hope that this response is useful and we would be pleased to further engage with the Law Commission on this important subject.

Yours faithfully

Mark J Talbot FRICS
Chair RICS Telecoms Board

c/o

James Kavanagh MRICS C.Geog

Director Land Group, Professional Groups and Forums

[redacted] W: www.rics.org
Professional Groups & Forums - the Centre of Excellence for professional standards

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: James Kavanagh MRICS C.Geog – Director Land Group Royal Institution of Chartered Surveyors 12 Great George Street, Parliament Square, Westminster, London SW1P 3AD [redacted] www.rics.org/land [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):**
Royal Institution of Chartered Surveyors RICS Telecom Forum Board
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 feel that rights should include the ''operation'' of networks in both (1) and (2) for completeness and clarity: -

(1) "to execute any works on land for or in connection with the **operation,** installation, maintenance, adjustment, repair or alteration of electronic communication apparatus".

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

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 feel that code rights should be extended, to include for the right to enter property to trim or remove vegetation that is interfering with network apparatus or its functioning (either transmission lines or radio transmission paths.) Please see further comments below.

There also needs to be a clear right for Code Operators to be able to enter property, upon reasonable notice, for the purpose of site survey inspections e.g. at site selection stage.

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

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.18.

We agree with the proposal whilst acknowledging that there are many challenges faced due to different technologies in both the fixed and mobile sectors, to attempt to differentiate would not we feel be constructive and potentially add complexity and uncertainty where clarity is required.

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.
	Obligations should be placed upon Code Operators to ensure that they utilise such rights in an appropriate way with due consideration to those that could be affected (both directly and indirectly) by the exercise of such rights. Matters such as insuring against any damage caused, the operation, maintenance (including removal), timely and diligent dealings in all matters relating to the exercise of such rights.

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 are 2 essential matters not currently covered by the definition: 1 – buildings and other housing structures 2 – ancillary apparatus, for example, standby power, an essential and integral component of any network So we propose additional wording as a subsection 1 (c) “for the reasonable operation and support of the apparatus referred to in paragraphs (a) and (b)”.

10.8	We ask consultees to tell us their views about who should be bound by code rights created by agreement, and to tell us their experience of the practical impact of the current position under the Code. Consultation Paper, Part 3, paragraph 3.40.
	There should be two circumstances were the Code should apply: - 1/ Where the rights are required to serve an occupier We believe that rights granted by an occupier should bind superior estates for so long as any occupier requires services, albeit many tenants/occupiers who could grant such rights do not do so because it results in them being in breach of their lease (thus the need to expand the scope of s134(2) see further in 10.17). We consider that the current position adequately protects the non-contracting landowner, as once the service condition is no longer met, the Operator can be requested to remove the apparatus and whilst the Operator could, if necessary, protect its position by the exercise of rights under paragraph 21, if that exercise of rights gives rise to loss, then the landowner is (and should be) entitled to compensation for its losses (see further below). In this type of situation, if the landowner had a genuine reason for removal, the Operator would be very likely to comply where the apparatus is no longer in use. For example, in the event that the landowner wishes to redevelop its property, there would be unlikely to be an occupier requiring service, and in practice the redevelopment would be undertaken in collaboration with all service providers on the basis that continued connectivity of utility services to the property (as redeveloped) would in any event be required for the purposes of serving the new development. There is no logic in the Operator opposing the redevelopment and thus leaving itself exposed to a substantial claim for loss of development value. If the tenant/customers have departed and the landlord has secured a vacant site for redevelopment, it is in the interests of all the utility

providers to co-operate with a view to providing a service to the new development.

2/ Where the rights required are part of a distribution network
These rights include rights required for the laying of conduits through land (of any nature) not receiving services directly from such apparatus, an urban rooftop situation, or any other site where an Operator has apparatus installed, the primary purpose of which is to form part of that Operator's distribution network. In these situations, the leasehold occupiers (if any) are unlikely to grant rights to Operators, and if they did so the superior estate would not be bound as the "service condition" is not met. Therefore inevitably it is the freeholder (or long leaseholder) who is the grantor of such rights, who would, as part of the grant of those rights, have sought (and obtained) financial payment. Any issue in those circumstances around the failure to remove apparatus at the end of the term of any agreement then falls under paragraph 21, and gives rise once again to the issue of compensation for loss of value if an Operator does not vacate (on which we comment separately) and if the operator were to remain, further financial payment. In this situation it is very often critical that the operator is able to protect the integrity of its network, which is of course one of the aims of the Code.

What ever the nature of the installation (i.e. within A or B), it is absolutely essential that rights granted bind successors in title of the grantor (or person who agreed its interest is bound), and inferior interests/estates, otherwise it could affect the certainty of the provision of services, render the operator liable for trespass, and/or give rise to the application of paragraph 21 with the potential for further payments of consideration and/or compensation, notwithstanding the adequacy of any payment already made.

There should be some obligation on the part of the Operator to make reasonable endeavours to notify and contact all parties with an interest in the land or property.

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

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

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

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

Consultation Paper, Part 3, paragraph 3.53.

We feel that there is benefit for the consistency of the various regimes for the compulsory acquisition of rights. Where possible and unless particular circumstances prevail, use should be made of the existing processes and procedures from other, similar, statutory rights for installing infrastructure elements in the public interest.

(1) For the reasons outlined in answer to paragraph 10.6 above, the benefit to the public interest should be considered in every case, for the reasons outlined in Paragraph A13, to accord with Circular 06/04. The public interest should also be balanced against the private interest in land.
(2) We cannot envisage a situation where a landowner expresses the view that no amount of compensation would be adequate. Thus providing the compensation / payment provisions

are fair and easily applied then the circumstances whereby a landowner is not adequately compensated should not materialise, any more than it would arise in any other situation where an acquiring authority compulsorily purchases land or an interest in land.

(3) This will require representation and decision, based on submissions, by the judicial body considering disputes. It can be inferred therefore that access to the use of the Code should not be available under either limb (a) or (b) but both elements will need to be satisfied for an order to be made.

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

Consultation Paper, Part 3, paragraph 3.59.

It is an essential requirement for Code Operators to be able to obtain access to their networks, for maintaining, altering, updating or adding to apparatus, including running cables, which may involve crossing neighbouring land. The Code should allow for an Order to ensure this can be enforced. Consent either by Order or directly from someone with an interest in the third party land should bind all 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.

The Forum has no comments

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 Forum has no comments

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 Forum has no comments

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 feel that to limit the right to cut back trees/vegetation would create a distinction between cable and wireless transmission systems. It is the intention of the Code that it should be technology neutral.

(1) It should apply to vegetation that has grown up (and roots growing under that may 'foul' cables) or will grow and interfere with apparatus that has been in situ for 12 months or more (to prevent abuse by an Code Operator)
(2) It should be ubiquitous
(3) It should cover all networks, wireless or cable (tangible)

All work should be carried out by a suitably qualified arbori-culturalist, at the cost of the Code Operator

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.

RICS could not reach a satisfactory industry wide consensus on this question and so has included sectoral viewpoints and opinion for the benefit of the Law Commission consultation.

Landlord members response –	Code Operator members response –
	It is important to firstly understand the breadth of the term upgrade and to the practicable

Preamble

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

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

What currently happens

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

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

Should an operator wish to install some equipment over and above that permitted by their agreement, the following might happen:

1. Each party refers to the agreement. Some agreements set out a procedure to follow when an operator wants to upgrade their equipment. The agreement might also include a schedule of prices (often referred to as a "Rate Card") for each element of additional apparatus deployed
2. The Parties negotiate a variation to the agreement. In most cases terms for a Deed of Variation to the restricted agreement are agreed amicably and in good time. However there are a few cases when this does not happen. Site Providers can demand too high an increase in rent or be too slow in granting consent.

issues faced by Code Operators as a result of any ancillary right to upgrade their apparatus.

Upgrades can vary from simple software updates to renewal, replacement or addition of new hardware equipment. Technological advances occur with extraordinary frequency and the ability of Code Operators to swiftly upgrade their networks in order to realise the benefit of such advances is pivotal to being able to realise the benefits they bring to consumers, the economy and to meeting Government Objectives.

It is increasingly common, in the mobile arena, for landowners to insist on a restricted ability to upgrade, seeking to be explicit on such matters by specifying precise technological criteria linked to additional payments. Ironically such agreements effectively build in inevitable problems of redundancy since the flaw with technology specific restrictions (e.g. those permitting X no panel antenna etc) are that they cannot foresee technological changes. They may work in today's environment but who can be sure that what is considered to be a "standard" Antenna/cabinet combination today will remain relevant tomorrow? Simply because existing practices have arisen through custom and practice does not mean they are the right starting point for the future.

Clearly, it follows that the meaning of "upgrade" cannot be defined (in a way that is technology future proof) but does that uncertainty then justify agreements containing absolute restrictions?

Clearly any restriction by its very nature becomes another step in the consent process so must logically result in some form of delay to network upgrade even in the most straightforward example. Indeed, restrictions within fixed line wayleave agreements relating to sections of backhaul networks have created significant delays to upgraded service and network improvements, causing direct adverse impact to customers including those in the public safety sector.

In order for Code Operators to develop and sustain world class networks, they must be able to change, upgrade and add to the hardware and software forming their network as technology and commercial pressures require and by right. A right to carry out apparatus upgrades will, therefore, form an important part of meeting Government objectives and should

Summary

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

Recommendation

1. Parties to an agreement should continue to be free to negotiate terms relating to the extent of equipment and the right to alter and upgrade that equipment.
2. On those agreements where the Code Operators are restricted, they should benefit from an ancillary right to upgrade their apparatus with the Site Providers consent (such consent not to be unreasonably withheld or delayed) PROVIDED that the alteration is within an existing cabin(et)(s) or any new apparatus is like for like or the upgrade relates to an upgrading of technology or frequency. In all other cases the terms of the agreement should stand.
3. On those agreements where the Code Operators are restricted and where no pre-agreed additional payment is set out, a further consideration could be sought by the Site Provider from the Code Operator when it increases the amount of its apparatus.
4. Any payment under 3 above is based on market evidence and if not agreed is referred to an appropriate Dispute Resolution Service.

be included in the Code revision.

In the case of mobile networks, the following issues arise:

There are instances where Site Providers have been successful in holding out for and securing an increased rent and others where Operators have had their plans to upgrade sites frustrated. It should be borne in mind that such additional cost burden and delay is not in the public interest.

It should also be borne in mind that Operators generally seek to upgrade and develop a network of sites rather than a site in isolation as each site is integral to the wider network. Technology upgrades on only parts of a network are unacceptable and often technologically impracticable if not impossible and a delay in the ability to upgrade one site can directly impact and delay the upgrading of a larger number of sites all of which have to be upgraded contemporaneously for technical reasons.

Having established that the definition of “upgrade” cannot be fixed and that attempts to place restrictions within agreements will inevitably cause issues for Operators in terms of delayed network improvement and/or service to the end customer, it is pertinent to consider the reasons why landowners and site providers press for such restrictions.

Experience tells us these are:

- Impact on Loading or safe working.
- Aesthetic.
- Purely Arbitrary or financial (ransom).
- Concerns over frequency interference.
- Prevention of development works.

We believe that there should be a general presumption in favour of upgrades with adequate protection afforded to Site Providers in connection with loading and safe working on rooftop sites.

Where the Site Provider owns the Mast infrastructure itself it is accepted that restrictions on the number and height of antenna on the mast to prevent the mast becoming overloaded and or having to be replaced or strengthened may be necessary.

		If Landlords' have the wish to control an Operator's ability to upgrade a site for practical, safe working or other similar reasons this should be on the basis that such consent should not be unreasonably withheld or delayed. Legitimate property management concerns (e.g. mast loading or restricted rooftop space) can therefore be properly accommodated. Given these existing controls for legitimate concerns, there is no justification for agreements containing absolute restrictions. It must be remembered that the aim of the legislation is to further the development of telecommunications infrastructure whilst balancing the interest of both parties, not to provide a cash cow for landowners. Code Operators should not be required to make additional payment when they upgrade their apparatus. In effect each time an Operator acquiesces to the unreasonable rent demands of one Site Owner; this is seen as precedent by the next. Often the next worst deal (from the operators' perspective) is used as the benchmark for market evidence. In effect the Operators are working within a highly distorted market place where "holding out" for an equitable solution and agreement thwarts a technology upgrade on a site or the ability to network it or other sites through it. Such delay works contrary to the public and national interests and holds back the ability and speed with which Operators can upgrade their sites. Landlords have, unfortunately, used a restriction on consent as an opportunity to demand increased rental for the grant of consent to upgrade beyond arbitrarily proposed technology restrictions. The Operator who would otherwise have disproportionate cost in pursing an alternative is effectively ransomed and or delayed from implementing upgrades because of this arbitrary restriction. It is recognised that in the case of mobile networks, a mast owner is generally (although not exclusively) also in occupation of the mast or they perform on behalf of the existing mast owner specific functions and services which sit out with those performed by Landlords or

	Owners of either Greenfield sites or Rooftops. Such functions include:- • Maintenance of the mast support structure. • Control of frequency interference. • Control of Access and site security (to ensure the safe maintenance of equipment by multiple operators) who may require to work close to or pass other operators equipment. (Landlords of Rooftops also often control access but this is generally from the perspective of the building security rather than safe working practice). • Supervise loading calculations (wind loading and structural loading) • Maintenance of the equipment compound and compound security fence. • Provide Lightning protection and power management. • Provide steelwork interface, cable trays etc. It seems logical that the owner of the mast, who not only performs the above mentioned services but also is required to manage the use of the mast structure and compound, has an equitable and transparent means by which to determine such payment amongst Operators although clearly, the level of rates to be applied within a rate card needs careful review (which will be covered elsewhere). However, it seems that Mast Owners are also seeking to restrict use or further charge for technologies or frequencies deployed in order to gain a further financial benefit without giving up any additional rights, nor incurring any additional costs. It is advocated that it is not in the public interest for a Mast Owner to be able to levy additional charge for the frequencies or technologies deployed. We recognise situations where a mast owner might legitimately be able to apportion and charge a rate based upon the proportionate use of a finite resource (the physical loading capability of a tower) and of a compound according to physical use. However, it also follows that restricting an operator from swapping out antennas on a like for like basis, upgrading of technology or frequencies or charging them additionally serves only to provide a mechanism for the Mast Owner to “cash in” on the Operators use of infrastructure.

	It is proposed that Mast Owners should be capable of charging on the basis of physical use of a finite asset (and for ease of implementation this could be made consistent with a rate card to be applied across multiple sites rather than calculated individually) but that such rate card should be capable of reference to Lands Tribunal should the Operator and Mast Owner be incapable of negotiating this rate card freely. Further, it is advocated that it is not in the public interest for a Mast Owner to be able to levy additional charge for the frequencies or technologies deployed.

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.

RICS could not reach a satisfactory industry wide consensus on this question and so has included sectoral viewpoints and opinion for the benefit of the Law Commission consultation.

Summary –
The detailed views are discussed below in summary –

Landlord members –	Code Operator members –
1. The ability of Site Providers to prevent Code Operators from sharing their apparatus does not cause difficulties in practice; 2. Code Operators should not benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void); and 3. An additional payment should be made by a Code Operator to a Site Provider and/or occupier when it shares its apparatus.	1. The ability of Site Providers to prevent Code Operators from sharing their apparatus serves only to delay infrastructure rollout, consumer choice and service provision. 2. Code Operators should benefit from a general right to share their apparatus with another. In practice the widening of rights is generally only secured by the payment of additional consideration and is rarely withheld for any other reason. 3. No additional payment should be made by a Code Operator to a Site Provider and/or occupier when it shares its apparatus, there being no additional

	burden upon the Landowner or Site Provider in terms of the grant of such right.

Landlord members response –	Code Operator members response –
<u>Preamble</u> Evidence suggests that most agreements cover the issue of the sharing of the occupation of the site and/ or the use of an operator's apparatus ("Site Sharing"). A relatively small proportion (14%) ban site sharing and at least about one half of agreements have some form of arrangement for the payment to the Site Provider of an additional sum, over and above a "base rent", should the site and/ or apparatus be shared ("Pay Away"). Pay Aways to Site Providers became more common as a result of Site Providers reacting to the advent of new operators in the market and the Government wishing to control the proliferation of masts by encouraging the sharing of sites. Site Providers sought Pay Aways in new agreements as a means of securing an additional consideration to reflect the fact that their tenant (as Host) gets a financial advantage by charging an annual fee from its Sharer. Site Providers were also faced with additional visits to the site across their property; and the very presence of an additional licensed operator on their property had repercussions under the Code when it came to seeking the alteration or removal of apparatus. <u>What currently happens</u> The amount a Sharer may pay the Host to Site Share has in the past been based on the amount of equipment the Sharer installs on the Host's apparatus (such as the mast). The amount of Pay Away is usually based on a % (typically 25-50%) of the Site Share fee. However, more recently and in particular with the advent of Radio Access Network sharing	From an Operator's perspective, restrictions on sharing can principally occur in four scenarios: 1. Sharing apparatus. This may be through group company arrangements or strategic partnerships. Code Operators frequently encounter obstruction from landowners in this regard. Operators find themselves having to argue for the unfettered right to conduct such sharing and this often leads to protracted debates with their professional representatives, and all the while the service to the customer is delayed which is clearly unsatisfactory. 2. In the case of fixed line Operators they may share use of cables/fibres which again landowner may seek to prevent or demand additional payments in the event of such sharing, albeit that the Operator may have already paid consideration for the grant of rights for such apparatus; 3. Sharing of Conduits. A Code Operator may permit another Operator to install cables in unused space within its conduits. This has an added benefit of reduction in costs for operators, and avoids proliferation of infrastructure and is a common practice where physical barriers exist e.g. canals and bridges. The presence of restrictions on the ability to share infrastructure in this way has been the cause of many disputes over the years as landowners have sought to use restrictions to hold Operators to ransom. 4. Site sharing / co-location: Code Operators commonly host third party Operators' (as customers) apparatus within each other's sites – often where networks (of the same or different natures) "interconnect" - and this is

("RAN sharing") the Pay Away set out in an agreement is based either on a % of the rent the Host pays the Site Provider (per additional sharer); or on a fixed sum (per additional sharer).

