The Law Commission

(LAW COM No 336)

THE ELECTRONIC COMMUNICATIONS CODE

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by the House of Commons to be printed on 27 February 2013

HC 1004 London: The Stationery Office £xx.xx

THE LAW COMMISSION

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Right Honourable Lord Justice Lloyd Jones, *Chairman*
Professor Elizabeth Cooke
Mr David Hertzell
Professor David Ormerod
Miss Frances Patterson QC

The Chief Executive of the Law Commission is Mrs Elaine Lorimer.

The Law Commission is located at Steel House, 11 Tothill Street, London SW1H 9LJ.

The terms of this report were agreed on 18 February 2013.

The text of this report is available on the Law Commission's website at http://lawcommission.justice.gov.uk/areas/electronic-communications-code.htm.

THE LAW COMMISSION

THE ELECTRONIC COMMUNICATIONS CODE

CONTENTS

GLOSSARY

2003 Code: the Electronic Communications Code: Schedule 2 to the Telecommunications Act 1984.

2003 Regulations: the Electronic Communications (Conditions and Restrictions) Regulations 2003.

Code Operator: an operator that has had the Electronic Communications Code applied to it by Ofcom under section 106 of the Communications Act 2003.

Code Rights: the rights that are protected by the Electronic Communications Code once granted to a Code Operator, and that can be imposed on a landowner pursuant to the Code.

Conduit: defined in paragraph 1(1) of the 2003 Code as including a tunnel, subway, tube or pipe.

Easement: a right that benefits the owner of land, or of an interest in land, to do something on, or to cross, other land.

Electronic communications network: defined in section 32(1)(a) of the Communications Act 2003 as "a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description".

Landowner: the holder of any freehold or leasehold interest in land.

Lands Chamber: the Lands Chamber of the Upper Tribunal: a specialist tribunal for certain disputes concerning land, particularly the valuation of land.

Lease: the grant of exclusive possession of land for a fixed period, or on a periodic basis that can be brought to an end by notice.

Line: defined in paragraph 1(1) of the 2003 Code as "any wire, cable, tube, pipe or similar thing (including its casing or coating) which is designed or adapted for use in connection with the provision of any electronic communications network or electronic communications service".

Linear obstacle: defined in paragraph 12(10) of the 2003 Code as land which is used wholly or mainly as, or in connection with, "a railway, canal or tramway".

Office of Communications (Ofcom): the independent regulator and competition authority for the United Kingdom's communications industries, responsible for applying the Code to operators.

Operator: an operator of an electronic communications network, whether or not it is a Code Operator (see above).

Site Provider: a landowner or an occupier of land who has granted Code Rights, or on whom Code Rights have been imposed, or who is bound by Code Rights.

Wayleave: a licence, or permission, to do something or keep something on land.

THE LAW COMMISSION

THE ELECTRONIC COMMUNICATIONS CODE

CHAPTER 1
INTRODUCTION AND SUMMARY

To the Right Honourable Chris Grayling MP, Lord Chancellor and Secretary of State for Justice

BACKGROUND: THE ELECTRONIC COMMUNICATIONS CODE

1.1 It would be difficult to overstate the importance of electronic communications, both for business and individuals. In 2011, there were 9.4 million business fixed lines in the UK, and businesses accounted for 1.7 million broadband subscriptions and 10.4 million mobile connections, including 1.4 million for mobile broadband. Of UK adults as a whole, 92% own a mobile phone and 39% own a smartphone, and it is reported that the number of households where at least one person uses a mobile phone to access data services is increasing. 76% of UK households have fixed or mobile broadband; overall, the number of fixed broadband connections in the UK is now over 20 million, and to that can be added 5.1 million active mobile broadband subscribers.[1]

1.2 The physical equipment that supports our reliance on electronic communications comes in a variety of forms: copper wire and fibre optic cables, cabinets, mobile phone antennae and masts, to name only a few. To the day-to-day user of a smartphone, some infrastructure is obvious, but the rest is easily overlooked – buried underground, situated on a rooftop or a water tower, and so on.[2]

1.3 Schedule 2 to the Telecommunications Act 1984 is known as the Electronic Communications Code.[3] It regulates the legal relationships between landowners and certain network operators, and enables those operators to acquire rights over land compulsorily in some cases. Rights under the Electronic Communications Code can be far-reaching, and they underpin the physical networks of apparatus which support the provision of electronic communications throughout the United Kingdom.