Operators are changing the arrangements over site share payments so that they do not have to make them in future.

For instance, some Operators as Hosts:

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

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

In most cases terms for a Deed of Variation to the restricted agreement are agreed amicably and in good time. However, there are cases where the operators feel that they are either being held to ransom because the Site Provider is demanding too high a Pay Away or the Site Provider does not want a further Code Operator (with or without any additional equipment) onto the site because it may, for instance, frustrate the Site Providers plans to redevelop the site.

Summary

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

necessary for all modern networks.

Furthermore, fixed line Operators have fairly regular experiences in the context of "service wayleaves" (i.e. those with landowners to provide services to tenants, whether of whole or multi-let buildings) of landowners restricting use of the apparatus to the provision of services of a named occupier, thus fettering the use of apparatus. In the foregoing examples the delay and impact on customer service that can be caused can run into many months and even years.

From a mobile perspective historically, there are many instances where the Operators have agreed with Landowners that an additional payment be made for physical sharing of a site. This has resulted in part as a consequence of Landowners being advised by their professional advisors to hold out for such provision for potential future financial gain. Rather than delay the implementation of their own scheme, in order to secure a potential future right for a third party Code Operator to share a site at nil consideration and in the absence of a statutory right to share, Operators would have generally agreed to the "ransomed" provision of a site share fee.

Any terms within an agreement precluding a Code Operator sharing facilities or systems usually represents an attempt to gain a financial advantage for the Lessor. This represents a restriction on the development of networks that would otherwise provide a competitive service offering, in the public interest.

Given the Code allows an Operator a right compulsorily to acquire a right to install apparatus on land; it would seem both contradictory and counter-productive to limit a right to share facilities because of lease terms between two other parties. Furthermore it should be borne in mind that the Government has produced guidance to encourage Code Operators to share systems and equipment.

The ideal approach, as stated above, is that the Operator should be able to take an unfettered site agreement. To that end we would support a general right to share apparatus and/or rights that would make restrictive terms void, on the grounds that such terms are a fetter to the (revised) Access Principle and to the operation

Recommendation 1. Parties to an agreement should continue to be free to negotiate terms relating to the arrangements over site sharing. 2. Code Operators should not benefit from a general right to share their apparatus with another (so that a contractual term restricting that right would be void) 3. On those agreements where the Code Operators are banned from site sharing, Site Providers should be entitled to agree terms (including payment of a consideration, if any) for a novation to an existing agreement to reflect the added value, if any, of the site to the Code Operator. 4. Any payment under 3 above is based on market evidence and if not agreed is referred to an appropriate Dispute Resolution Service.	and development of networks. In terms of whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it shares its apparatus many landowners do not, or chose not to, understand that Operators incur significant costs in the establishment of networks. In such cases it is inequitable for owners to seek additional fees for site or apparatus sharing. The crux of the problem is that a highly artificial market has been created, and continues to be fed by the needs of Operators. In our view, there should be no automatic right to additional payments for sharing apparatus or site sharing. It is advocated that Operators should be paying compensation based upon the diminution in value of the effected property (injurious affection) and where shared use of the effected property does not result in any additional diminution there should be no additional right for a further levy or (consideration). In the context of Mobile Operators. It is important to understand that the host Operator or Primary Tenant of a greenfield site will have incurred the initial costs of turning the telecoms site from a “Greenfield” site into a telecoms site. To this end, an annual fee from the Sharer seeks to reflect:- The host Operator will have incurred higher initial acquisition costs, including for Network Planning Engineers, Acquisition Surveyors, Solicitors (often meeting the Landlord’s legal and surveyor costs or a high capped contribution of such costs too), Planning Consultant fees, Designer’s Fees etc. The Host Operator would have commonly paid for a new electricity supply connection to be installed. The Host Operator would have paid for the compound fence, tower base, tower, lightning protection, any vehicle hard standing, access track etc. Additionally and ongoing, the host Operator would be responsible for:- • Maintenance of the mast support structure. • Control of interference. • Control of Access (to ensure the safe

	maintenance of equipment by multiple operators) who may require to work close to or pass other operators equipment. • Perform loading calculations (wind loading and structural loading) • Maintenance of the equipment compound and compound security fence. • Provide power management (where a sub metered power supply exists) Importantly, the Landowner or Site Provider contributes nothing toward any of the above costs. If a Landowner or Site Provider were to receive an additional payment then this should be commensurate with the injurious affection suffered. The shared use of equipment generally results in there being no (injurious affection) through the shared use of the equipment. The ability of a Site Provider / Landlord to withhold consent or to ransom their consent in any way can only work contrary to Government intention and has the potential of delaying network rollout and or technology, capacity upgrades and or consumer choice. It is suggested that 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).

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10.17 We ask consultees to what extent section 134 of the Communications Act 2003 is useful in enabling apparatus to be shared, and whether further provision would be appropriate. Consultation Paper, Part 3, paragraph 3.88.
We are not aware of the provisions of section 134 of the Communications Act 2003 being utilised. We would concur with the Commission that the scope of this section is limited and as such generally not utilised as it refers to matters done inside a building occupied by the lessee. It is perhaps a good example of where the current legislation falls short in terms of providing any real practical benefit.

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.

RICS could not reach a satisfactory industry wide consensus on this question and so has included sectoral viewpoints and opinion for the benefit of the Law Commission consultation.

Landlord members response –	Code Operator members response –
<u>Preamble</u> Evidence suggests that most agreements (98%) cover the issue of the assignment of agreements. Most agreements currently have some form of restriction on assignment, but only a relatively small proportion (5%) ban assignment. Arrangements over the assignment of agreements are common in all commercial leases in order to maintain covenant strength. Since the beginning of 2009 the assignment provisions in leases have come under closer scrutiny as Code Operators seek to assign their leases not to one Company (as one might expect under a merger) but to itself <u>and</u> another Company. For example, T-Mobile (now Everything Everywhere) and Hutchison 3G sought to share their portfolio of sites with each other. Rather than rely on the site sharing provisions of the agreements to do this they decided to seek to assign each of their leases into the joint names of themselves and the other. On completion of the assignment each lease then had T-Mobile (now Everything Everywhere) and Hutchison 3G as joint tenants. More recently other mobile phone operators are seeking to alter the definition of "Group or Associated Companies" in leases away from the usual definition under s42 Landlord & Tenant Act 1954 to "*a company in which [the tenant Code Operator] has a 15% or more*	1. In terms of general comments, as they relate to the existence of restrictions in site agreements, then points made in Q10.15 apply. Where such restrictions relate to assignment rights, these create the same types of ransom situations as exist where restrictions relate to sharing or upgrading equipment. The ability of a Landowner and occupier to prevent Code Operators from assigning the benefit of agreements that confer code rights causes delay and cost to that operator in terms of their ability to freely deal with their network. In the case of new network deployment and the procurement of new site agreements, the insistence of landowners seeking to impose such restrictions significantly slows down negotiations. The case for the unfettered leases and flexible wayleaves has already been made. In practicable terms, because each site or cable is an integral part of a wider network, delays in securing consents on one site often have considerable knock on implications in terms of the ability to progress upgrades, technological improvements etc on sites beyond the site in question. The consequential effect of

shareholding". The tenant Code Operator can then set up a company with one or more other licensed operators (who are not necessarily genuine Group Companies, under previously accepted definitions) in which it retains a 15% or more shareholding and then assigns its lease to that company, thus enabling one or more other licensed operators to operate from the site, when previously they might not be able to. It is clear that these ways of sharing portfolios of sites with each other is being pursued because it costs the respective companies much less. As can be seen from the tables in the Annexe, nearly three times as many agreements ban site sharing compared to those agreements that ban assignment (14% and 5% respectively). In addition in those leases that we have analysed 36% of the site sharing clauses provide for no payment compared to nearly 100% of the assignment clauses which provide for no payment to be made to the Site Provider. <u>What currently happens</u> In those [few] circumstances where an operator wishes to assign its lease but is banned from doing so, the agreement might need to be varied by negotiation. In most cases terms for a Deed of Variation to the restricted agreement are agreed amicably and in good time. We are aware of no cases where the operators feel that they are being held to ransom. <u>Summary</u> 1. A small proportion of agreements ban assignment (5%), the remainder of agreements allow assignment either conditionally or unconditionally. 2. Some Code Operators are seeking to use the assignment provisions of the agreements, in ways that were originally not envisaged, as a means of becoming joint tenants on a site or to avoid future Pay Aways to Site Providers 3. Where needed, the Market for assessing the additional payments (usually one off Premiums) to allow Assignment is established and available within the industry. 4. Site Providers seek payments because a site which is occupied by two Code	which is that it adds cost and delay to service provision which is not in the consumer interest. There is no increase in injurious affection as a result of an Assignment. Where Landlord's consent is not to be unreasonably withheld the grant of such consent seems to benefit only the Landlord or Site Provider's professional advisors whose reasonable costs would be generally be sought from the Operator. 2. Yes, an amended Code should over-ride such restrictions, and/or render void the requirement for consents and/or direct covenants. There are complications that we consider arise as landowners advisors currently take the view that as a contract the burden cannot be assigned so an amended Code would need to create some kind of special privity between the landowner (grantor & its successors) and the assignee of Code rights (where there is no privity of estate). Currently, landowners often insist upon prior consent and/or deeds of covenant which in the context of many thousands of agreements such as service wayleaves is unrealistic. To alleviate concerns about "covenant strength" assignment should be limited to Code operators, on the basis that a "man of straw" would be unlikely to operate a communications network 3. The code right should continue to exist when assigned to a Code Operator for so long as that assignee and its assignees continue to be a Code Operator. There should not be a need for additional a payment to landowners as assignment does not change to nature/value of the right granted.

Operators is worth more than a similar site occupied by just one Recommendation 1. Parties to an agreement should continue to be free to negotiate terms relating to the arrangements over assignment. 2. Code Operators should not benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void) 3. On those agreements where the Code Operators are banned from assigning Site Providers should be entitled to agree terms (including payment of a consideration, if any) for a novation to an existing agreement to reflect the added value, if any, of the site to the Code Operator. 4. Any payment under 3 above is based on market evidence and if not agreed is referred to an appropriate Dispute Resolution Service.	

10.19 We ask consultees to tell us if they consider that any further ancillary rights should be available under a revised code. Consultation Paper, Part 3, paragraph 3.94.
We feel that ancillary rights appear to be reasonably covered, taking account of current and foreseeable circumstances in the section above.

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.

The scenario painted in the Consultation Paper, a Code Operator seeking rights to cross third party land to provide a service to tenants in multi let buildings, (whether commercial or residential), is a problem experienced by Forum Board members. Even in instances where the 'third party' is the tenant's landlord, experience shows that their response is at best disinterested, invariably slow, often seeking inappropriate terms and conditions, giving rise to protracted negotiations and considerable professional advisors' fees.
The situation ultimately impacts on the end users experience due to the unnecessary delays and additional costs whilst the economic and social benefits of access to broadband are well documented and understood, practical delivery is inhibited by such situations.

In these instances, Paragraph 8 does not assist and is rarely used, because it is the Operator who needs to secure the right over land.

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.

Please see the response in 10.20.

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.

Please see the response in 10.20.

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 views are that, unlawful actions could remove service/coverage of a network. The Code Operator requires rights to ensure the restoration of service as quickly as possible.
(2) Not applicable.
(3) Refer to (1) above.

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 sure that we understand what the Law Commission are querying here. We note that the query comes under the section "Enforcement of Code Rights" in the Consultation Paper, but the discussion in that section appears to centre on Code Operators having problems with landowners interfering with Code rights.

Looking at it from the landowner's perspective, we wonder whether the question is seeking to address a situation where the Code Operator is delaying completion of the legal agreement. In this situation, as the legal contract has not yet been completed there is no contractual obligation to be performed at all on the part of the Code Operator, so we are not sure what the Law Commission would be suggesting in these circumstances. Until the legal agreement is completed, the landowner is; of course, free to agree a deal with another party.

Or is the question here aimed at land-banked agreements? (Land-banked agreements are those where the operator enters into an agreement with a landowner, but the rental payments and any obligations under that agreement do not "kick in" until the telecoms operator starts work on the Site). In a land-banked agreement there is no obligation to build the site, but rather merely a right to build. As such there is no obligation that can be enforced, so again in these circumstances we are not sure what the Law Commission is suggesting. In some situations, a holding payment is paid to the landowner in respect of the period prior to commencement of works, to compensate him for the inconvenience of his land potentially being sterilised.

As land-banked agreements are freely negotiated commercial agreements, which do not appear to have caused either party any issues, we can see no reason to interfere with the current system.

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 would broadly agree that the current provisions under paragraph 9 do not generally give rise to issues. Nevertheless it is worth pointing out a couple areas where there is a potentially increasing scope for problems.

Firstly, in relation to the wording providing Operators with the right to install etc. apparatus in publicly maintained streets, we would point out that the placement of apparatus on street furniture owned by Local Highways Authorities is potentially outside the parameters of what is permitted since, technically, posts and other street furniture do not fall within the legal definition of land. This is why Operators need to enter into agreements with those Public Authorities. Given the increase in the use of such street furniture as part of network upgrades and expansions, we suggest that the wording of the Code be amended to include these structural elements. We believe that this would close what we perceive to be a gap in the provisions, continue the spirit of this special regime and comply with central and local planning objectives to utilise existing structures and avoid the proliferation of masts.

Secondly, in respect of apparatus obstructing access to new development, this is again a balance of interests. Operators in our experience will always site apparatus where it is least vulnerable because of the financial and operational impact of having to subsequently reposition and re-route the network. Thus street cabinets are not consciously placed in pathways where it is evident that the location would provide a potential access to land.
We would therefore agree that on this basis there is no need to include an explicit prohibition on the obstruction of access that is, as yet, undeveloped.

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 aware of the existence of disputes that centre on the special provisions relating to tidal waters, Crown owned land and property interests.

However, as a professional body representing the interests of both the public and its members within the property and telecommunication industries, we cannot comment on particular cases but would expect that the parties to those disputes will no doubt separately respond to this Consultation with specific details of those experiences as they feel appropriate.

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 believe there is no justification to differentiate in the treatment of such land.

(2) We tend to agree and feel that to the extent there may possibly be an argument for a slightly different regime for tidal waters, due to the physical nature of the land in question; however on balance these lands are already protected by legislation such as the Marine Act and as a starting point, for the purposes of Operators seeking to develop telecommunication networks which are dependent on international connectivity, our view is that there should be a consistency in the code provisions with other general land provisions.

(3) We do not believe that any land should be treated in a fundamentally different way to any other as it would be in consistent and inequitable to so do.

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.

As the GEO case highlighted, the existence of linear obstacles and the special code provisions currently relating thereto, has undoubtedly given rise to very specific and contentious disputes between landowners and Operators. The GEO case highlighted the extent to which such disputes have the capacity to substantially delay the roll out of telecommunications networks and provision of service to the end consumer. It also publicly highlighted how such disputes generate significant costs for the parties as the dispute escalates through the legal processes.

Leaving aside the financial elements of this special regime, it is our view that the potential reasons, whatever they were, for the code containing special provisions for linear obstacles when originally drafted, are now nevertheless superseded by the need to balance the interests of all parties in the light of the present commercial and technological environment, which is very different to that which existed nearly 30 years ago.

As such, we believe the acquisition of rights by Operators in under or over linear obstacles should proceed under the same regime as other general land provisions and in such circumstances

therefore do not consider sub sections (3) to (5) of this question to be relevant.

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

Do consultees agree?

Consultation Paper, Part 4, paragraph 4.34.

We agree with the proposal in the Consultation that paragraph 15 offers a sensible precaution by recognising the importance of all utility services passing through conduits and the need to ensure there is no disruption to the provision of these services to the general public. We therefore concur with the above Consultation recommendation.

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 concur with the proposal in the Consultation in that we are not aware of problems arising under this regime. Undertakers works are generally done within the regulations falling under the New Roads and Streetworks Act and by and large we understand the processes relating to this and the communication and dialogue between utilities and Highways Authorities, to be generally working satisfactorily.

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 have nothing to add and concur with the Consultation recommendation.

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.

Summary –

There is broad agreement to the proposal from both landlord and operators representatives, with detailed views outlined below.