[1] Office of Communications, *Communications Market Report* (July 2012) sections 1.8 and 5.2, available at http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/CMR_UK_2012.pdf (last visited 20 February 2013). Mobile broadband refers to access via a USB device or dongle, or a datacard built into a tablet or other computer; it excludes internet access via a mobile phone.

[2] An idea of the prevalence of mobile phone base stations may be gained by searching Ofcom's Sitefinder website at http://www.sitefinder.ofcom.org.uk (last visited 20 February 2013), although this does not include all up to date information.

[3] This name comes from the Communications Act 2003, s 106, although Schedule 2 itself is headed "the Telecommunications Code"; see *Geo Networks Ltd* v *The Bridgewater Canal Company Ltd* [2010] EWHC 548 (Ch), [2010] 1 WLR 2576 at [7] by Lewison J. We have provided a version of the 2003 Code on our website, for use only in assisting readers in following the discussion in this Report: http://lawcommission.justice.gov.uk/areas/electronic-communications-code.htm.

1.4 The Telecommunications Act 1984 was enacted in the wake of the privatisation of the public corporation British Telecom and as part of the move to a more competitive market. Schedule 2 was amended by the Communications Act 2003 to reflect developments in technology and in the regulatory regime, in the light of European intervention by way of a series of Directives.[4] In this Report we refer to the current version of the Electronic Communications Code as "the 2003 Code".[5]

1.5 We use the term "Code Operators" to mean those operators who have the benefit of, and are subject to, the Electronic Communications Code; and thus can take advantage of the rights afforded by it to develop their own networks. An operator becomes a Code Operator by having the Electronic Communications Code applied to it by the Office of Communications ("Ofcom").[6] We use the term "Site Providers" to refer to the owners and occupiers of land who are bound by the rights of a Code Operator, under the Code, to install and keep electronic communications apparatus there.[7]

1.6 Prior to the 1984 reforms, such apparatus could generally only be placed on land with consent, and the drafting of the Code still focuses on the regulation of consensual relationships.[8] The 2003 Code requires the written agreement of the occupier of land to confer rights under the Code to install and keep apparatus on that land.[9] If agreement is not forthcoming, there is provision for the court to dispense with agreement in certain circumstances.[10] Despite this focus on agreement, the rights enabled by the 2003 Code have the potential to become more far-reaching and durable than anticipated by the owner or occupier of land at the time when they are granted.[11]

[4] See para 1.17 below.

[5] As part of this project we have also considered the Electronic Communications Code (Conditions and Restrictions) Regulations 2003, SI 2003 No 2553 (see para 3.29 below) and the Electronic Communications and Wireless Telegraphy Regulations 2011, SI 2011 No 1210 (see para 9.11 below). The 2011 Regulations implement Article 11 of the Framework Directive (see also the 2003 Code, para 24A).

[6] Under the Communications Act 2003, s 106(3)(a). Ofcom also has powers to enforce the Electronic Communications Code (Conditions and Restrictions) Regulations 2003, and is responsible for approving the forms of notice to be served by Code Operators under the 2003 Code, para 24(1); we make some recommendations addressed to Ofcom at para 9.105 and following below.

[7] We say more about these "Code Rights" at para 2.12 and following below. We use the term "landowner" to mean someone who has any freehold or leasehold interest in land. An "occupier" may be a landowner, but may also be someone who is on the land by permission but does not have any proprietary interest in it, such as a lodger or the holder of a grazing licence.

[8] This was emphasised, in particular, by the response of the Central Association of Agricultural Valuers (CAAV), and we are grateful to the CAAV for the insights they have provided into the historical origins of the 2003 Code.

[9] 2003 Code, para 2(1).

[10] 2003 Code, para 5, discussed below, Chapter 4.

[11] In particular, due to the provisions of the 2003 Code, para 21, which restrict the ability to have apparatus removed at the end of the agreed term; discussed below, Chapter 6.

BACKGROUND TO THE LAW COMMISSION CONSULTATION

1.7 In the light of the prevalence and importance of electronic communications, significant Government funding has been committed to developing broadband networks.