Matters raised for consideration include, clarity as to possible duplication of 'removal' found in both paragraph 20 & 21. A clear demonstrable requirement to move/alter any apparatus preferably to within the current landlords holding and a requirement for sufficient notice to be given to facilitate such a move. It is also suggested that alterations should not extend to removal if the current position to contracting out endures.

Landlord members response –	Code Operator members response –
The current regime under Paragraph 20 of the Code causes confusion because it includes a right to remove apparatus, as well as a right for site providers to require an alteration to apparatus. This seems to duplicate Paragraph 21 which also deals with removal of apparatus. Telecoms agreements usually include terms at the outset that provide for site providers to alter apparatus, although these are often referred to as "lift and shift" clauses. Telecoms agreements also often include rights to terminate a contract if the site provider envisages a need to regain possession at some point during the term of the agreement. If neither lift and shift nor a break option is included in a telecoms agreement then the site provider would expect a negotiation and would expect to pay costs to relocate or remove a Code operator within the term of an agreement. As the current regime requires a site provider to pay costs for any alteration there is little benefit in retaining paragraph 20 rights. In the context of there being an existing contract between the parties Para 20 need not apply. A site provider would not expect to be able to relocate a telecoms operator or remove a telecoms operator if a telecoms agreement	Any revised code should provide for a clear process by which a Site Provider or adjoining landowner can seek the relocation of a Code Operator's equipment within a contractual term of occupation (PARA 20). There should be a general presumption that a Site Provider or adjoining Landowner will only request the relocation of a Code Operator's equipment where absolutely necessary and there needs to be a burden of proof in this respect. There should be a further requirement that the Operator's equipment be temporarily relocated for the minimum time period practicably possible in order to effect the works or alternatively for such re-location to be to a new position which is technically suitable to the Code Operator. All this should be at the Site Provider's expense or at the expense of the adjoining Landowner where they are the party serving the Para 20 notice (this to avoid and ensure that frivolous or tactical use of lift and shift provision is not encouraged). In the event that the Site Provider's scheme requires, by necessity, the permanent re-location of a Code Operator's equipment, within the contractual term of occupation, then the Code should provide for a mechanism whereby the Code Operator's costs of decommissioning the existing, acquiring, building, deploying equipment and integrating

previously entered into did not allow it. Similarly Code operators would plan their network based on the contractual arrangement that they have entered into and would not expect a landlord to use statute to override an agreed contract.

However, there are situations where no contractual arrangement exists, whether current or historic and in such instances Paragraph 20 rights to have equipment relocated or removed remain a requirement. Examples under the current regime are:

1. Streetworks masts installed on the public highway but directly outside a property can frustrate development. The mast may be in the only position that can provide access to a larger development and may need to be moved for an entrance splay, for example. A developer may be willing to factor into the cost of the larger development a sum for the operator to relocate the mast further up the street. Under the background of Para 20 there are examples of this being agreed by negotiation. This is relocation and not a removal from the landlords land.
2. There are instances where the "occupier" has granted consent and the land or property reverts to a superior interest. The occupier may not have sought superior landlord's consent to the sub-letting despite this being in breach of an existing lease. In such circumstances the superior interest may want to relocate or remove an operator. If the Code is not amended to ensure that Code operators obtain the consent of all interests in land then a lift and shift or termination provision needs to apply. The reversioner can decide whether a lift and shift is feasible or whether removal is the only option. In such circumstances I could be argued that costs should not be borne by the reversioner, whose rights have been overridden by statue.

If Code operators are permitted to hold over under Code after expiry of a contract it needs to be clear that the site provider can operate a Paragraph 20 lift and shift provision or a Paragraph 21 removal provision and in either case it would be unfair to expect a landlord to

the replacement solution is met in cost terms by the party serving the Para 20 notice.

In respect of Lift and Shift requests in contracted term. The Site Provider should be obligated to accommodate the Code Operator (subject to technical suitability and Town and Country Planning) elsewhere within their landownership. If a technically suitable alternative(s) is required, or desired, by the Code Operator elsewhere other than upon the Site Provider's land then the Code Operator should be free to pursue such alternative(s). However, the cost of such alternative(s) should still be borne by the Site Provider of the original site or by the party serving the notice.

It is important that the Code provides adequately for the appropriate notice period to be given to the Code Operator to Lift and Shift, this should be a minimum of 12 months.

In practicable terms the Site Provider and the Code Operator should be free to negotiate alternative provision and apportionment of costs.

A revised alterations regime should not extend to removal of apparatus, particularly if the position regarding contracting out remains unchanged.

pay costs for a lift and shift or removal. There is confusion regarding the application of para 20 and para 21 when it comes to removal. Within a revised Code we would suggest a right to "lift and shift" and a separate right for "removal". The application and costs applied will need to vary depending on the circumstances of the case.	

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.

Whilst generally striking the right balance there are perhaps procedural matters that could assist in adding clarity and certainty to the process.

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

1. It would be simpler if one regime (Paragraph 20) applied to the genuine alteration of apparatus and another regime (Paragraph 21) applied to its removal.

We would suggest that:

1. Separate regimes are developed for:
    a. the alteration of apparatus (an improved Paragraph 20 regime)
    b. the removal of apparatus (an improved Paragraph 21 regime)
2. Parties to an agreement should be free to negotiate terms relating to the alteration of apparatus which would be binding on both parties.

Where agreement cannot be reached, the Court should have discretion as to where the costs of alteration should lie.

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

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.13.

Summary –

The Forum generally agree with the proposal but would refer to matters raised in the response to 10:32, regarding the reasoning behind most contracting out requirements from landlords driven by the fact that Paragraph 20 refers to removal as well as alteration. The fact that existing agreements may already incorporate contracting out or 'lift & shift' provisions should endure despite of any Code amendments.

Landlord members response –	Code Operator members response –
If a contract exists between the parties then that should take precedence over any statutory provision. Telecoms leases often include provisions for lift and shift or alterations. Currently, Landlords only seek to contract out of Paragraph 20 because it includes a provision against removal of the apparatus which may contradict any break options willingly agreed between the parties within a lease. If the removal provisions are taken out of Paragraph 20 then a non-contracting out provision may be appropriate. If not it could contradict the new proposals for Paragraph 21.	It should not be possible for Code Operators and Landowners to contract out of the alterations regime in a revised Code. Subject to clarification that a contracted arrangement, whereby the parties make specific provision for Lift and Shift or alterations should be able to work. E.g. if a Code Operator agrees with a Landlord that it will temporarily relocate it's equipment in order to facilitate say roof repairs then such provision freely entered into between the parties should prevail. Many landowners insist on having contractual rights to require alteration during the term of the agreement, often on less stringent pre-conditions, and usually with an express provision whereby the operator does so at its own cost (coupled with an express obligation on the Operator not to rely or exercise its rights under paragraph 20). These more or less non-negotiable conditions are widely accepted in the context of service wayleaves, usually on the basis that the issue of alteration is unlikely to arise whilst premises are occupied by consumers, and it has become virtually impossible to agree to such a wayleave without such a condition. However, a landowner expectation that Operators will agree to, or indeed, can relocate apparatus is dangerous in other contexts – for example for distribution networks - as it may not be physically or technically possible to "replace the missing link" to ensure integrity of the network. Given that agreements in this context are often on a commercial basis and that terms are often dictated by landowners who insist upon the Operator agreeing not to rely on its rights under paragraph 20, we agree with this

	proposal. The current legal position seriously undermines the security of Operator networks leaving them exposed to substantial operational and financial risks which in turn would jeopardise the service of potentially thousands of end consumers, including private and public sector customers.

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.

Our view is that, as with the overall provisions of paragraph 14, on which we comment above, the current alteration provisions relating to linear obstacles are inconsistent with the general spirit and aspirations of the Code. It is evident that the balance of interests between those landowners of linear obstacles and Operators needs to be adjusted. This would achieve better consistency and fairness.

Currently the grounds for an owner of linear obstacles to require alteration of an Operator's apparatus are vague in particular the definition of the term "interfere" for which there is no measure of materiality. It could therefore be envisaged that an alteration of apparatus, which is likely to have significant cost and operational (consumer) impact, could be required by the landowner. Such uncertainty should be removed.

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.

Summary –

Whilst there are differing views as to the requirement to be able to contract out of Paragraph 21 of the Code (set out below) these are not as far apart as initially thought.
There is a general acknowledgement that the uncertainty and costs of the existing process requires alteration (proposed process is suggested), a clear understanding that Code Operators do not want to stand in the way of bona fide redevelopment of landlords assets and indeed wish to attract more landlords to offer their assets for use. The utilisation of security as a negotiation tool by either side is considered undesirable and unconstructive.
It is hoped that these perspectives may assist the Commission in their drafting of their recommendations.

Landlords members response –	Code Operator members response –

The first point to make is that, without doubt, Para 21 is the primary reason why a significant number of landlords refuse to entertain telecoms equipment on their land and property. The revenue they can generate from a telecoms installation is relatively low and the perceived difficulty, court costs and delays in regaining possession could adversely affect their core business. If they can let space with certainty more sites would be opened up to telecoms use. The only way to achieve this is to allow the parties to agree to contract out of the security of tenure provisions of the Code. Having said that, contracting out should not be allowed without good reason. Using the lack of security as a negotiating position to improve terms for a landlord needs to be avoided. Thus contracting out should only apply to situations where to remain would adversely affect the landlords interest. For example redevelopment, refurbishment or improvement of a property, change of use (particularly residential where perceived health and safety issues remain) and occupation by a landlord or one of their commercial tenants for their own purposes. The second point is that without Para 21 security Telecoms operators would have to spend significant capital in relocating equipment to alternative sites and landlords might use this fact to negotiate a higher rent on renewal than market rental value. However Para 21 goes further than it should and Code operators use the cost and uncertainties created by Para 21 to demand improved lease terms and rents lower than market rental value. With rents at a low level it is simply not worthwhile issuing proceedings at the County Court. The need to protect the network is understood but the need to provide the Code operator with an advantageous negotiating position is not. A suggestion for dealing with this is to have two procedures rather than one which is in line with that under the Landlord and Tenant Act 1954. • Firstly, an opposed notice procedure where the landlord requires vacant possession at the end of the term • Secondly an unopposed notice where	Much of the dissatisfaction around paragraph 21 can be traced to a combination of a lack of understanding of the Code, including the (eventual) right of the owner for “compensation” for loss and motives of the parties. There are a number of very different but equally complex circumstances behind reliance by an Operator on a right to restrict removal. If we are to approach this sensibly then the first step is to recognise the scenarios where the service of a paragraph 21 request by a landowner is likely to arise. This seems to be as follows: • A tactical step taken by the landowner to negotiate or renegotiate terms, but who has no real reason for removal, and is otherwise happy for the apparatus to remain (this may arise where apparatus has inadvertently been installed in private property adjoining the highway in the mistaken belief of the operator – and may arise many years after the genuine mistake); • The landowner requires removal for reasons, other than genuine redevelopment, and the Operator wishes to stay; • The landowner wishes for apparatus to be removed and has a genuine intention to redevelop. • The landowner requires removal and the Operator is happy to remove apparatus but does not take any action. In all scenarios, the rights of the Operator are subject to it serving a counter-notice within the relevant time period. Where the Operator genuinely does not wish to remove/relocate, it is essential that the Operator does take relevant steps or risk not satisfying a Court under sub-paragraph (6). We can only imagine the dim view that would be taken by a court of an Operator who did not actively pursue negotiations and/or ultimately the exercise of its rights under paragraph 5 (where applicable). In our experience, the exercise of Operator rights under paragraph 21 mostly falls within one of the first three scenarios. The purpose of the Code is to ensure that electronic communications networks are adequately protected in all such circumstances – it is not about providing them with “an advantageous negotiating position”.

the landlord is willing to grant a new lease but simply wants to agree terms in a timely and cost-effective manner. (10.38 below suggests a procedure for this.)	What is often overlooked is the ultimate obligation of an Operator to compensate a landowner for any loss should the Court ultimately fix financial terms of the agreement that would almost certainly ensue. Therefore where an Operator retains apparatus which prevents redevelopment, the landowner is not financially prejudiced, as compensation for that loss is payable under the provisions of the Code. The fact is that it is not the intention of Operators to thwart development and where possible, the siting of apparatus invariably takes into account any such risk. It is usually reasonably evident where development potential exists and Operators cannot afford the disruption resulting from careless siting of apparatus. We oppose the idea of parties being able to contract out of paragraph 21. In theory it would be consensual, but in practice, contracting out would become the default position. This would in turn result in every renewal or new agreement or requirement for such to become referred to the County Court or Lands Tribunal (whichever the revised Code directs). We believe the pressure to go with such proposal stems from an academic fear of the provisions of paragraph 21 where landowners are poorly advised. However, the provision of the Notice and Counter Notice and the grounds for seeking possession by a Landlord should be revised. The current mechanics of Para 21 are complicated to understand, costly to implement and cumbersome to administer and provide 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?

Consultation Paper, Part 5, paragraph 5.48.

The Forum agree with this proposal but would suggest that –

(1) There is a robust regime under Town & Country Planning legislation to deal with any unlawful development; therefore perhaps it is more appropriate to alter this legislation so as not to create confusion or conflict between the two regimes.
(2) It may be appropriate to extend the emergency powers granted to Code Operators from 6 to 12 months to allow sufficient time to appeal and or migrate services.

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.

Summary –

Please note comments made under 10:36 above.
The Forums views are set out in detail below but generally, there is agreement that clarity, an improved procedure (recommendations outlined below) and the addressing of the interaction of other regimes is required.

Landlords members response –	Code Operator members response –
Comments under Para 10.36 above, suggests under a revised Code, 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 and his intention is true then if he has a contracted out agreement his position is clear and both parties have clarity. If the agreement is not contracted out then any potential claim for loss and damages incurred would encourage the telecoms operator to move on time and if not then either party can apply to the Lands Chamber to decide the matter. Under a revised Code, vacant possession notices should always be served in good time. 12 months is suggested where an agreement is not contracted out. To plan effectively a Code Operator needs 12 months to find,	The Consultation states that once an Operator has indicated in its counter-notice the steps it intends to take to secure a right against the person seeking the removal, there is after that no requirement for the Operator to do anything to secure its right to retain its apparatus. It states the onus then falls on the person serving the notice to seek enforcement and that this is regarded as unacceptable by landowners. We consider that the onus should remain with the landowner, particularly as the Operator may not know of the landowner's true intentions and/or has no immediate means of bringing a landowner to the negotiating table. We consider that were the onus placed on the operator, there would be a substantial increase in litigation, albeit in some cases solely to prevent the loss of rights pending negotiation of an agreement. This would also result in increased costs and resources on Operators, which consumers would ultimately

acquire, obtain planning permission, build and integrate a replacement site into their network. The current notice regime of a landlord's notice at any time followed by a counter-notice within 28 days is of little use to either party. To allow sufficient time it is suggested that in future a Code operator can serve notice within 3 months of receiving 12 months notice from the landlord stating whether or not they will vacate and an application for a Tribunal decision can be made any time thereafter. As mentioned above, the issue here is not simply about removal but that under the current Code, Para 21 applies where the parties want to renew a lease and Para 21 is the only recourse left for a landlord even where he does not want the equipment removed but simply can't agree renewal terms. In such circumstances, under a revised Code, an unopposed notice can be served without any need for a counter notice. An application to Tribunal or to ADR could be made at any time on the basis that the new agreement will commence from expiry of the old, removing and delaying tactics from either party where sites are over or under-rented. The current problem for landlords is that on renewal of a telecoms lease the telecoms Code operator knows that they can remain in occupation for any length of time beyond expiry of a lease 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 lease. 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 lease 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. Under a revised Code, a two pronged approach could deal with this: 1) The valuation date for all new telecoms leases should be the day after expiry of the old telecoms lease and 2) the rent shall be payable (or reimbursed) from the date of valuation (with interest). Thus	bear in the form of increased charges. Splitting of Para 21 into opposed and unopposed notices would distinguish between a Para 21 Notice whose intended effect is to renew agreements (unopposed) and a Para 21 Notice whose intention is to seek the removal of the Code Operator's equipment. Such distinction has potential merit.

there is no financial incentive for either side to delay. Rents and all lease terms should continue during the period of holding over with payments reconciled on settlement of the new lease. Accruals on either side might also encourage speed in dealing with matters. The proposed intention that L&T Acts shall not apply to telecoms leases, under a revised Code, 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 perhaps statute and case law under the L&T Acts should set the procedure and precedents for Code renewals. If the removal of Landlord & Tenant protection is not retrospective then perhaps in existing documents the use of the word Lease should mean a lease and the words licence or agreement should mean that L&T does not apply. After all, that would have been the original intention of the parties.	

10.39 We ask consultees to tell us whether any further financial, or other, provisions are necessary in connection with periods between the expiry of code rights and the removal of apparatus. Consultation Paper, Part 5, paragraph 5.50.
The Forums view is that whilst it is rare for code rights to expire at all, should this occur then the passing rent at expiry of the Code rights should be paid until removal and reinstatement to the landowners' reasonable satisfaction occurs, assuming that this is carried out in a reasonable timely manner. Should however a Code Operator remain or indeed a landowner utilise this Para 21 Notice for tactical purposes, the matter should be revisited by referral to the Lands Chamber.

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.

Summary –

The Forums view is as with 10:36 above whilst there are differing views as to the right to be able to contract out of the security provisions of a revised code (set out below) these are not far apart, and there is an opportunity to cater for this in drafting that may accommodate both sides.

Landlords members response –	Code Operator members response –
Many landlords are discouraged from making sites available for telecoms because of the security of tenure rights under Code and this results in a lower supply of sites and higher rents for those landlords that are prepared to enter into contracts. Conversely, landlords need to be prevented from gaining ransom value by the knowledge that it costs considerable capital for an operator to relocate unnecessarily. In order to remove such a negotiating tactic the parties should be allowed to contract out of Para 21 but for redevelopment, refurbishment, improvement, change of use and occupation by a landlord or one of their commercial tenants for their own purposes. This is a common provision in many current telecoms leases particularly where landlords have the right to break for redevelopment. No work around (penalties nor indemnities) would be needed if Para 21 does not apply to these specific circumstances. Evidence of the landlord's intent at the time could receive a similar test to that under the L&T Act case law. The reality under the current Code is that an operator will always relocate if there is a genuine intention to redevelop as they do not want to face a claim for the damages and losses incurred for delaying or preventing a redevelopment. The new provision needs to reflect this reality and make it clear that no operator would intend to remain where intent to carry out a genuine redevelopment exists.	It should not be possible for the provisions of a revised Code to be contracted out. If it were then every Site Provider would automatically be advised to seek such exclusion as a default provision. This would be unacceptable to the Operators and in turn result in every renewal or new agreement or requirement for such to become referred to the County Court or Lands Tribunal (whichever the revised Code directs).

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.

RICS could not reach a satisfactory industry wide consensus on this question and so has included sectoral viewpoints and opinion for the benefit of the Law Commission consultation.

Landlords members response –	Code Operator members response –
One of the issues 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. If the revised Code is to continue to apply retrospectively this could have an adverse impact on the roll-out of new broadband networks or upgraded 4G networks since there will be significant uncertainty in the market until a revised Code becomes law.	Provisions of a revised code should be applied to all equipment installed by a Code Operator.

FINANCIAL AWARDS UNDER THE CODE

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

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

Do consultees agree?

Consultation Paper, Part 6, paragraph 6.35.

We agree that in line with rules and principles under the Compulsory Purchase Act 1965, all owners of interests and rights in land, should have a right to compensation to the extent that their property and interests in property are injuriously affected by the exercise of powers of an acquiring authority. It is considered to be in the interests of simplicity to have a single entitlement in this respect rather than the complex provisions as exist presently under the Code as this will offer a consistent and fair approach without distinguishing between different parties. As the Consultation states, it will not follow that in every case a claimant will succeed under all Heads of Claim but it does ensure a robust and thorough process is followed.

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.

Summary –
Generally, the views set out below support such a proposal but point out that the revised code should actively ensure that such situations do not arise and that all parties to be affected by such installations are advised at the outset.

Landlord members response –	Code Operator members response –
The Code Operator should have a responsibility to identify the superior interests and to ensure that they are party to any contract, within which they will receive compensation and consideration, if appropriate. Those with reversionary interests in the property will then be aware of the Code Operator's occupation when the property reverts to them and can plan ahead and notify the Code Operator whether vacant possession will be needed well in advance allowing the Code Operator time to respond and protect or reconfigure their network.	(Compensation should follow the same mechanism as per 6.35 above). This is in acknowledgement of the concerns of landlords where the actions of their tenants can stop them removing apparatus even where the tenant is in breach of the lease terms by agreeing to the installation. The issue of the tenant proceeding with a service connection in breach of its lease terms is problematic for all parties and we see this as a reflection of the need for better communication and dialogue between landlords and tenants

The Code Operator should not intentionally avoid seeking the consent of a superior interest and should not knowingly seek to induce a breach of contract [see Crestfort v Tesco (2005) 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 on the hook (for the tort of inducing a breach of contract) as well as the tenant (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 lease.	to work towards lease agreements which have a balanced approach and recognise the need for occupiers to be able to access essential services without undue restrictions but with the ability of landlords to have an element of control over the conduct of works undertaken to their property. The Consultation refers to the possibility of those not bound by code rights potentially being unable to remove electronic communications apparatus citing the case of tenants acting in breach and permitting the installation of such apparatus to their premises. However, we consider this to be more of an academic risk based on fears which do not in practice materialise. In the event that the landlord wishes to redevelop the land or property, the position would be no different to any other utility service provider whereby the redevelopment would be undertaken in collaboration with those service providers on the basis that usually, continued connectivity of utility services to the site would be required by the landowner anyway for the purposes of serving the new development. There is no logic in the Operator opposing the redevelopment and thus leaving itself exposed to a substantial claim for loss of development value. If the original tenant customers have departed and the landlord has secured a vacant site for redevelopment, it is in the interests of all the utility providers to co-operate with a view to providing a service to the new development. The scenario described above is of course different to a cellular base station on an urban rooftop situation where an Operator has apparatus installed, the primary purpose of which is to form part of that Operator's distribution network. In these situations, the building tenants are unlikely to have sufficient rights over the rooftop to be in a position to make a grant to any third party and it is inevitably the landlord himself who is the grantor. Likewise in a green field rural setting, it is generally the landowner who will directly enter into a site agreement with the Operator and is thus bound by Code rights. Any issue in those circumstances around removal of apparatus at the end of the agreement then falls under paragraph 21 and again raises the issue of compensation for loss of value if an Operator does not vacate, on which we comment separately. Where a tenant allows an Operator entry, perhaps in breach of his

	agreement, if the Operator wants to retain operational apparatus beyond the termination of the occupier's agreement, it would accord with the principles outlined in section 6 that compensation equal to the effect on the reversionary interest should be paid to the superior interest.

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.

Summary –

The respective views detailed below, generally it is felt that they raise a number of issues for consideration in the drafting of legislation. It is accepted that consideration should not reflect ransom or profit share and that the position of a single Operator as a special purchaser should be disregarded.

Landlord members response –	Code Operator members response –
The telecoms property market has developed over a period of 28 years (since 1984) and the valuation of telecoms installations by reference to market rent is now well established. The market between ducts and fibre in the ground is entirely distinct from the market in wireless telecoms equipment which is installed above ground and this is reflected in the market rents payable for each type of installation. Comments made by the Law Commission to maintain a consistent approach across all technologies are noted and whilst the two markets are distinct both can be subject to market adjustments to reflect the type of equipment deployed and the resulting impact that that equipment may have on the use of the land or property rights granted. However, the Law Commission's conclusions seem to be very much based on the fixed mobile market and duct and fibre in the ground with virtually no mention of the	We agree with the Commissions' proposal and believe that it provides a workable solution and mechanism for determining value. Fixed Operator - Perhaps one of the most, if not the most, acrimonious aspect of the current Code provisions is the complex and often conflicting rules relating to the level of payments to various interested parties in particular the interpretation of and relationship between the terms compensation and consideration. In this respect the Code Consultation itself does not correctly explore the interrelationship between the two as it does not fully articulate the valuation principles and heads of claim that exist under the familiar compensation rules where compulsory purchase powers are used to acquire rights over land. The Consultation talks about the depreciation of

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 they didn't have a crystal ball and could never 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.

The main distinction between fixed and wireless apparatus is that wireless installations usually have another location 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 landlord's land. Similarly to roll out broadband to a rural community may need fibre to cross land to serve a community. There may be another route but that is significantly longer and more costly to the Operator. The question of a ransom value arises more readily and this is the value that needs to be removed from the equation by the Code, not market value. This can be achieved by the definition of market rent, as defined below in the RICS Valuation Standards ("the Red Book"). This is in line with the Mercury case which specifically excludes any ransom value or profit share, the main issue in that case being whether consideration includes any revenue share and it being determined that it does not.

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

In this section, the consultation paper does not mention the Bridgewater Canal case [2010] EWHC 548 (Ch) where Nicholas Taggart (cited) acted for the telecoms operator 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 are being guided by the Bocardo case which concerned the extraction of oil under the ground and not telecommunications. The two are distinct. land over which the right is to be acquired and other aspects including severance and injurious affection (at paragraph 6.7 and following), all of which are relevant where the owner retains some land held with the land to be acquired. However it does not discuss in any detail that an owner of property is also entitled to compensation for the value of land taken for the purposes of the statutory acquirer. Indeed, this is always the first head of claim to be considered by valuers under any compensation case. In this respect, for cases to which the Land Compensation Act 1961 apply, the basic rules of valuation and assumptions as to planning permission and betterment are found in sections 5 and 14.

The key question then, if compensation applies to an acquisition under the Code, is whether there should be some "extra" or additional payment and if so what? For whatever reason, the explicit mention of the separate term "consideration" under various though not all sections of the Code, leads to the core of most disputes, namely the task of making a subjective assessment for a further payment over and above the payment for the land or right taken under the compensation claim.

The difficulty in distinguishing between when a payment is purely for compensation and when it also contains some additional element (consideration) already exist elsewhere within the Electricity Industry. Interestingly there is a suggestion in the footnote of the Consultation that there is an element of consideration within the compensation provision of paragraph 7 of Schedule 4 of the Electricity Act 1989 although we note that leading textbooks on electricity consents do not specifically discuss this. Thus it is not entirely clear whether in practice a consideration element as well as compensation is somehow embedded within the national payment rates agreed by the electricity industry with bodies such as the NFU/CLA. Significantly, these national schedules of rates, originating from the electricity industry when it was state owned, continues today with the now privatised electricity companies. The same approach became the basis of similar payment rates, which continue today, with certain electronic communication Operators, deploying ducts and cables.

The challenge is avoiding an overlap or

Whilst fixed apparatus is 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 to apply compulsory purchase principles where they were not expressly incorporated. There are two problems with relying on this judgement. Firstly, oil extraction and the deployment telecoms networks are entirely different. Secondly, the object of this exercise is surely to start with a blank piece of paper and find a Code that works, not to reinterpret an existing Code that has been found deficient. 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? It is notable that the only 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 mast installations are concerned there are always other options and Court proceedings have not been required, with both sides preferring to settle terms independent of legal direction. According to the Mobile Operators Association there were 53,300 mobile base station sites in the UK at the end of 2010 and these have been established without a single recourse to the Courts under the current 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 paragraph 6.49. The proposed use of market value using compulsory purchase rules is not currently in use and a new market will need to be established. This could take another 20 years to develop. It is surely preferable to refine and	duplication in a scenario that envisages a payment for the land or right taken based on value to the owner that is compensation and a further payment for the right taken based on value to the purchaser – in this case the Operator – namely consideration. If a landowner receives payment for land or rights taken under the compensation rules, is it reasonable that there should be a further payment for the grant of the right? This complexity that already exists under the current code framework, which would be continued under the Law Commission's proposals as they continue to talk in terms of two distinct elements. It is unknown for parties to negotiate terms with distinct heads of claim against each since to distinguish between compensation and consideration and accommodate both in a consistent manner is the practical challenge faced by parties. The annual rent paid by the mobile operator for the lease of land or wayleave rent paid by the fixed line operator must be regarded as the compensation to the landowner or occupier for the grant of rights. But when looking at the level of rental payments for example for the plot of land leased by the mobile operator, the levels of annual payment often far exceed the annualised capital value of the land itself. We do not agree that the removal of the express term "consideration" would necessarily result in little or no compensation being payable for the grant of the right. The fact that the interest taken by the Operator is usually less than a freehold purchase, does not override the need to consider, under the compensation rules, the relevant payment arising under the head of claim appertaining to the land or right acquired. As the Consultation Paper itself acknowledges (at paragraph 6.67), some special types of properties and rights are difficult to value on any market basis where there is little or no market for them but this does not automatically mean they have no value. Therefore in the case of leasehold interests or wayleaves, an interest in land has been taken, albeit not as extensive as a full freehold interest but their lesser nature does not negate the need to ascertain a value. For example, the acquisition of rights in a river bed to construct a road bridge (Port of London Authority v Transport for London [2007]) relied on evidence of prices paid for the grant of River Works Rights by the Port of London Authority. So, on this analysis, we feel this calls into question the need for the inclusion of

iron out issues in the currently established rental market value that both sides are happy to work with, which suggests 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 paragraph 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 building. In fact mobile operators often pursue 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 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 a property or area of land, 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 where the parties had acted knowledgeably, prudently and without compulsion and on the assumption that there is more than one property or area of land available for occupation”.

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.

an express payment entitled “consideration” in addition to the heads of claim which would ordinarily fall due under a compensation claim.

It is recognised that compulsory purchase at a market value (of land taken) basis can give rise to opposition and disquiet is expressed by landowners at such payments for the purpose of “commercial” operations. To offset this, the Consultation makes a proposal for a payment for the rights to be assessed. We take the view that a clear and simple basis of payment is crucial to achieving the aims of all stakeholders. However, we recommend that in the interests of avoiding a continuation of the confusion around the inter-relationship between compensation and consideration that a separate and additional payment described as “consideration” should be dropped and that the basic premise of payments should be as stated under the LCA 1961, with a modified definition under rule 2.

The issue of commercial rates for wayleaves

Crucial to the success of this definition and the working of any new Code regime, is the ability of valuers to refer to “comparables”. Clearly this, as with any valuation assessment which has reference to a market, depends on complete transparency and the ability of all parties to a particular transaction to be able to freely exchange information on individual comparable transactions which make up the market. Those valuers will need to interrogate the detail as the terms of each agreement will affect the payment amount. The need for this unrestricted exchange of comparable information is acknowledged within the Consultation (para 6.17) and indeed HHJ Hague QC in the Mercury case stated that assessment of payments is best determined by looking at comparable transactions which can only be done where there is full transparency.

However the normal practice of valuers freely exchanging information on property deals and transactions, which forms the bedrock of a transparent and efficient market, appears to operate in a one sided manner when it comes to negotiations for telecommunications agreements. On the one hand Operators do not share information on transactions but work in isolation from each other. By contrast, the landowner representatives appear to have more freedom to communicate amongst

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 installing apparatus 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 telecoms 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 rent comparable to the established market level.

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

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

A further issue with the proposal to use compulsory purchase is that not all rooftop users or tower users are Code operators. This will result in the creation of a two tier market. Those paying a 'market' rent and those paying well below market rent. A landlord will seek out and have a preference for non-Code Operators if at all possible. This contradicts the Law Commission's earlier stated objective to ensure a level playing field between how telecoms are provided, whether it is by fixed links or wireless links. Effectively Code Operators will be offered a subsidy paid for by themselves and exchange information on transactions.

The prime reason for this unusual situation can be traced to the OFT investigation initiated in 2001 against the UKCPC and its Operator members, triggered by allegations of a collective boycott and collective wayleave negotiation. That investigation which was eventually closed by the OFT without reaching a substantive decision. The practical consequence of this incomplete investigation was nevertheless a curtailing of communication between Operators relating to lease or wayleave transactions. There has, therefore, been a paralysis on the part of many Operators in terms of conducting the sort of activities that within the property industry would be considered to be entirely normal and indeed essential to the operation of an open market. Those activities specifically relate to the due diligence investigations and exchange of information relating to Code related, comparable transactions. The overriding need to take a cautious approach rather than risk incurring the potential draconian sanctions of the competition rules, has to prevail.

The Code Consultation therefore presents an opportunity to overcome the current shortcomings of the Code to improve transparency and enable the market to work effectively by implement a framework or basis for methodology for wayleaves payments. We believe an essential component of this Consultation is the rectification of the anomaly which exists between wayleave transactions and all other property transactions. Without transparency on comparables or guidance on appropriate rate methodologies we are concerned that the aims of the Code reform may not succeed.

Mobile Operator -
It is a fallacy that there are always other options available to a Code Operator in terms of wireless operator rooftop installations. There are many cases where to replace a lost network site, two, three or more sites are required to replicate the same coverage or capacity of the site. It cannot be in the public interest for there to have to be multiple installations where one would suffice nor is it in the public interest for Operators to be capable of being ransomed to pay a higher consideration to select a single site.

property owners, whereas a non-Code Operator must pay a market rate. Many new start-ups may not have Code powers, for example wireless broadband providers using open 2.4 GHz and 5 GHz frequency bands. They would be at a disadvantage to Code Operator competitors, which would reduce competition in the market.

The result of lower rents and a two-tier market means that the Code Operator application 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 impose 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 up to 100 times per year. For example, [redacted] accessed the roof of [redacted] Hospital on 44 occasions between 8th Feb 2012 and 20th July? It is surely difficult to prove that a number of streetworks 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 streetworks sites will be removed by the proposed method of valuation.

Another economic factor to consider is the active investment market in telecoms installations. Third parties often own portfolios of masts and rooftop sites which they then sub-let or sub-licence to both broadcast and telecoms providers. To allow Code Operators to pay a nominal subsidised rent would result in the value of portfolios being decimated overnight. Companies like Wireless Infrastructure Group and Shere Group would be unlikely to survive and would be wound down. Companies such as Arqiva would find

One of the issues that reference to the RICS Valuation Standards ("the red book") has is that the definition of market rent as "The estimated amount for which a property or space within a property, should lease (let) on a 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 issue here is that no such market exists in reality it is a notional or hypothetical basis of valuation. There is no evidence to be drawn from in terms of properly marketed interests. It is generally the Code Operator who identifies a suitable telecommunication site (rather than the Landowner) or the Code Operators is directed to existing telecommunications site by virtue of the Town and Country Planning regime which encourages the co-location or existing installations in order to reduce the incidence of proliferation. To this extent, market evidence is inherently distorted by either the Code Operator being a "Special Purchaser" or the Site Provider having an artificial ransom benefit by virtue of the Town and Country Planning Regime.