> The Government recognises the economic growth potential of broadband and has made available £530m to stimulate private investment to take superfast broadband to 90% of UK premises and basic broadband coverage to virtually everyone else at a speed of at least 2Mbps. It has also allocated a further £150m to support the development of super-connected cities which will have ultrafast broadband and high speed wireless internet access.[12]

1.8 As well as giving financial support in this way, Government is committed to improving the legal framework for electronic communications. As part of its wider review of the regulatory regime for electronic communications in the UK, the Department for Culture, Media and Sport asked the Law Commission to conduct an independent review of the 2003 Code. This project was included in the Law Commission's Eleventh Programme of Law Reform.[13] The project began in September 2011, and the Consultation Paper was published on 28 June 2012,[14] with the consultation period running until 28 October 2012.

1.9 It was clear to us from the beginning of the project that the 2003 Code is in need of reform, for three main reasons. First, it is complex and extremely difficult to understand; famously described judicially as "not one of Parliament's better drafting efforts … one of the least coherent and thought-through pieces of legislation on the statute book".[15] It is also difficult to discern the relationship of the 2003 Code with other elements of the law, such as the Land Registration Act 2002.

1.10 Secondly, its approach is outdated. The original draft was based on several 19th and early 20th century statutes dealing with telephone wayleaves; it is clear that the drafters of the 2003 Code did not contemplate that Code Operators might require a leasehold estate in land in order to site their apparatus on it. As a result, although attempts have been made to update the legislation for modern technology, important points have been left unclear.

[12] Department for Culture, Media and Sport, Government response to the House of Lords Communications Select Committee Report, "Broadband for all – an alternative vision", (October 2012) CM 8457, p 4, available at http://www.culture.gov.uk/images/publications/Gov_Response_Broadband_for_all_Cm_8457.pdf (last visited 20 February 2013). "Mbps" stands for "megabits per second"; its meaning is technical, but can be considered as the "speed" of an internet connection – the higher the number of bits per second, the more information that can be transferred in a particular time frame. "Superfast broadband" is defined as having a potential headline access speed of greater than 24 Mbps, with no upper limit.

[13] Eleventh Programme of Law Reform (2011) Law Com No 330, paras 2.41 to 2.46.

[14] The Electronic Communications Code (2012) Law Commission Consultation Paper No 205, referred to in this Report as "the Consultation Paper".

[15] *Geo Networks Ltd v The Bridgewater Canal Company Ltd* [2010] EWHC 548 (Ch), [2010] 1 WLR 2576 at [7], by Lewison J.

1.11 Thirdly, there is evidence of concern that the Code is making the rollout of electronic communications more difficult. The 2003 Code seeks to regulate the effects of agreements to confer specified rights, and to back this up with a system for compulsion where agreements cannot be reached. Yet it lacks clarity on several important matters, such as who is bound by rights conferred on Code Operators, how to assess the level of payments for the grant of rights, and how the termination of those rights is to be enforced. This, together with the absence of efficient dispute resolution, considerably hampers its usefulness to both Code Operators and landowners. In addition, it is not clear that it strikes the right balance between those parties.

1.12 Reform of the 2003 Code involves striking a balance in the light of not only those two contrasting interests, but also the interests of the public who increasingly require access to electronic communications services, and whose needs and expectations as to the quality and choice offered in relation to those services are evolving rapidly.

1.13 As agreed with the Department for Culture, Media and Sport, this Report does not include a draft Bill. Government is committed to drafting and implementing a revised Code following our Report;[16] the Law Commission welcomes this opportunity to make recommendations which will form the basis of the revised Code. We remain of the view that the advantages of this review will only be felt if the revised Code[17] is drafted from a "clean sheet of paper"; there is no point in merely amending the 2003 Code.[18] Our aim in making our recommendations is to facilitate the production of a clear and readily understood document, reflecting and balancing the interests of landowners, Code Operators and the public, and providing a dispute resolution procedure that works.

1.14 It is only realistic to add that the revised Code is unlikely to please everyone. In some respects the different parties involved have common interests – in particular in having a Code that is clearly written and no more complex than it need be. But in some respects the interests of the different parties are diametrically opposed; that is certainly true in the matter of pricing, and to a lesser extent the protection from removal afforded to electronic communications apparatus. With that in mind we have regarded balance as important, knowing that consensus is in some respects impossible.

1.15 There is much in our recommendations that is both technically and commercially sensitive. We would counsel Government to allow time, between publication of our Report and the introduction of legislation to enact the revised Code, for the electronic communications industry and stakeholders to absorb this Report and to comment on it and react to it. We have been greatly assisted in our consultation process by the experience of stakeholders; they still have a vital role to play in appraising our recommendations and exploring their implications.

[16] Department for Culture, Media and Sport, *Electronic Communications Code to be reviewed*, available at http://www.culture.gov.uk/news/news_stories/8339.aspx (last visited 20 February 2013).

[17] In this Report we use the term "the revised Code" to refer to the new Electronic Communications Code to be enacted following our recommendations.

[18] Consultation Paper, para 1.21. Reform will require primary legislation, since that is the form of the 2003 Code.

1.16 In formulating our recommendations, we have borne in mind the legal background against which the Code operates, as set out at Part 2 of the Consultation Paper. In particular, the revised Code must be compatible with human rights law concerning the interference with the peaceful enjoyment of possessions which occurs where rights over land are acquired compulsorily.[19]

1.17 It must also comply with European Union law. In 2002, the European Union adopted a series of five Directives[20] concerning electronic communications, as follows:

(1) the "Framework Directive", on a common regulatory framework for electronic communications networks and services;

(2) the "Authorisation Directive" on the authorisation of electronic communications networks and services;

(3) the "Access Directive", on access to, and interconnection of, electronic communications networks and associated facilities;

(4) the "Universal Service Directive", on universal service and users' rights relating to electronic communications networks and services; and

(5) the "Privacy and Electronic Communications Directive", concerning the processing of personal data and the protection of privacy in the electronic communications sector.[21]

1.18 We refer to the provisions of these Directives where they are relevant to our recommendations for the revised Code. In particular, article 11 of the Framework Directive concerns the procedures which relate to a Code Operator's application for rights to install facilities on private property, including the timescale for decision and mechanisms for appeal.[22]

1.19 The 2003 Code applies to the whole of the United Kingdom. This project has been conducted by the Law Commission for England and Wales, in consultation with the Scottish Law Commission and the Northern Ireland Law Commission. The policy expressed by the recommendations made in this Report is intended to apply to the whole of the United Kingdom. We have, however, referred specifically only to the law of England and Wales. We are passing on to Government the comments we received on consultation which related specifically to Scotland and Northern Ireland, which will assist the drafter of the revised Code in expressing that policy in terms appropriate to the jurisdictions to which it will be

[19] European Convention on Human Rights and Fundamental Freedoms, First Protocol, Article 1, discussed in the Consultation Paper, paras 2.6 to 2.17, and below, paras 2.6 to 2.8 and paras 4.3 to 4.4 below.

[20] In a European Union context, Directives are binding on the member states "as to the result to be achieved", but member states can take different approaches to their implementation provided that the result is achieved within the timeframe specified in the Directive.

[21] Respectively Directive 2002/21/EC of 7 March 2002, Directive 2002/20/EC of 7 March 2002, Directive 2002/19/EC of 7 March 2002, Directive 2002/22/EC of 7 March 2002 and Directive 2002/58/EC of 12 July 2002.

[22] See also the Electronic Communications and Wireless Telegraphy Regulations 2011, SI 2011 No 1210, reg 3.

applicable.[23] Another reason for Government to pause between our publication and the introduction of legislation is the importance of allowing our recommendations to be worked on by Scottish and Northern Irish legal advisers so that the revised Code will be technically correct for all three jurisdictions in which it will apply.

THE CONSULTATION PROCESS

1.20 Our consultation spanned three phases. We held a number of discussions with stakeholders before publication of our Consultation Paper in June 2012. Particularly useful was an open meeting that we hosted on 29 March 2012, which attracted over 70 expert attendees. During the consultation period (which closed on 28 October 2012) we held a number of meetings, in an endeavour to capture as many points of view as possible. We were assisted by two large-scale events. One, hosted by Charles Russell LLP on 1 October 2012,[24] was attended by over 30 individuals with an interest in the project, including Code Operators, landowners and valuers. The other took place at the Law Commission on 10 October 2012 and brought together primarily telecommunications lawyers, again to discuss a variety of topics relating to reform of the Code. Finally, we spent some time analysing the 130 formal responses to our consultation, and took the opportunity to contact some consultees at that stage to ask for clarification of their views where we felt that that would be helpful.

1.21 Throughout these different stages we heard from a number of different groups. Whilst the Code is written to regulate the relationships between Code Operators who provide electronic communications networks, and the landowners whose land and buildings they use, we have also held useful discussions with wholesale infrastructure providers, some of whom are Code Operators and some of whom are not. We also heard in the course of consultation points of view expressed on behalf of the general public, whose towns and streets are closely affected by the presence of electronic communications apparatus even where their own land is not involved. Equally, the general public whose business and personal communications are fostered, or put at risk, by the provisions of the Code have been very much in our minds.