It has been contended by Site Provider Agents that "In a no scheme world rents for a 10m x 10m area of a field for a mobile mast may be valued 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 levels they simply will not deal with Code Operators". This statement demonstrates very clearly the extent of the issue over value. The fact that there is such a wholesale departure from the values cited above demonstrates the extent to which Code Operators are effectively ransomed away from paying a Landlord a straightforward "Compensation" for their loss. Code Operators are potentially willing to Compensate a Site Provider at a level which inflates upon a the Compensation in a "no scheme world" but must be protected within the provisions of a revised Code from paying rents which are arrived at through brinksmanship due to the cost to relocate, the cost to litigate, the disruption to customer experience, the time to progress alternatives or the simple lack of alternatives.

that telecoms income would disappear and this could have an impact on the viability of 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 this respondent's 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 paragraph 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 will reduce the rents that landlords will accept and that Operators pay. Finally, it is worth recording that within the mobile telecoms market landlords and site providers have recently experienced a reduction in willing lessees from five to two. On the one hand Vodafone and O2 now have a Radio Access Network Sharing agreement. On the other hand T-Mobile (now Everything Everywhere Ltd) and Orange Personal Communications Services Ltd have merged their UK businesses and T-Mobile has a Radio Access Network Sharing agreement with Hutchison 3G UK Ltd. Landlords are already faced with a duopoly that is driving rents down. Surely a duopoly does not need rental subsidies from landlords and property owners, enforced by Central Government? 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.	The concern expressed by the Forum member who is a Site Provider Agent that "were compulsory purchase provisions to be introduced the telecoms property market would disappear overnight. Landlords will withdraw all properties that they have made available for telecoms use and, for existing sites where they can expect a greatly reduced rent on renewal, they will seek vacant possession" clearly demonstrates both the need for Code to protect Code Operators on the one hand but also the extent to which current "ransomed" consideration is such a wholesale departure from Compensation. A balance requires to be struck. It is unfortunately fanciful to expect that were it possible to contract out of Paragraph 21 that this would open up all rooftops and land to Operators at a rent that reflects the benefit to both parties. In itself the statement demonstrates that Code Operators pay an inflated consideration because of the very protection that they are afforded. This is counter-intuitive. Moreover, were the ability to contract out of Paragraph 21 introduced then every Site Provider would be requesting contracting out as a matter of course, certainly this would be the anticipated advise given by Site Provider Agent or Solicitor.

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 further comment, please see 10:44 above.

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

Do consultees agree?

Consultation Paper, Part 6, paragraph 6.78.

We agree that, in the interests of consistency and fairness, the treatment of cases for payment under a revised Code should fall under the same rules which we recommend in paragraph 10.44 above, which is to say that the payment regime would fall under a single compensation regime, with a modified valuation definition as stated above and no separate distinction under the heading "consideration".

For linear obstacles this would mean a payment for the rights to retain electronic apparatus in the same way as any other Code agreement where an Operator secures rights over land and property. Whilst this would be at odds with the decision in the *Geo* case, this outcome was determined under the current special provisions of paragraph 12. We agree with the Consultation that currently there is an illogical distinction with linear obstacles and that any agreement between a landowner and Operator for Code rights relating to such land ought to be conducted under the same compensation payment provisions as we recommend above. We believe there are sufficient safeguards in the payment definition we propose to ensure that Operators are not held to ransom whilst at the same time, the owners of those lands will feel there is a consistency in the rules.

10.47 We provisionally propose that, where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid. Do consultees agree? Consultation Paper, Part 6, paragraph 6.83.
The Forums' discussion revolved around the need as generally we were not aware of any landlord seeking to use paragraph 20 when there was an existing contractual right for the Code Operator to be in occupation. The principle however is supported; the practical route to realisation may however be challenging as whilst in a situation where a capital payment had been made this might be readily identifiable, in a purely 'rent' based scenario it may be more difficult. We would also suggest that should the situation involve a Paragraph 20, that any costs incurred by the person seeking the alteration/removal should be offset by the benefit of any rental payments made in advance or capital sums received.

TOWARDS A BETTER PROCEDURE

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

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.26.

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

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

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

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

(3) any other form of adjudication.

Consultation Paper, Part 7, paragraph 7.27.

We are of the view that the Lands Chambers of the Upper Tribunal is the most appropriate forum for resolving disputes under a revised Code. However, we have reservations as to whether the Lands Chamber currently has sufficient resources to deal quickly with disputes under a revised Code and are reluctant to force the parties to incur the professional fees which would inevitably result from a reference to a Court or Tribunal unless other options have already failed.

RICS Dispute Resolution Service (DRS) is the world's largest provider of alternative dispute resolution services to the property and construction industries, appointing around 10,000 dispute resolvers per year. We offer a complete range of methods for resolving disputes.

DRS has been in existence for over 30 years and is working on a continuous development of new products and services to meet our clients' needs. Alternative dispute resolution is often cheaper and quicker than taking a case to court. We inspire confidence in parties through our complete impartiality and the quality of our dispute resolvers. All DRS management and administration systems are accredited to BSi standard ISO 9001:2008. Mediation is an effective tool for tackling a wide range of property and construction related issues. It involves the facilitative role of a trained third party neutral to assist parties in themselves coming to and managing the settlement of their dispute.

A mediator helps to clarify and prioritise issues, crystallise needs, reality check and assist parties in searching for solutions. They are facilitators who guide and manage the parties through a process of controlled negotiations, as to avoid escalation of conflict.

As a neutral third party, our mediator brings a new energy to stalled negotiations; they explore how parties are willing to move from entrenched positions by identifying the real issues between them, their concerns and needs.

RICS believes that our Dispute Resolution Service could offer a viable and effective alternative to the current process of telecommunication related property disputes and would we pleased to discuss this in more detail with the Law Commission if necessary.

It does seem that disputes regarding valuation could be resolved quickly and cost effectively by reference to independent expert determination. This process involves the intervention of a neutral person who is an expert in valuation. S/he would take representations from both parties, make relevant investigations of their own and issue a valuation which is binding on the parties. RICS effectively regulates members engaged in valuation through our Valuer Registration Scheme (VRS).

We believe that the parties should be free to agree the identity of their independent expert RICS regulated valuer. If the parties cannot (or do not) agree the identity of their independent expert within a prescribed time, then provision could be made for an expert to be independently appointed by a body (RICS Dispute Resolution Service) which maintains a panel of independent experts who are trained and assessed specifically for telecoms valuation disputes. RICS can in this regard act as an independent appointing body and has developed in-depth dispute resolution experience by forming, appointing, managing and maintaining numerous expert panels and dispute resolution schemes over many years.

A Party Wall dispute procedure would be unsuitable for telecoms disputes. It can be a complex process, would be difficult to implement and would give rise to unnecessary costs, e.g. 3 surveyors would need to be paid. Party Wall disputes do not involve consideration and are one off settlements rather than an on-going lessor and lessee agreement. They are not suitable for telecoms agreements.

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

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.31.

We agree with the Law Commission's proposal that it should be possible for the award of code rights to Code Operators to be dealt with separately to and at an earlier stage than the resolution of any dispute over the value of any payment to be made under the Code. Our view is that, whilst related, the issues can easily be separated.

One of the main issues under the Electronic Communications Code at present is the fact that mobile/wireless Code Operators do not believe that reliance on any of the provisions would allow them a quick and effective solution to accessing sites where negotiations have broken down with the landlord. The question of valuation of both the compensation and/or consideration to be paid to a landlord under the Code can often be a more complicated issue to resolve than whether the Code Operator should be awarded the code rights in the first place. Separating out the two issues will ensure that adjudication on more complicated issues will not hold up the potentially more straightforward issue of whether such rights should be conferred at all. It would also leave the door open for the two issues to be resolved in different forums, if the Law Commission thought that to be appropriate.

The RICS Telecoms Forum Board also hold the view that prior to Code rights being conferred on an Operator by the Court, there must be evidence available to demonstrate that the parties have first sought to negotiate an agreement, as opposed to an application to the Court being a first instance way of Code Operators obtaining code rights.

It is further suggested that where access rights are conferred that the matter could then be referred back to the parties to reconsider the dispute over payment or for the matter to be referred to Arbitration or Independent Expert, rather than immediately being referred back to the Lands Chamber.

10.51 We would be grateful for consultees' views on other potential procedural mechanisms for minimising delay. Consultation Paper, Part 7, paragraph 7.32.
Please see the proposals above, we believe that they 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
(1) Our view is that a regime whereby the Code Operator was responsible for payment of all costs under the Code would not be a workable solution, as it would potentially encourage frivolous litigation by some landlords. If landlords knew that, come what may, they would not have to pick up their own costs then there would be no disincentive against them advancing cases through the Courts even where, on balance, they stand little chance of success with potentially costly consequences for Code Operators. We believe, as set out in further detail at (2), that the existing Civil Procedure Rules (CPR) adequately deal with the costs situation in relation to disputes and litigation and we can see no reason why these well-established and tried and tested rules should not be applied to disputes under the Code. (2) The current costs regime as detailed in the CPR is comprehensive and gives the Court a wide discretion to consider all relevant factors before making a costs order. Whilst the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party that starting point can be displaced in the light of the surrounding circumstances. We believe that the current costs system has sufficient flexibility to address the concerns regarding any financial inequality between the Code Operator and the land owner. In many cases, just as where a matter is being dealt with by the Court under the 1954 Act, the Court will order terms that do not accord with those sought by the landlord or with those sought by the Code Operator. In those circumstances the Court, under the current system, has a very wide discretion in deciding where costs should lie. On balance, we believe that this approach is better than starting from the presumption that the Code Operator will pay the costs which, as emphasised above, has the potential to encourage frivolous litigation from landlords.

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

Consultation Paper, Part 7, paragraph 7.38.

We can see no reason why it would be necessary for different rules to apply for costs depending on the type of dispute. The current rules on costs (as set out in our responses to 7.37(2) above) seem to adequately deal with all scenarios.

If the Law Commission were minded to suggest any exceptions to the general rule on costs, the only areas that might potentially merit being treated differently would be:

(1) Disputes under paragraph 5 of the Code, where we could perhaps see an argument for the Code Operator to pay all costs on the basis that they are seeking to force access on a landlord's land against their will. We would, however, caution against this on the basis that landlords could use a different costs regime under paragraph 5 to their advantage by behaving in such a manner (potentially unreasonably) as to leave the Code Operator with no alternative than to pursue an action under paragraph 5.

(2) Disputes under paragraph 20 where a party that did not grant consent in writing, inherits a Code Operator when a property reverts to them as superior landlord.

10.54 We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service.

Do consultees agree?

Consultation Paper, Part 7, paragraph 7.52.

We agree that a revised Code should prescribe consistent notice procedures and should clearly set out the rules for service.

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

Consultation Paper, Part 7, paragraph 7.53.

We believe that the current forms of notices used by Code Operators could benefit from a degree of simplification, as well as by the inclusion of clearer warnings to the land owner. The Explanatory Notes in the current notices are very technical and the basic information that the land owner needs is not clearly separated from the more detailed information that may mean little to him. One way to deal with this might be by the creation of a suite of notices similar to those used under the Landlord & Tenant Act 1954 regime.

The 1954 Act notice regime works well for both landlords and tenants. The notices are relatively clear containing prescribed warning information on the rear but making use of boxes and highlighting to separate the most important warnings to the recipient.

The Law Commission has suggested (Paragraph 7.50) that it would be inappropriate to require

land owners to use a standard form of notice. We disagree with this statement. The current uncertainty as to whether a landlord has in fact served a notice pursuant to the Code results in a significant number of unnecessary counter notices being served by Code Operators. The form of notice to be served by a landlord need not be complicated and may in fact be as simple as requiring the landlord to specify that the letter is in fact a notice pursuant to the relevant provision, but some clarity is required.

We disagree with the suggestion that landlords would be unable to understand or comply with this requirement and again would refer to the 1954 Act regime where landlords are required to serve notices in a prescribed form.

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 current OFCOM approved notices are comprehensive and, apart from the suggestion made in Q7.53 above regarding the format and layout of these notices, as well as the inclusion of clearer warnings regarding the legal nature of the notice and the need to take legal advice, it is not felt that the landlords need any additional information.

Where a landowner is approached by a Code Operator requesting rights to occupy property their initial approach should make it absolutely clear that any agreement entered into will be subject to the provisions of the Code and more specifically, should set out the statutory security of tenure rights. We appreciate, however that this would be more likely to be included in a voluntary Code of Practice than embedded within an amended statute.

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms.

Consultation Paper, Part 7, paragraph 7.60.

We envisage that there would be a number of difficulties with the proposal for standardised forms of agreement and terms, which we set out below.

The rights required by Code Operators in respect of their equipment are many and varied and can take numerous different forms. Code Operators sometimes require fixed line equipment, which can run either underground, overground and which might need to pass through or circumvent obstacles. Alternatively they might need to deploy antennas and/or dishes and/or smaller “microcell” equipment but the type of equipment and location of that equipment means that the legal agreements need to take different forms depending on whether the installation is ground based, on a rooftop, inside a building, or installed on masts/other structures owned by third parties. The nature of the environment within which the equipment is located often means that specific terms need to be included in those agreements. We believe that it would be difficult to come up with a set of standardised forms of agreement that would adequately address all these scenarios.

Our experience suggests that different types of landlord can have quite diverse requirements in relation to their agreements and it will be difficult to find a middle ground that would be acceptable to many parties. For example, the type of agreement that an institutional landlord would require is unlikely to be appropriate for a single site owner with less sophisticated property-holdings.

We also envisage that it would be difficult to draft a suite of legal agreements that deal adequately with the rapid advances in technology which are experienced in this sector. As technology evolves and develops quickly it would be necessary to ensure that any standard documents were regularly reviewed and updated to keep up with such changes.

Most of the networks used by existing Code Operators are now mature and existing agreements and rights are being renewed. Many of the existing rights are contained in leases which are protected by the LTA 1954, and Code Operators will be seeking to renew those rights under the security of tenure provisions contained in the LTA 1954. We cannot see how the proposal for standard agreements and terms would sit easily with this scenario.

We are aware that the British Property Federation have created some standard leases and lease terms for leases of business premises but our experience suggests that these are rarely used in their complete form. Our experience indicates that parties cherry-pick parts of the standard leases and lease terms which suit their purposes.

Our view is that it would not be appropriate to enforce a set of standard agreements and terms in a revised Code and that, unless parties are forced to utilise such agreements and terms, they will be little used.

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.

Summary –

There is an acknowledgement that the current situation is confusing and unhelpful and that clarity is required.

The various issues are discussed below; in essence the current 'dual protection' should be removed in favour of a single piece of legislation however, that either draws the requisite areas, (as outlined below) of the '54 Act into the Code, or ensures that the '54 Act is amended to cater for Code situations.

Landlord members response –	Code Operator members response –
Yes provided that it excludes any commercial property that the operator occupies and the method of valuation under Code is market rent. It is common market practice for telecoms leases to be excluded from the Landlord and Tenant Act provisions and this provision simply reflects what is happening in practice. If part II of the L&T Acts no longer applies to telecoms agreements, then agreements can revert to Licences, Wayleaves or Leases, whichever is the more appropriate for the types of installation installed by Code operators. Code operators do not just occupy land and property for network purposes. They also occupy shops, offices and industrial units. In many instances they install network equipment within or on top of those buildings. It would be wholly wrong for them to claim that a microcell within a shop is part of their network and therefore the shop lease is renewable under Code and not the L&T Acts. Similarly for switch sites within industrial units or offices. Landlords would simply refuse to lease any commercial property at all to Code operators. To avoid this property should be excluded from Code rights where the primary use of the property is for standard commercial purposes and where network equipment is ancillary. Finally, if the Landlord and Tenant Act 1954 is deemed not to apply then it must not apply for the duration of that telecoms agreement	We do not agree with this proposal (excluding protection from L&T). It does not recognise the complex nature of Operator's property portfolios and assumes there is a simple test related to the occupation of land solely for the purposes of installing electronic communications apparatus. This is not the case and if we consider our own situation for example, we have many properties and sites with mixed use i.e. some operational network and some corporate support such as backroom office functions. We are not unusual in this respect and this scenario will be replicated amongst many Operator portfolios. So how would the Code alone protect complex sites with mixed use? How do you deal with changing occupation within a property? i.e. when does "primary" cease to be primary and become ancillary? Quite how would that all work in the real world? It must also be recognised that over time such uses will change so that what might be a single use site initially, may become mixed over time. This could mean that apparatus forming part of an electronic communications network would be covered by different legislation depending on the nature of and the nature of any other use within the building housing that apparatus. Clearly an unsatisfactory situation which we believe would easily become an unfortunate and unforeseen consequence of these proposals. We have not experienced issues with both the Code and Landlord and Tenant regimes running

as assignment may take place to Non-Code occupiers and it would be a nonsense for the L&T Act to then apply following assignment as the Code operator has fallen away. Similarly a Code operator could in theory request non-Code status 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.	in tandem. It has not caused a problem for us or our landlords. We believe if the Code was revised so as to remove its complexity and uncertainty, it would become more apparent that it does not cause the contradictions which are often claimed but which we feel are really symptoms of a lack of knowledge of the Code provisions. The suggestion that all agreements for Code Operators should revert to wayleaves or licences, would potentially impact the transparency of the "market" In addition to which such agreements are not registrable… There are also concerns expressed about a two tier market. Yet the CLA/NFU Statement of Facts accompanying the recent OFT Short Form Opinion, where this major rural landowner body openly advocates a two tier market in terms of Operator agreements. There must be a level playing field across the entire industry and on all sides so perhaps the various landowner representatives could get together and present a more coherent position on this.