OUR RECOMMENDATIONS

Some general points arising from consultation

1.22 The consultation process has generated a great deal of extremely useful material which we could not access before publication of the Consultation Paper. Three things struck us very forcefully.

The value of the existing market

1.23 First, the fact that the 2003 Code is grounded in the regulation of consensual relationships is in itself valuable. In this respect the electronic communications industry stands in stark contrast to the traditional utilities. The water companies

[23] We are grateful to the consultees who provided us with these comments. In particular, we would like to thank Shepherd & Wedderburn LLP for sharing their expertise on aspects of Scottish landlord and tenant law.

[24] The consultation response submitted by Charles Russell LLP reflects the discussions at this event.

are entitled almost without restriction to rights over land; while the right to lay pipes, or carry out other works in relation to them, can only be exercised after reasonable notice has been given to the landowner, there is no requirement to obtain permission, and no right to object.[25] The electricity and gas providers are able to acquire rights, subject to a public interest test, at a price that does not reflect the value of the rights or of the land to the utility provider but reflects only loss to the landowner.[26] By contrast, the use of land by those who operate electronic communications networks is primarily consensual, and the 2003 Code operates largely by regulating consensual agreements[27] although it can also be used to impose rights upon landowners.[28] And likewise the pricing of the rights that can be granted to Code Operators is based upon what might be agreed between a willing buyer and seller, which generates a form of market value.[29] As the Central Association of Agricultural Valuers (CAAV) put it:

> … 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 … . 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 … . 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.

1.24 We have been greatly assisted by the evidence provided to us on this topic by a wide range of consultees. In the Consultation Paper we provisionally proposed to introduce more clarity on the vexed issue of pricing by departing from the market value basis of consideration under the Code; but in this Report we have recommended that the revised Code should maintain that market value basis. We have recommended that the unclear wording in the 2003 Code be replaced with terms that reflect established valuation practice; and consultees have convinced us that there is enough by way of available evidence of comparable transactions to make this workable. To do anything else would generate an extremely difficult transition, and a consequent overload of litigation; more importantly, the market in sites benefits the economy – not only small businesses in the countryside but also some larger concerns.

[25] Water Industry Act 1991, s 159; but see section 181 regarding investigations by the Water Services Regulation Authority. Findings that the undertaker failed to consult adequately or acted unreasonably in the exercise of the powers may result in a requirement to pay a complainant a sum of up to £5,000.

[26] The pricing of statutory wayleaves for electricity companies does include an element for the value of the right, as well as compensation for disturbance; see Consultation Paper, paras A.29 to A.33, referring to the Electricity Act 1989, sch 4, para 7. However, the values in this market appear to be rather lower than those encountered in the electronic communications context. See generally Consultation Paper, paras A.22 to A.37.

[27] Based on the 2003 Code, para 2(1).

[28] 2003 Code, para 5.

[29] Opinions vary as to whether the price generated by the provisions of the 2003 Code is a "market value" or a "fair value" (see paras 5.15 to 5.20 below); both are forms of market value reflecting value to buyer.

1.25 We might have reached a different conclusion if existing practices had not already become established. As it is, any radical change to the basis of the Code and of dealings between Code Operators and Site Providers is likely to cause considerable economic loss, and may also generate practical and economic problems for the operation of the electronic communications network. We return to this theme, and to our decision to depart from our provisional proposal on pricing in the Consultation Paper, in Chapter 5.

Legal diversity

1.26 Second, the 2003 Code presupposes a relatively simple structure of relationships between occupiers and Code Operators, although it allows for the possibility of various interests in land. It makes no provision for situations where the landowner deals only with a wholesale infrastructure provider, who in turn deals with Code Operators; nor does it provide for tripartite arrangements between a landowner, a number of Code Operators and a wholesale infrastructure provider. Arqiva explained that:

> There has … been a blurring of the way networks are deployed, operated, shared and maintained, with many sites now being owned and managed by wireless infrastructure companies, who are effectively neutral hosts providing a range of infrastructure and operational management services to operators. This has also led to a blurring between the relationships held with the landowner, with often no direct link with third party sharers who may be code operators.
>
> Thus the underlying assumption in the Code that a single operator may need to use code powers in relation to a network site against a single landlord is therefore no longer valid.