Independent legal members response –

It is accepted that the current interaction of the Code and the Landlord & Tenant Act 1954 is unhelpful and does potentially give Code Operators a dual level of protection which could make it difficult for a land owner to secure vacant possession of a site, even in circumstances where possession is required for genuine reasons.
However, the complete removal of the protection provided by the Landlord & Tenant Act 1954 from Code Operators is inappropriate for a number of reasons, including:
1 The 1954 Act gives a degree of protection for the tenant both in relation to their entitlement to occupy the site and the terms upon which they continue to occupy. The same level of protection is not necessarily available under the Code which does not require the court to apply the O'May principles when considering the terms upon which a Code Operator can remain on a site following the expiry of a tenancy.
2 The 1954 Act also gives some guidance as to the basis upon which the rent is to be fixed. It is noticeable that the Code is vague on the calculation method for compensation if the Code Operator is seeking to occupy a site under Paragraph 5 of the Code. If the 1954 Act is to be excluded completely in this area then the Code needs to contain far better guidance on how the terms of occupation are to be fixed, particularly in situations where the Code Operator is already in occupation such that relocating could be prohibitively expensive.

Given that there are both Code Operators and non-Code Operators there may be confusion for land owners in deciding whether or not it is necessary to contract a lease out of the relevant provisions of the 1954 Act. In addition, a landowner may decide not to contract out the lease being granted to a Code Operator but if the site was subsequently assigned to a non-Code Operator, or the Code Operator ceased to be a Code Operator, then the protection of the 1954 Act could bite at a later date.

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 believe that it is imperative for electronic communications agreements which create an interest in land of the type that is ordinarily registrable to be registered in accordance with the provisions of the Land Registration Act 2002.

The primary reason for our view on this point is that it is often not possible to be aware of the presence of electronic communications equipment merely from an inspection of the property (for example equipment which is underground, equipment within the fabric of a building and microcells and other forms of smaller equipment). The ability of future purchasers to discover the existence of Code rights is invaluable and in the interests of ensuring that the Land Register is a complete a picture as possible of interests affecting land. Rights in respect of electronic communications equipment also need to be registered.

The current situation, whereby Code Operators are unsure as to the correct interpretation of paragraph 2(7) of the Code, has led to some Code Operators registering their legal agreements and others deciding not to do so. This position is wholly unsatisfactory, as there is no consistency of approach, which cannot be beneficial to potential purchasers of land.

Unfortunately, even if the revised Code creates an obligation on Code Operators to register interests in land in the future, that still leaves a number of existing legal interests that have been created in favour of Code Operators unregistered. This situation is a difficult one to address and we are unable to advise to what extent this is an issue. Some Code Operators have certainly taken the view that it was necessary to register all registerable legal interests created since the coming into force of the LRA2002, whilst others may not have done so. Whether the revised Code advocates the compulsory registration of existing legal interests would need to be a policy decision made by the Law Commission but given the size of the networks held by some Code Operators such a proposal is likely to meet with some objection.

Interaction with Other Legislation

We believe that leases granted to Code Operators should be expressly excluded from the notice requirements under Section 5 of the Landlord and Tenant Act 1987.

The intention behind the Landlord and Tenant Act 1987 ("the Act") was to give residential tenants a right of first refusal to buy their landlord's reversion to their building and effectively to give them the opportunity to become their own landlord.

The right of first refusal arises under the Act where a landlord of premises comprising a number of flats wishes to dispose of the whole or part of the premises. The landlord is prohibited from making a "relevant disposal" of the premises unless the landlord has served all of the "qualifying tenants" of the flats in the premises with an offer notice.

Leasing part of the rooftop to Code Operators could be considered a "relevant disposal" and caught under the terms of the Act, since is not covered by any of the specific exceptions from the definition of a "relevant disposal" under Section 4 of the Act. This means that, in circumstances where a Code Operator wants to install its equipment on a building containing residential flats, a

landlord may seek to serve notices on its tenants to avoid facing liability under the Act (which carries with it criminal sanctions).

At the very least, if a landlord serves notices under the Act, this can delay the Code Operator's transaction until the relevant time limit to accept the offer has expired. In the event that the tenants respond with the requisite majority of acceptances, the Code Operator's plans will be blocked and a new site will have to be sought elsewhere.

Given the general public feeling with regard to the proximity of homes to telecommunications equipment, this procedure under the Act can prove a substantial obstacle to Code Operators' plans and the rollout of their networks.

The point of the legislation was to enable residents to become their own landlord but this legislation is now having an unwelcome side effect for Code Operators, which flies in the face of the objectives for the Code. It is therefore suggested that the leasing of communal areas to Code Operators should be included as a specific exemption under Section 4 of the Act.

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 have not come across circumstances where these funds have been called upon.

(2) Creating the necessary documentation on installation and ensuring sufficient funds are held in an escrow account does create an administrative burden on Code Operators. Keeping sufficiently accurate records to ensure each deployment in the highway has proper funds allocated to it is a task beyond the majority of Code Operator Systems. As outlined in the Consultation it is highly unlikely that all of an Operator's equipment deployed in the highway would prove to be redundant to all other Operators; the majority would be taken over. A reasonable, unallocated fund to meet the cost of restoring highway land would, therefore seem sensible.

We recall that the equipment deployed by Dolphin, which went into liquidation approximately 7 years ago, took some time to identify and remove. The administrators did dispose of much of the infrastructure to alternative Operators.

(3) Given the above we consider that some form of funding, held independently from the Operator, would be a reasonable and sensible form of reducing the risk of an Operator leaving a significant burden on public funds/Highways Authority budgets, particularly in the current financial circumstances.

(4) A standard figure might be estimated for the removal of an assumed 'standard' form for each type of apparatus deployed using powers under the Streetworks Act. Operators should be required to keep sufficient records to be able to identify how many types of each apparatus they deploy and these records should allow them to secure appropriate sums. The standard list should allow for economies of scale, reflecting the likelihood of re-use of many masts. The calculation of the standard de-installation cost for each type of apparatus could be calculated each year, perhaps by Officers of the Government's Valuation Office.

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.

Planning, conservation and protected areas: -

The interaction between the Regulations requirements and Town & Country Planning legislation is often misunderstood. The General Permitted Development Order 1995 (as amended) (GPDO) grants planning permission for Code System Operators to deploy apparatus, subject to various limitations and conditions. Without Regulation 5, Operators would be free to deploy their apparatus without reference to any Authority. The benefit of this Regulation means that Local Planning Authorities (LPAs) have information about development within their area. They can properly inform anyone enquiring about or challenging the legality of any development. They can also correct an Operator, where the development proposed actually comes outside the conditions of the GPDO. There seems no point in granting an LPA rights to apply conditions that are un-enforceable. Planning legislation does not permit LPAs to make any such conditions and the Regulation specifically states that they do not have to be complied with. This Regulation seems pointless, particularly as conditions are applied by the GPDO, in any case.

Further there seems little point in requiring an Operator to serve notice on an LPA where the GPDO does not grant planning permission and an Operator has to make a specific application. The areas of land specified under Regulation 8 are identified by the GPDO as Article 1(5) land, from which GPDO rights are removed. The application itself forms that Notice, so the Regulation seems redundant. The bodies (Natural England and National Trust) that should be informed under the Regulation should be statutory referees for the required planning application in any case, if the Planning Authority considers the development to be so intrusive as to affect the interests over which they have duties to exercise control. If the development is not referred to these bodies, it will be so unobtrusive as to be *de minimis* as far as those interests are concerned.

Sharing and co-operating with others: -

Regulations 3(3), 3(4) and 3(5) duplicate requirements under the GPDO, forming enforceable planning conditions. As the LPA is likely to become aware of any breaches more readily that OFCOM, the Regulation seems to be the more redundant element of this duplication.

Regulation 3(1) duplicates requirements to consult with the Highways Authority, to deploy apparatus under the Streetworks Act. Since streetworks deployment will always be referred through Highway Authority staff, they will be more familiar with Highway legislation and, again this Regulation seems to be unnecessary.

We have little other experience of difficulties or non-compliance with the other Regulations outlined within the Consultation.

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:
Robert Paul
Email address:
[redacted]
Postal address:
Strutt & Parker Theatre Royal 16 Shoplatch Shrewsbury SY1 1HR
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):
I am responding on behalf of Strutt & Parker, a national firm of property consultants and chartered surveyors. We have a specialist team of 24 consultants specialising in telecommunications matters, advising property owners in respect of telecoms leases. We act on behalf of thousands of private and institutional landowning clients across the UK with more than 50 offices across the country from Inverness to Exeter and Canterbury and 8 offices in London. Our Institutional clients range from charitable organisations [redacted] through to Government departments [redacted]. We also act for Local Authorities including a number of London Boroughs and County Councils and we act for a further range of corporate organisations [redacted], hotel chains and property investment organisations. Furthermore we act for a range of schools, universities and colleges [redacted] and many others. Our responses are provided so as to reflect generally the views of our landlord clients who have, for sound business reasons, reached commercial agreements with operators in respect of the use of their premises, buildings, farms and existing towers, with telecommunications operators. The rent roll for those on behalf of whom we act runs to tens of millions of pounds. The legislation surrounding telecoms installations has clear financial implications as well as the implications for land and business management.
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 consider there to be a need to differentiate between different types of installation. If you are referring to cables which are subject to a non-exclusive right of occupation then such rights may be necessary for telecommunications operators. However, where a site is subject to a lease on terms agreed commercially between parties and where operators are being fully advised by both lawyers and agents, then those leases invariably contain sufficient rights. We have not yet experienced a situation where operators have been unable to access their equipment where they have previously entered into a commercial lease. The majority of their leases are protected by the Landlord and Tenant Act 1954 Security of Tenure Provisions.

We consider that operators enjoy sufficient protection under the Landlord and Tenant Act 1954 and through their own ability to structure agreements accordingly to suit their needs.

The position with respect to cables as previously stated, may be slightly different.

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 do not consider that the rights should be extended and we believe that certain rights 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 broadly agree with this proposal but consider that where operators enjoy exclusive possession of premises by way of a commercially agreed lease (as is generally the case with telecommunication base stations both on greenfield sites and on roof top sites) then the operators and landlords should continue to be free to agree terms on a commercial basis and do not require any further protection from the telecoms Code. Indeed, we understand that the operators have frequently found the Code to be a hindrance to them and creates several conflicts. Generally, there is little ransom power in respect of telecommunications base stations but with cabling we understand that telecommunications operators may be held to ransom by landowners and by linear obstacles.

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 be obliged to create as little interference and disturbance as possible with reinstatement carried out to the satisfaction of the property owner. They should also have regard for the landowner's use of the land and where reasonably required, Code Operators should be obligated to remove or relocate their equipment. The lifting and shifting of cables, for instance can be relatively straight forward but can otherwise seriously hinder a development site.	

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 definition of electronic communication apparatus is sufficiently wide so as to capture all essential components of an electronic communications installation. We do not consider that it should be further amended.	

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.
At present it is possible for a tenant or licensee to grant an initial consent to a Code Operator who may subsequently rely upon the Code. When that tenancy or licence falls, the head landlord is left with the Code Operator against their wishes. That would surely seem unfair.	

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 fundamentally disagree with the premise that landowners can be satisfactorily compensated in every case. It is the case that immediate disturbances can be compensated, e.g. crop losses, but in cases where the Code applies, if a landowner wishes to put land to an alternative use, the lifting and shifting of the telecommunications apparatus can only happen by way of a request to the Code Operator and the landowner is expected to meet the cost of the works. Similarly, with a roof top installation, where a property owner wishes to carry out remedial works or essential repair works to the rooftop, any costs incurred in relocating equipment (even temporarily) have to be met by the property owner. This seems entirely inequitable. Where the property owner is not fundamentally objecting to the on-going use of their premises but has a genuine requirement for the relocation of telecommunications apparatus which is otherwise being imposed upon him, then the costs should be met by the owner of the apparatus in question.

We consider that the weighing of the public benefit against the prejudice of the landowner is an important aspect of the current Code and in many respects does not go far enough.

(2) We do not consider that there are any circumstances where a landowner's agreement can be dispensed with or should be dispensed with where he or she cannot be adequately compensated. In such circumstances, the parties should be bound to make every endeavour to find terms which may be agreeable and which provide flexibility for both parties combined with a compensatory package.

(3) At present, the onus is on landowners to establish the extent of the public benefit. We consider this to be unreasonable. The definition of public benefit in light of the Code principle that 'no person should unreasonably be denied access to an electronic communications network, is extremely vague – if three other operators for instance provide a network in the locality, should the prevention of another Code Operator constitute an unreasonable denial of 'an electronic communications network'? We believe that the onus should be upon the Code Operator to demonstrate the need for the installation and the public interest/benefit that ensues. We believe that the current balance is completely skewed in favour of the operator who in practice merely serves a paragraph 21 notice and can then remain in occupation whilst waiting for a landowner to mount legal proceedings at very substantial cost. The Code Operator should prove their own case in order to justify the forcing of rights upon another person's property.

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.
Fundamentally, the consent of an occupier should not bind anyone with a greater interest in the land than that occupier. Similarly, the grant of access by one user should not hinder the access or use of the property by other interested parties.

10.11 We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused. Consultation Paper, Part 3, paragraph 3.67.
Three meters is a restrictive height for the purposes of modern farming machinery. There are well established precedents for wayleave payments in respect of cables to reflect consideration and compensation and we do not believe that the Code should place the burden upon a landowner to meet the cost of any diversion of cables. There is otherwise scope for the Code to put Operators in a position of ransom.

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 that landowners should have the ability to object to overhead apparatus and there should be an obligation upon Code Operators to take account of such objections and to make reasonable endeavours to locate their apparatus with regard to those objections. The agreement reached between the parties should reflect both the landowners objections and the Code Operators requirements.

10.13 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence. Consultation Paper, Part 3, paragraph 3.69.
We believe a common sense approach should be applied. Each site should carry some signage being relatively easily visible to confirm which Code Operators are using any particular site or are located on the premises, not least to assist Ofcom in identifying the location of Code Operator transmission sites. There is a more obvious requirement for health and safety notices to be fixed to every installation particularly where microwave dishes and high voltage apparatus are involved. We believe it should be an offence not to provide adequate health and safety notices but should be a matter for Code Operators licences to be required to fix notices to identify the ownership of the equipment or the fact that they are operating from a site.

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) We consider that there are differing scenarios. In respect of cabling we appreciate that there will be a general requirement to be able to cut back trees which are interfering with such cables. We do not consider, that there should be an absolute right to enter property in order to cut back trees which **may** interfere with cabling. In respect of radio mast base stations, Operators are able to choose locations which suit their requirements. For sites located in wooded areas, the likelihood of interference by trees will have been obvious to the Code Operator from the very outset. The consequences of allowing a Code Operator to fell or lop trees could be very substantial to such landowners. (2) We consider that rights should only exist where trees are actually interfering rather than where there may be some likelihood of interference. (3) Again, Code Operators are able to locate their equipment generally where considered to be the most suitable. We have not encountered situations where problems have been incurred by trees surrounding base station sites. Generally masts and dishes are located in positions that avoid such interferences. It is difficult to envisage that Code Operators will incur such difficulties in respect of trees growing on land which is owned by the respective landowner with whom they have an agreement for their installation. The trees are more likely to be growing on land owned by third parties. Code Operators generally include clauses in their commercial agreements to protect themselves where trees are likely to be of concern and this practice has worked perfectly well for Code Operators and landowners alike.

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) Equipment upgrades can have the same benefit to an Operator as the addition of apparatus. Upgrades can also facilitate the sharing of sites with other Code Operators. Both circumstances will provide significant commercial advantage to the Code Operator and it is appropriate that further compensation or consideration should be payable to a landowner. Such rights are normally agreed between a landowner and a Code Operator and in nearly all agreements, the upgrading of equipment within equipment cabinets or cabins is unrestricted. It appears that Code Operators and landowners in the market place have been satisfied by their ability to reach agreement on such issues. Not only does the sharing of networks or sites cast significant benefit to Code Operators but they can be significant further disadvantage to the landowner on the basis that the number of Code Operators on their property will have increased along with the associated additional burden. (2) As above, an additional payment should be made by the Code Operator when it upgrades its apparatus or shares its 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) The market has generally worked effectively to the extent that where Operators are prevented from being able to share the site freely with other Code Operators, agreement to reverse the situation has been reached with suitable commercial considerations. Clearly it is more convenient for the Code Operators if they can share their sites freely but we believe this would create an unreasonable burden upon landowners. We have experienced a large number of situations where landowners are adversely effected by the enforcement of rights contained in legal agreements enabling Code Operators to share sites freely with other Operators or to assign their interest to other Operators and where additional layers of protection under the 1954 Landlord and Tenant Act and the Code are afforded to further Code Operators. There are also implications for the lease administration where the agreement to rent reviews or enforcement of lease terms subsequently has to take place with more than one Code Operator.

(2) The current market has evolved over approximately twenty years and there are generally good reasons why restrictions are placed upon the sharing of apparatus with other Operators. It would be completely inequitable to render sites sharing restrictions (which had been agreed in an open market between Code Operators and landowners) to be subsequently void. It is extremely rare that any Code Operator looking to site equipment is unable to find appropriate premises at an appropriate tariff.

(3) In every case, Code Operators should pay the landowner an additional payment when it shares its apparatus. Code Operators are increasingly finding ways of reducing the amount of monies paid to landowners in site share arrangements, yet the Code Operators remain in competition with each other and seek to make profit as individual corporate organisations. Again it would seem inequitable, therefore, for Code powers to be relied upon for profit making purposes and yet to take valuable rights from landowners without paying for the proper value of those rights.

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 any difficulties with section 134 of the Communications Act 2003 nor found it to be of any benefit. We do not consider there needs to be any greater ability for apparatus to be shared and would not wish to see any greater ability granted to Code Operators that might allow them to override or even void contractual agreements with landowners in relation to the sharing of masts and apparatus.

10.18 We ask consultees:

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

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

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

Consultation Paper, Part 3, paragraph 3.92.

(1) The market has generally worked effectively to the extent that where Operators are prevented from being able to assign their rights freely with other Code Operators, agreement to reverse the situation has been reached with suitable commercial considerations. Clearly it is more convenient for the Code Operators if they can assign their sites freely but we believe this would create an unreasonable burden upon landowners. We have experienced a large number of situations where landowners are adversely affected by the enforcement of rights contained in legal agreements enabling Code Operators to assign sites freely to other Operators and where additional layers of protection under the 1954 Landlord Tenant Act and the Code are afforded to further Code Operators. There are also implications for lease administration where the agreement to rent reviews or enforcement of lease terms has to take place with more than one Code Operator.

(2) The current market has evolved over approximately twenty years and there are generally good reasons why restrictions are placed upon the assignment of leases with other Operators. It would be completely inequitable to render assignment restrictions (which had been agreed in an open market between Code Operators and landowners) to be subsequently void. It is extremely rare that any Code Operator looking to site equipment is unable to find an appropriate premise at an appropriate tariff and Operators should be generally prevented from assigning leases into joint names.

(3) In every case, Code Operator should pay the landowner an additional payment when it shares it apparatus. Code Operators are increasingly finding ways of reducing the amount of monies paid to landowners in site share arrangements, yet the Code Operators remain in competition with each other and seek to make profit as individual corporate organisations. Again it would seem inequitable, therefore, for Code powers to be relied upon for profit making purposes and yet to take valuable rights from landowners without paying for the proper value of those 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.

We do not consider that any further rights should be available under a revised Code to enable Code Operators to assign agreements to each other. We consider that this would lead to a highly inequitable situation whereby a single Operator could assign a lease into the joint names of all the other Operators. It must also surely be the case that this infringes on human rights of individuals who would have made the conscience decision to grant rights to one particular party and with no intention to unilaterally grant such rights to other organisations or Code Operators.

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 situations where Code Operators will have experienced difficulties in accessing electronic communications. In our experience, to a considerable extent, the behaviours of Code Operators is regulated by their contractual obligations within their licences and leases with landowners. We are aware of situations where access to premises may have been barred by a landowner is response to either a perceived or an actual breach by the Code Operator of the contractual agreement and where the landowner is otherwise suffering as a result of the non compliance. We consider that this form of regulation is essential in order to protect the interest of landowners and/or affected occupiers.

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 are not aware of such situations arising and do not consider that such rights need to be granted to Code Operators.

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

10.23 We ask consultees:

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

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

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

Consultation Paper, Part 3, paragraph 3.106.

We are not aware of any problems or issuing arising in respect of interference. Telecoms leases generally provide for any potential issues arising but this is mostly as a result of other telecoms Code Operators in the vicinity. We have always understood that the Operators conduct their own co-location protocol to avoid any such interference and the law generally provides remedies to Code Operators in respect of any breaches of their occupational agreement or by other third parties.

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.

It is important that the framework provides that Code Operators will comply with the obligations of their occupational agreements and that they maintain a high level of co-operation making genuine and proper endeavours to reach agreement in respect of lease renewals, rent reviews or any other negotiations.

The majority of landowners are not generally well placed to deal with complicated legal proceedings following the service of a paragraph 21 notice which, in our experience, invariably results in the Code Operator sitting comfortably waiting for the landowner to make the next move. If all options reasonably available to the parties have been exhausted then (and only then) should Code Operators seek to use Code powers available which again should weigh the public benefit against the sufferance of the landowner.

We consider that any Code Operator relying on the Code should be required to compile their case in the first instance demonstrating how all options have been exhausted in terms of alternative locations repositioning, negotiating alternative terms, paying consideration and compensation or agreement to contractual terms which satisfy the concerns of the landowner. In that first instance, the case may be heard not by the County Court, but by a suitable mediator before reference is made to an alternative dispute resolution mechanism. The costs should be met by the Code Operator and it should be clear that only in circumstances where the landowner has clearly behaved unreasonably, should he have to meet the costs incurred in defending his position. We consider that such a framework would make the Code powers usable when absolutely necessary but removes the ability for Code Operators to serve a paragraph 21 counter notice as a matter of course and without having applied proper consideration to the issues and options. The Code Operator should be able to acquire rights by negotiation failing which the Code Powers could apply as a last resort.

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 consider there to be two main areas. Firstly, for cabling, it would seem appropriate that paragraph 9 should enable Code Operators to use existing infrastructure in order to lay cables and to also prevent the highway from becoming a linear obstacle. However, the Code Operators appear to be using public highways for the construction of radio mast base stations which is not perhaps the original intention of paragraph 9. This can have undesirable consequences particularly when masts are installed in front of or near to residential property.

Private owners have had little issue with the installation of cables in highways. However Code Operators have used this right to install masts in the highway because they do not have to pay anything to the Highway Authority, yet the considerable foundations are often in privately owned soil while the surface is no longer being maintained by the Highway Authority. This seems inequitable, not only because the original acquisition of the land was for the purposes of a highway and not for the purposes of constructing a valuable telecommunications mast, but also that, whilst the surface of the land becomes the responsibility of the Highways Authority, the subsoil essentially remains in the ownership of the adjoining owner.

The attraction of streetworks installations by Code Operators is that they do not have to pay any rent. The removal of the current special regime should give rise to a valuable income stream which could assist highway maintenance.

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 do not have any experience of tidal waters and lands held by Crown Estate, but do not consider that there should be any need for a relaxation of the current regime.

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.

Again, we have limited experience of the issues in respect of tidal waters and lands held by the Crown. We would only presume that the current regime was put in place having considered the issues most carefully and would not consider that there is any need for change 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.

As we understand it, the Code currently provides Operators with the absolute right to cross land using a railway, canal or tram way without payment of consideration. This was the issue explored in the Bridgewater case. We consider that if there is to be any amendment to the regime then this regime is perhaps considered unnecessary and should be dropped altogether, with agreements being governed by reference to market value without ransom.

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.
Given the potential risk and the public disruption flowing from interference with the sorts of conduits in questions, we consider that the paragraph 15 restriction is a sensible precaution. Furthermore, we consider that the rights of Code Operators to manage such conduits should be in accordance with terms agreed with the body who granted rights for the conduits in the first place.

10.30 We provisionally propose that the substance of paragraph 23 of the Code governing undertakers' works should be replicated in a revised code. Do consultees agree? Consultation Paper, Part 4, paragraph 4.40.
We have no experience on which to base any representation in this regard. As per the comments in respect of 10.27 above, we presume that the current drafting was considered most carefully and the justification behind the original wording should be revisited. We have commented already in relation to radio mast installations on the Highway.

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 agree, there should be no more special regimes than are absolutely 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?

Consultation Paper, Part 5, paragraph 5.11.

We consider there should be a balance between the respective interest of Code Operators and landowners. The framework needs to ensure that if the landowner requires the relocation of equipment for genuine purposes, then the Code Operator should respond rapidly and conduct themselves in a reasonable and timely manner throughout the necessary proceedings. It is certainly completely inequitable for a landowner to have to meet costs of relocating equipment in situations where Code Operators have used Code powers to install the apparatus in the first place. Equally, if the land owner does not have the requisite rights within the lease to a Code Operator to enable equipment to be relocated, it would seem inequitable for the Code to have to come to the rescue of landowners.

Currently, the burden is very much on the landowner without good reason. The alteration has to be shown to be necessary not just desirable for paragraph 20 to apply. The burden is then on the applicant to show that the alteration 'will not substantially interfere with any service which is or is likely to be provided using the Operators network' – a very tall order and in nearly every case likely to require great cost. The default presumption is then that a successful applicant will reimburse the Code Operator for its costs of alteration which would be very substantial and also hard to predict – they are reported to differ widely between cases and there is no check on reasonableness. The framework should provide that the burden of proof should be on the Code Operator. If there is some question as to who should bear the cost of removal then there may be some discretion for the courts to decide this in the event that the landowner is unable to prove reasonable necessity.

On a final point, the question refers to the Code Operators networks being 'at risk'. This is perhaps a misleading term as it suggests that the entire network could be at risk whereas in reality this is not the case. The parties should endeavour to find a solution to any predicament with the use of Code powers being a last resort.

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.

Issues have been found in relation to paragraph 20 in practice. This is not helped by the fact that the word 'alteration' includes moving and removing apparatus. We refer to our comments above in 10.32 in relation to reasonable necessity for alterations rather than simple desire. References to alterations being 'necessary' could be interpreted very differently by different people. The burden being on the applicant is not necessarily fair and whilst Code Operators provide an element of public service, they also operate for commercial profit and their commercial interest should not necessarily override those of the landowner. Otherwise, there is a strong likelihood that a genuine requirement for landowner would be frustrated by the basic reluctance of a Code Operator to carry out an alteration. Again we would refer to our comments in 10.32 above.

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

Do consultees agree?

Consultation Paper, Part 5, paragraph 5.13.

If it is a key issue for a landowner that paragraph 20 can be contracted out of (so that apparatus can be relocated or altered for reasons envisaged by the landowner at the outset of an agreement) and if being able to agree such a term enhances the likelihood of an agreement being reached between an Operator and landowner, then the ability to contract out of paragraph 20 should remain in any revised Code.

The agreement to contract out would need to be 'two ways'. If the ability to contract out assists Code Operators in the acquisition of sites, then the Code should allow it. We have long heard that the Code in fact hampers Operators in the acquisition of sites.

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 particular comment in relation to this point.

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 is a serious issue of interaction with the Landlord Tenant Act 1954. Within that legislation, the parties are free to contract out of the security of tenure provisions and that statute has not hampered the Operators in the rollout of a telecommunications network. Again, there are differences between radio mast sites and telecommunications cables but in relation to radio mast sites, we contend that freedom of contract should exist and parties should be able to contract out of the Code powers should they so wish.

Considerable frustration has been caused by Operators who, at the end of their contractual agreements, neither make any endeavours to remove equipment or engage with the landowner in respect of the agreement for terms for a new lease. There is little that an individual landlord can do to prevent such inertia on the Operators part. We suggest that Code Operators are required to compile a case for keeping equipment on site (e.g. a radio mast) within a strict timescale, failing which their right to rely on any Code powers should lapse. Alternatively, the Code Operator should be liable for exemplary damages to the landowner if it fails to make reasonable endeavours to agree terms.

We have one on-going situation where a Code Operator has installed telecommunications equipment on land owned by a client of Strutt & Parker which the Operator had presumed to be owned by the Highways Authority. Subsequently, the Code Operator has assigned the lease to the joint names of themselves and another Code Operator. The Code Operators now discover that the land is not owned by the Highways Authority but on request for removal of the apparatus,

a paragraph 21 notice was immediately served. It seems highly inequitable that the Code Operators should be able to rely on Code powers, in a situation that arises out of their own error. This specific case has been compounded by the fact that the Code Operator has now shared their site with a further Code Operator and will likely do so again in the near future.

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 that planning authorities should be able to take enforcement action against apparatus which has been installed unlawfully or which remains installed having been abandoned.

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.

Experience suggests that with the current statutory background, Operators can serve Counter-notices under paragraph 21 and then take no action, safe in the knowledge that their interests are protected. Landowners will often be ill-equipped or lack resource to be able to take effective action. The onus should be placed on Code Operators to justify their requirement for the retention of apparatus otherwise there is little to prevent complete inertia and procrastination on the part of the Code Operator. We would advocate a rapid and efficient procedure with time frames set for parties to try to resolve issues and with the assistance of mediation in the first instance prior to any court proceedings.

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

We consider that there should be a provision for damages in connection with any period between the expiry of a valid notice to quit and the removal of apparatus without a written agreement being in place.

However, if the context of the question is as to whether equipment should be removed after it has ceased to be used then we would agree that removal of equipment should be immediate failing which there should be some financial penalty. This would sit more comfortably with planning regulation also. There is also a risk that a landowner may become liable for the rates payable in respect of a radio mast left in situ by a Code Operator, which again would seem unfair.

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 with this proposal. We consider that in all cases, the parties should be free to agree to contract out of the provisions of the Code. We further consider that the parties should be able to agree retrospectively that the Code should not apply even if apparatus is already installed. This would be by means of written confirmation with a form of words which are either set out in the regulations in a set format, or whatever form the parties wish but where benefit of the doubt is given to the landowner where an attempt to contract out has evidently been made. Clearly, care needs to be taken to avoid potential litigation over the question of whether or not the wording used actually constitutes a contracting out.

Essentially, a 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 apparatus was installed outside of the Code regime then the Code should not apply. Arguably, apparatus installed under the Code and without any other agreement, should be protected by the new Code and the old Code should fall away completely. However, the new Code should not apply to apparatus which remains on the landowner's property by virtue of a paragraph 21 notice. Where agreements have expired and where Code Operators are relying upon paragraph 21, the onus should be put upon them to agree terms or to take steps to trigger the Code afresh in its revised form with payments being backdated.

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 at all. We do not agree that landowners should be entitled only to compensation for the loss or damage sustained and we consider that a consideration is both appropriate (given the commercial operations of the Code Operators) and fair. It would be highly inequitable for tens of thousands of landowners who agreed terms with Code Operators at the outset, to include rents or licence fees, to then only receive compensation upon the expiry of the initial agreement. In reality, the Operators would simply state that they cannot agree to the terms (including a rent) and will then seek to rely upon the Code. The argument would then be solely in relation to the quantum of compensation. For some clients on behalf of whom we act, rent rolls exceed one million pounds per annum and if only compensation were to be paid then that income stream would be lost in its entirety. In reality, a 10m x 10m radio site in the corner of a field occupies approximately 0.025 of an acre and a single compensation payment would likely amount to less than a quarter of one year's rent currently being paid.

Further, this proposal would not work on the basis that Code Operators may upgrade, add to or share sites and apparatus and if only one claim can be made at the outset, then the landowner's ability to receive a further payments will have been justified following an upgrade, but would be disallowed.

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 the right to compensation should be extended to those who are not bound by Code rights when they are created but we consider that this should be extended to consideration also where it is appropriate. For example if a landowner cannot remove apparatus which was installed by agreement with a third party (such as a tenant) then the landowner should be entitled to compensation and a consideration.

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. Code Operators generally comprise companies that are run for profit and over many years they have established relatively clear market levels for payments to be made for the installation of apparatus. The Code Operators may suggest that the cost of renting sites from landowners is ultimately passed onto consumers but in the event that they should be relieved of paying rents for their radio masts sites, we see little evidence of any likelihood of any substantial benefit being passed back to consumers.

The market for radio mast sites has been established despite its very polarised nature and being driven chiefly by half a dozen Code Operators. Between them, the Operators have also exerted considerable pressure on the market and continue to find imaginative ways of reducing their operating costs. As landowners have responded to such moves, balances continue to be struck and the market continues to find its own level. We do not see any need for interference with the market. We would consider it fair to ensure that there was no ransom element being included in any market valuation but in reality such ransom cases are extremely few and far between.

We refer to our previous example in relation to a radio mast site in the corner of an arable field measuring 10m x 10m. If no account were to be taken of value to the grantee, then it is highly unlikely that any landowner would offer a site to an operator for a relatively short lease at a rent, only upon expiry to be paid nothing more than basic compensation. We consider that this will have a very substantial impact upon the Code Operators ability to reach agreements on a voluntary basis with landowners and this will result in Code powers having to be used to acquire any new sites 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.

We believe that statutory uplifts would not work. A very substantial uplift would be required in respect of the arable field example as per 10.44 above. If the gross margin of an arable field is, say, £400 per acre, the loss of crop compensation applicable for the radio mast site will be approximately £10 per annum. The multiplier required to give sufficient uplift would therefore need to be in the order of 500 times the annual loss of crop compensation. The problem with this is that small variations to the compensation figure would give rise to significant differences in the uplifted sum. We therefore envisage only greater difficulties with any attempt to legislate for some alternative formula. Market value is clearly an already established mechanism and one which is workable and has suited the parties to date.