1.27 We have kept in mind throughout our Report the need to accommodate the various commercial relationships that support the electronic communications industry. One of the difficulties with the 2003 Code is its lack of clarity about legal structures; it is not known, for example, whether or not the 2003 Code gives the court power to impose a lease rather than merely a wayleave.[30] Another difficulty is the uncertain interaction between the protection for electronic communications apparatus under the Code and the security of tenure for business tenancies provided by Part 2 of the Landlord and Tenant Act 1954. Our recommendations would resolve this uncertainty.

Technological complexity

1.28 The third point relates to the question we asked in the Consultation Paper as to whether a revised Code should be technology neutral.[31] Consultees were in broad agreement that the Code should be technology neutral so as to be "future proof" – that is, so as not to become quickly outdated as technology advances. The UK Competitive Telecommunications Association (UKCTA) agreed and noted that:

[30] See paras 4.47 to 4.51 below. A wayleave is an agreement which does not amount to a property right (that is, it is a licence or permission), in contrast with an easement or a lease.

[31] Consultation Paper, para 3.18.

> 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.

1.29 But many stressed, and gave us a great deal of information about, the difference between the mobile/wireless sector, operating through mast sites, and the cable/fibre sector, which relies upon underground ducts. There are distinctive markets in wireless technology and in fibre,[32] and their effect upon site providers is very different in terms of size and the inconvenience they cause. Wireless Infrastructure Group (WIG) observed:

> the physical deployment for wireless is more intrusive; wireless is more likely to require exclusive demise when compared to an underground cable; wireless operators may run several competing deployment options at a time (given the inherent nature of the technology a number of site options can deliver signal to an area) lowering the risk of ransom situations compared to fibre; wireless equipment needs to be accessed more frequently and the lease terms typically requested have short breaks (often after year 5); and a more active market arguably exists for wireless real estate … .

1.30 The Country Land & Business Association (CLA) pointed out:

> Telecommunication masts and ancillary equipment, which occupy an area of ground on which the landowner will be precluded from farming, for example, will normally be dealt with under a lease. Cables, on the other hand, will normally be the subject of easements or wayleave agreements. As the nature of the right taken in each case is different, the market for each differs. Leases are commercial agreements, with the terms agreed between the parties, and open market rents are normally negotiated. Easements and wayleaves have commonly been dealt with by reference to nationally negotiated rates, on a £ per metre run basis, agreed between the NFU and the CLA on the one hand and certain operators on the other, as they are in the context of utilities such as electricity.

1.31 Indeed, some consultees went so far as to argue that there was no need for a Code to regulate leases of electronic communications sites – a policy which, were we to recommend it, would impact upon the mobile sector and not upon cable and fibre. Strutt & Parker LLP said:

> 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

[32] See paras 5.51 to 5.54 below.

understand that telecommunications operators may be held to ransom by landowners and by linear obstacles.

1.32 We continue to take the view we expressed in the Consultation Paper that a Code is needed, regardless of different technologies and of the different legal structures involved.[33] In other words, leases of mast sites should be within the revised Code, as should wayleaves for cables. To recommend otherwise would generate litigation (because it would become important to establish that a given agreement was or was not a wayleave or lease), and it has been suggested to us that it would distort the market.[34] Some provisions of the Code – particularly those relating to security of tenure – are arguably more important where a lease is used than where there is a simple wayleave for a cable; but by recommending the elimination of the overlap between the revised Code and Part 2 of the Landlord and Tenant Act 1954 we have made the legal situation simpler and the Code itself more straightforward.

1.33 We acknowledge comments made by WIG, that the wholesale infrastructure business does not require to be regulated by the Code, and that the reach of the revised Code should be restricted to "first service" situations where electronic communications are not yet available. Others, however, stressed the need for regulation in a context where just one service is not enough, and the public interest in a Code that will support the availability of a range of providers and of different technologies. We have not therefore restricted the reach of the Code to a narrow range of circumstances, nor to any particular technology; but in recommending a Code that supports a market, rather than regulating pricing, we hope that we have allayed much of the anxiety expressed by WIG and other landowners about the application of the Code.

1.34 However, although the recommendations we have made are technology neutral in the sense that they make no reference to different types of equipment or to different electronic communications services, certain provisions refer to different legal structures. We have taken the view that it is important to allow the general law to regulate who is bound by a lease, for example, and that too will make the Code simpler and less intrusive. Some of our recommendations will impact differently upon different technologies. For example, our discussion of rights to upgrade or to share equipment takes into account the comments that consultees made about the physical effect of different sorts of equipment, in answer to our question about technological neutrality. And we acknowledge in our discussion of

[33] Babcock International Group plc commented: "Under European legislation, there is a requirement for legislation to remain technologically neutral so as not to favour any particular emerging technology". This is not strictly a requirement: as we noted in the Consultation Paper (para 3.14), it is one of the principles that underpins the European communications regulatory framework. The European Commission expresses it as follows: "[the] aim to be technologically neutral; ie not impose, nor discriminate in favour of, the use of a particular type of technology, but to ensure that the same service is regulated in an equivalent manner, irrespective of the means by which it is delivered" ("Towards a new framework for Electronic Communications infrastructure and associated services – the 1999 Communications Review", COM (1999) 539, pp v to vi).

[34] Surf Telecoms said: "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."

pricing for wayleaves that the market in cable/fibre is very different from that in mast sites.[35]

Our recommendations for the revised Code

1.35 The core of our recommendations has been outlined above: a revised Code based on the regulation of consensual relationships for which a market price is payable, but with the ability for Code Operators to apply to have Code Rights imposed on landowners where it is appropriate to do so and agreement cannot be reached. Chapter 2 of this Report explores the Code Rights that will be at the heart of the revised Code: these are the rights that will attract the protection of the revised Code, and that can be imposed on landowners if the test for the grant of Code Rights is passed.

1.36 In Chapter 3 we explore some of the implications of Code Rights, setting out a limited range of rights that are triggered by the grant of Code Rights: a right to assign Code Rights from one Code Operator to another, and a very circumscribed right to upgrade and share equipment.

1.37 Chapter 4 of the Report sets out our recommendations for the test to be applied when Code Operators seek to impose Code Rights. We conclude that the "Access Principle" in the 2003 Code is outdated and ineffective, and we recommend a new test that overtly balances the public interest with that of the landowner, and takes into account the need for choice and quality in the provision of electronic communications services.

1.38 In Chapter 5 we explore the issue of the payment to be made for Code Rights to Site Providers and to others. We maintain the distinction found in the 2003 Code between compensation (available to a wide range of landowners) and consideration (the price payable only to those who confer Code Rights or have them imposed upon them). We explore the evidence presented to us by consultees about the current market and conclude that the revised Code should clarify the definition of consideration by using a familiar definition of market value.

1.39 Chapter 6 moves to the other end of the lifespan of Code Rights by exploring the circumstances in which landowners can have electronic communications apparatus moved or removed. We conclude that landowners should not have a general right to have apparatus moved or otherwise altered. But we recommend a wholly new system for the revised Code in relation to the removal of apparatus, which will do away with the current overlap between the 2003 Code and Part 2 of the Landlord and Tenant Act 1954. The new system incorporates the best features of the 1954 Act security of tenure regime, in particular the continuation of Code Rights despite their contractual expiry (thus regularising the position of Code Operators) while giving landowners the right to have equipment removed when they plan to redevelop or where the Code Operator is in breach of its obligations. Those who are not bound by Code Rights would be enabled to give notice to Code Operators to require them to remove apparatus, which Code Operators could oppose with an application to keep it on the land.

[35] See paras 5.52 to 5.54 below.

1.40 The scene changes in Chapter 7 where we discuss the "special regimes". We recommend that the revised Code continue to prescribe special regimes in particular contexts, especially for tidal waters and lands and where there is a need to take apparatus (particularly lines) across linear obstacles; but we recommend change to some of the terms of those regimes, including the introduction of a market value definition for the price payable for crossing tidal waters and lands which are subject to a Crown interest.

1.41 Chapter 8 addresses a miscellaneous group of rights that arise independently of the legal relationships between Site Providers and Code Operators; notably we recommend a right to have vegetation cut back where it obstructs apparatus on a highway. We examine the 2003 Regulations, and particularly regulation 16 (which requires Code Operators to set aside funds to cover the costs of removing apparatus from a highway); we do not recommend radical change to the regulations in the absence of cogent evidence from consultation that this is necessary.

1.42 Finally in Chapter 9 we recommend that the forum for almost all Code disputes should be the Lands Chamber of the Upper Tribunal. We think that this will be one of the most important changes brought in by the revised Code; many consultees regarded it as crucial for the revised Code to be backed by an adjudication system with more specialist expertise than the County Court can offer. We also recommend that Code Operators should be able to apply to get early interim access to sites where all terms are agreed other than price, in a way that does not stack the odds against the landowner by instantly creating protected Code Rights.