We would agree that the market for cabling is still essentially being established and whilst many CLA/NFU members have adopted the recommended rates, those rates are considered by many other parties to be inappropriate.

We consider that status quo should be maintained and the market should be left to find its own levels.

Many millions of pounds of rent will also be lost by businesses which rely upon it. There is a very significant rating liability in respect of telecoms sites which provides valuable income to Local Authorities. There would also be a significant reduction in revenue received by HMRC for taxes

on rental income received by landowners. Many Government Departments and bodies would stand to lose very significant income streams. There are many businesses whose sole venture is the ownership of sites and towers for the receipt of rental income – these businesses would fail almost immediately if reference to a consideration were removed from the Code.

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 – we agree that there should be a single regime and no distinction.

10.47 We provisionally propose that, where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid. Do consultees agree? Consultation Paper, Part 6, paragraph 6.83.
We do not agree with the proposals. The vast majority of payments are made on an annual basis and it is extremely rare for a single one off capital payment to be made in respect of telecommunications equipment. Some cabling wayleaves may have been commuted into capital sums but otherwise the payments made are periodic and it is not appropriate to legislate for any repayment of such sums.

TOWARDS A BETTER PROCEDURE

10.48 We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes. Do consultees agree? Consultation Paper, Part 7, paragraph 7.26.
We agree with this. We suspect that the County Court may lack some specialist knowledge required.

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 advocate the most speedy and cost effective option for dispute resolutions. Arbitration is a well understood process and generally well accepted by all parties concerned. The use of independent experts may also be appropriate. Issues concerning land would be better dealt with by the Land Chamber rather than the County Court. As to the question of the alteration, relocations or even removal of apparatus, mediation might be a better first step for the parties to ensure that all options had been fully exhausted before pursuing action via any other tribunal or court.

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. It is crucial that both elements are dealt with together. Historically we have seen difficulties in Operators occupying sites and then not agreeing or concluding deals or even in some cases negotiating. This was particularly common in respect of early access arrangements which we curtailed the use of because of such issues. Once Operators are on site and are operating with electricity supplies connected then there is a danger that all urgency to conclude or even commence negotiations can disappear. It cannot be right for an Operator to essentially take access to a site without having had proper regard to the financial considerations. In such cases, if the Operator has underestimated the issues, then protracted and costly proceedings are almost inevitable.

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

Consultation Paper, Part 7, paragraph 7.32.

We would propose that some penalty be placed upon Code Operators for failing to set out their cases in a set timescale. This would avoid situations where Code Operators occupy premises without making appropriate payments.

The emphasis on the Code generally has to be that if the Code Operators wish to rely upon it then they must accept that the burden is upon them to set out their case convincingly showing the need in conjunction with a lack of alternative options. Given the established nature of the market, it would simply be too draconian to relieve the Code Operators of their responsibilities to prove their need and to place the burden on (generally) more poorly resourced landowners.

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) We consider this the appropriate position to take. This concurs with all other compulsory purchase legislation in relation to costs. Code Operators will be protected by the fact that the landowner acting unreasonably would be penalised by having to meet costs. We also believe that exemplary damages should be levied against the Code Operator if they should act in an obstructive or dilatory fashion or in the absence of other set penalties for failure to meet timescales.

(2) We do not consider that the losing party should always bear costs. If the losing party has acted unreasonably then there might be some case for them to pick up additional costs. Landowners do need to be able to argue their cases and to defend their positions in a reasonable fashion. If reasonable arguments are proposed but are defeated, either easily or by a narrow margin, then the costs should still be met by the acquiring authority. We anticipate that frequency of such cases arising in any event will be low.

More importantly, we consider that the policy whereby the loser pays only benefits the Code Operators who will generally be better resourced than the average landowner. If the policy is that the loser pays, then this will increase the tendency for landowners to feel pressurised into agreeing terms which may be put forward in a forceful fashion and/or with the threat of substantial costs being levied in the event that they should lose in Court. If Code Operators are to meet the costs then generally there will be a greater likelihood of settlement without recourse to court.

All reasonable costs incurred by landowners in connection with compulsory purchase matters should always be met by the acquiring authority imposing itself upon the landowner.

10.53 We also ask consultees whether different rules for costs are needed depending upon the type of dispute. Consultation Paper, Part 7, paragraph 7.38.
We do not consider that costs should be capped or taxed. Costs should in every event be reasonable and an element of burden should be placed upon the parties to show that the costs they have incurred are reasonable. We do not consider there should be any formula or scale for cost – Ryde's scale was abandoned many years ago and in our experience, the Electricity Supply industry scale simply does not work.

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 would agree. Clear guidance and a clear set of procedures will be helpful for all parties concerned. Upon revision, the Code should not be capable of the criticism it received in the Bridgewater case, in terms of 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.
Standard forms of notices may be appropriate coupled with clear guidance as per 10.54 above.

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 advocate clear guidance in plain English with any counter notice being coupled with an information pack clearly setting out the landowner's rights and options available to them. Procedures should be easily understood and the aim should be to reduce the level of professional advice being required in order to understand the basic situation from the landowners prospective.

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms. Consultation Paper, Part 7, paragraph 7.60.
We would doubt very much that standard agreements could be workable given the vast array of circumstances between individual sites and the requirements of the Code Operators. There may be basic stipulations required which could be agreed between the parties to best suit the requirements of each side. Standard agreements would invariably impose unfair conditions on one party or another and the aim should be to agree terms which enable the apparatus to be installed or to remain in situ with appropriate compensation and consideration and as far as possible, providing flexibility for both parties either to deal with apparatus as they wish (and with additional payments where appropriate) or to deal with and manage the land (in the case of the landowner) as they should reasonably require. We would agree that some standard structure may be acceptable and imposing mandatory terms would simply not be workable.

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 recognise that there are major complications with the interaction between the Landlord and Tenant Act 1954 and the current Code. Namely, whilst a landowner may consider that they have the ability to regain possession, the Code Operator can continue to rely on the Code and remain in occupation and the resultant deadlock is only broken by expensive court action. The interaction of the two layers of protection enjoyed by the Code Operators regularly cause confusion and the mechanism within the Code for dealing with the issues are currently insufficient. We would consider that where the Code has been invoked, then Part 2 of the Landlord and Tenant Act 1954 should not apply. There is no need for it and again there is only potential for further confusion. In our dealings on behalf of landowners, we frequently encounter situations whereby leases which were contracted out of the Security of Tenure provisions of the Landlord and Tenant Act 1954 may expire and yet landowners meet complete inertia from the Operators to try and agree any new terms. That is a common cause of frustration and often leads to notice for removal which in turn triggers a paragraph 21 notice and costs simply escalate without any great prospect of resolution. We would therefore advocate complete freedom of contract in relation to the 1954 Act and the Code. If the parties so wish, they should be able to agree that the Security of Tenure provisions of the 1954 Act should not apply and that the Code should not apply. Equally they should be able to agree that one or both layers of protection might apply but in practice, as above, we see little point in the 1954 applying if the Code is to apply in any event. Logically, the parties should agree first whether or not the Code is to apply. If it is, then the 1954 act should not apply. If the Code is not to apply then the parties would need to consider whether the 1954 Act should apply. If neither layer of protection is to be afforded to the Code Operator then it would be for the parties to deal with matters between themselves and landowners would simply need to be careful in their dealings so as not to give away security of tenure under the 1954 Act via the means available to any landlord of a commercial tenure e.g. creating a tenancy at will or accepting rent without prejudice to the on-going lease renewal negotiations. The trouble is that at present, landowners are often unable to resolve matters given the backdrop of the current Code which again only encourages inertia on the part of the Code Operator and stagnation of the dealings.

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 consider that all agreements for installations should be registered on the basis that nearly all of them are for periods of more than seven years or they are permanent easements. The obligation for registration should be put upon the Code Operators who should meet the additional cost in full. We consider this would facilitate the roles of both Ofcom and HMRC and provide clarity for mortgagees who undoubtedly have a great interest as to whether or not the Code powers would apply. We further consider that registration of all such interests will make it clear for the avoidance of doubt for landowners that where they are entering into agreements with Code Operators and where those agreements are not contracted out of the Code, then the landowner may encounter issues with the Code, the consequences of which they should be clear about. Arguably, any interest held in any property for the purposes of the installation or maintenance of telecommunications apparatus, which currently carries the possibility of Code powers being evoked giving rise to a long term tenure should be registered already. When such rights come to an end, registered entries should be removed. There will also need to be some facility for rectification and since it will have been the Code Operator who registered the interest, it should be the Code operator that arranges for the rectification at their own expense.

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 not had any experience of the requirement for funds set aside under regulation 16. We do consider, however, that Code Operators should be required to demonstrate that they have sufficient funds set aside to deal with the decommissioning of their apparatus and removal, including dealings with waste regulations and full reinstatement of the land. The situation is comparable perhaps to the wind farm industry where developers are required to put in place a reinstatement bond with local authorities to ensure that funds are available for reinstatement at the end of the life of the turbines.

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.

Regulation 3 (1) requires a Code Operator to consult the appropriate planning authority. This might need to be widened to involve consultation with the local community.

Regulations 3 (2) requires the Code Operator to ensure that the depth is sufficient for underground cabling so as not to interfere with the use of the land. This is an important issue for landowners.

Regulation 3 (4) relates to sharing and states that a Code Operator, 'where practicable, shall share the use of electronic communications apparatus'. In our experience, this is not always followed by Code Operators.

Regulation 4 (1) contains a requirement for Code Operators to install lines underground. We believe this should be preserved except where this would be undesirable for the landowner but subject to planning at all times.

Generally in relation to the remainder of the regulations, we believe that these should be enacted in any revised Code.

Canal & River Trust

Keeping people, nature & history connected

26 October 2012

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

Dear Sirs,

Law Commission Consultation Paper No 205

This response to Law Commission Consultation Paper No 205 is made on behalf the Canal & River Trust (the "CRT"), a charity registered with the Charity Commission with number: 1146792 and whose principal place of business is at Head Office, First Floor North, Station House, 500 Elder Gate, Milton Keynes, MK9 1BB.

We have determined to respond to the Consultation Paper in this form, as opposed to using the optional response form as we have considered and we are [generally] supportive of the full response made on behalf of the Royal Institution of Chartered Surveyors. In this response we have raised issues that we wish the Law Commission to take into account in the context of the proposals made for the reform of the Electronic Communications Code (Schedule 2 to the Telecommunications Act 1984) and your subsequent recommendations for reform.

In order to put our response into context for the Law Commission, the CRT is a charity that has responsibility for the care of more than 2000 miles of waterways in England and Wales together with the amenity land abutting those waterways and a wide and significant network of bridges, embankments, towpaths, aqueducts, locks, docks and reservoirs many of which have historic and national heritage importance. The costs of complying with our responsibilities are significant. To put those costs into context in 2011/2012, British Waterways, largely the predecessor of the CRT, expended £125,700,000 on the maintenance of the waterways in its custodianship before any of the other significant running costs of British Waterways were taken into account. Over the same period the revenue of British Waterways was £180,500,000 made up of Government grants of £57,700,000, third party contributions to works of £14,600,000 and its commercial income of £108,200,000. It will be readily appreciated that the substantial funding for the essential work of being the custodian of the country's waterways is borne from the entity's

commercial income. The proceeds received from property rentals, way leaves and premiums make up roughly a third of the commercial income.

Unlike Code Operators, CRT is not a commercial operation returning profits to shareholders and operators. Its revenue is applied for the maintenance of the nation's heritage and for the amenity of the public as a whole as opposed to the investment return of the few.

If the commercial income of the CRT is reduced the impact will affect the ability of CRT to fulfil its purpose unless the associated reduction is matched by additional Government funding. If that were the case, it seems paradoxical that the public purse is applied in a way that directly benefits private investors in the Code Operators.

We now comment on the sections of the Consultation Paper that are of particular concern to CRT and where we wish to add to the response made by the RICS.

CRT's Response to the treatment of Financial Awards under the Code – Consultation Paper Part 3.

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

The statutory powers provided to Code Operators inescapably interfere with the rights of landowners and occupiers and private rights. While CRT endorses the absolute need for the statutory powers to exist the exercise of those powers needs to be conducted in a sensible and appropriate way that acknowledges the interference with others rights.

Accordingly, so as to ensure a consistency of approach between Code Operators and those affected by the Code Operators exercise of their statutory powers, the Code should provide clear guidance as to how those powers must be exercised.

CRT are of the view that the Code should require a formal contractual agreement to be in place at all times between the Code Operator and the landowner or occupier. That formal contractual agreement should either be in a form agreed consensually between the Code Operator and the landowner or occupier or one imposed by the Court in the event that the parties are unable to reach a consensus or in the case of emergency.

In the context of the CRT estate the integrity of the canal and other structures needs to be specifically taken into account when considering how the Code rights should and could be operated. Clearly there are serious issues that must be addressed for example, the potential for escape of water with the material associated risk of loss of life, injury, damage to property and the obvious other health and safety aspects that are attendant on escape of water .

CRT consider that there would be merit in a set of standard from court endorsed agreements be developed to address the various applications of Code based rights. For example, there could be a standard form Site Licence that provides the basic pro forma for

the contractual relationship between Code Operator and landowner or occupier concerning the deployment, siting and maintenance of apparatus.

CP para 10.9 – We ask consultees for their views on the appropriate test on dispensing with the need for a landowner or occupier's agreement to the grant of code rights ……..

The balance of Code Operators' and private interests needs to be maintained. The Code Operators ought to be required to act reasonably and in good faith with a view to securing the agreement of affected landowners and occupiers. This will inevitably involve a consultation phase where the Code Operator should be required to take the representations of the landowners and occupiers into account when determining how to seek to operate the statutory rights. The dispensing of the need for agreement between the Code Operator and the landowner or occupier should be a last resort in circumstances where the landowner or occupier is acting unreasonably or in cases of emergency.

The application of this will depend on the circumstances but the courts are well attuned to determining reasonableness and it is submitted that they can readily determine reasonableness in the circumstances of the enforcement of the Code.

Where the court steps in to impose terms those terms should adhere to the standard forms advocated in our above answer subject to the relevant adjustment to meet the individual circumstances of the case – such as the level of the compensatory payments.

CP para 10.28 – We ask consultees : (1) Is it necessary to have a special regime for linear obstacles or would the General Regime Suffice ?

Provided the General Regime is clarified and, in particular, the provisions with regards to consideration and compensation, we can see no logical support for there being a separate regime for linear obstacles.

Should the separate linear obstacle regime be maintained the provision ought to be clarified so that the principle right is to cross the linear obstacle as opposed to the present formulation which is the right to cross "any relevant land".

CP para 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?

CRT has very clear obligations when it comes to the maintenance and safety of the waterways and the remainder of CRT's estate. The rights to require Code Operators to move or remove apparatus at their own cost in the event that the trust has a bona fide requirement to maintain or otherwise deal with its land should be preserved. To provide otherwise would place an intolerable burden on the landowner or occupier.

Clearly, nothing should interfere with the landowner or occupier's right to require removal or movement of apparatus in the face of a bona fide necessity. In CRT circumstances and example might be to permit CRT to address an issue threatening the integrity of the waterway in question.

Equally, as the CRT is required substantially to self-fund through commercial exploitation of its estate it would seem illogical to potentially preclude the development of land for commercial purposes by restricting the right of landowners or occupiers to require removal or movement. If such a restriction was to be put in place the limiting effects of doing so ought to be addressed when rewriting the Code provisions concerning compensation. This is unlikely to be attractive.

CRT does acknowledge that the present provision concerning movement and removal permits abuse. CRT would be wholly supportive of an obligation being incorporated which will make the availability of the provisions for movement and removal subject to the landowner or occupier showing bona fide cause.

CP para 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 on 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?

A significant degree uncertainty is presently caused by the compensation and consideration references. It is beyond debate that the position needs to be clarified. Whatever compensatory mechanism is adopted it should address the requirement for land owners and occupiers to be compensated for loss and damage caused by the exercise of rights and also address a licence fee or similar in recognition of the long term occupation of land by the Code Operator.

CRT sees no reason why a distinction should be drawn between the treatment of Water, Gas and Electricity providers and Code Operators.

CRT refers to the introductory sections of this response. From CRT's experience, the long established status quo prior to the decision in Geo Networks Limited v The Bridgewater canal Company Limited was that Code Operators entered into Site Agreements providing for their contractual rights to install and maintain apparatus on CRT land in return for which the Code Operators paid an annual fee in a sum agreed consensually between the parties. The agreement of the level of those fees was a result of negotiation and, in CRT's experience, issues in agreeing the level of fee were uncommon. The Site Agreements also contained provisions addressing safety on site, insurance, lift and shift and the like. Again, in CRT's experience these Site Agreements worked well and with very low levels of dispute.

The potential of restating the Code in a way that will deprive entities like CRT of an income that has been relied upon over a long established period needs to be very seriously considered and the interests of commercial Code Operators and the enormously wide spectrum of land owners and occupiers need to be balanced. CRT is concerned that the present direction of the Consultation Paper, when it comes to the issues of compensation and consideration, does not balance those interests.

When the Law Commission approaches the matter of adjustment to the compensatory and consideration provisions in the Code CRT asks that they do so having informed

themselves of the net effect of such adjustments on those whose operations will be affected by the adjustment.

Yours faithfully

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