The revised Code should not be retrospective

1.43 We are conscious that the introduction of the revised Code will need to be managed with care and considerable thought given to transitional provisions. We do not think that it would be practicable or appropriate simply to apply the revised Code to existing arrangements. This would result in retrospective application, affecting rights which had already arisen. In some cases, there would be disruption to carefully-negotiated agreements by which the parties have sought to strike a balance within the context of the existing Code.

1.44 We think that it is inevitable, therefore, that for some time after the introduction of the revised Code, parties and their advisers will need to be aware of the relevance of the 2003 Code to historic agreements. As new arrangements are formed and old ones renewed under the revised Code, the 2003 Code will eventually become obsolete.[36]

ACKNOWLEDGEMENTS

1.45 We would like to thank all of those who responded to the Consultation Paper for their detailed and thoughtful contributions, which have informed the final recommendations set out in this Report.

[36] In particular, apparatus installed before enactment of the revised Code will eventually be the subject either of removal, or of consensual new rights under the revised Code, or of an application to remove it under the 2003 Code. If such an application results in the acquisition of new rights, those rights should be conferred under the revised Code.

1.46 During the consultation period, discussion seminars were held to explain our provisional proposals and publicise the consultation. We would like to thank all the industry experts and practitioners who attended these seminars and contributed to discussion. In particular, we are grateful to the Law Society of Scotland; the Law Society of Northern Ireland; and Charles Russell LLP who hosted one of these seminars and recorded the discussion in the form of their consultation response.

1.47 We also met with a number of stakeholders before, during and after the consultation period, and we are grateful to those who gave up their time to meet with us. We also thank the representatives of RICS who met with us to provide neutral, technical advice on valuation definitions.

CHAPTER 2
THE CODE RIGHTS AND THE REGULATED RELATIONSHIPS

INTRODUCTION

2.1 In this Chapter we recap briefly the reasons why a Code is needed; this is a matter that we discussed in the Consultation Paper and that has to be borne in mind when we make recommendations for the contents of the revised Code. We then examine the Code Rights. These are the rights – currently listed in paragraph 2(1) of the 2003 Code – that in effect trigger the provisions of the Code. Where one or more of these rights have been conferred, whether by agreement or otherwise, the Code takes effect. Finally, we discuss the issue of who is bound by a Code Right, once it has been created, and the applicable registration requirements.

2.2 We stress at the outset of this Chapter that the Code Rights are not rights that Code Operators have by virtue of their status.[1] We found widespread misunderstanding about this amongst consultees, many of whom resisted any extension of the list of Code Rights on the basis that that in itself would extend Code Operators' rights. The function of the list of Code Rights is to set out the rights that have certain consequences *if* they are validly conferred, by agreement or by the tribunal,[2] and not to widen Code Operators' powers automatically.

WHY DO WE NEED A CODE?

2.3 We noted in Chapter 1 that the purpose of the 2003 Code is primarily to regulate consensual relationships. Most electronic communications equipment is sited on land pursuant to agreements, of varying levels of formality, between Code Operators and Site Providers. Against that background, the work of the 2003 Code is primarily to generate certain legal consequences for those agreements – in particular, it regulates their effect on others. In Chapter 1 we stressed the value of those consensual relationships and the fact that the electronic communications industry has been able to thrive on that basis.

2.4 A further reason why a Code is needed, however, is to ensure that the availability of electronic communications is, so far as possible, not impeded by difficulties in gaining access to land. This is relevant not only in those few areas not yet served with a particular form of electronic communications but also in other areas where a better choice or standard of service is wanted.

2.5 The 2003 Code also protects equipment, whether or not it is installed or retained on land by agreement. That is an issue to which we return later, as we have given careful thought to whether such extensive protection is necessary.

[1] Such rights are conferred elsewhere in the 2003 Code; for example, under paragraph 10 (see para 8.3 and following below), and under the "special regimes" at paragraphs 9, 11 and 12 (see Chapter 7 below).

[2] Throughout Chapters 2 to 8 we anticipate the policy explained in Chapter 1 and discussed in Chapter 9, that the majority of Code disputes should be adjudicated by the Lands Chamber of the Upper Tribunal.

2.6 The imposition on Site Providers of rights for Code Operators must be human rights compliant. Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms, concerning the peaceful enjoyment of a person's possessions, is engaged. The imposition of Code Rights can amount, within the terms of Article 1, to a control of the use of land – and potentially perhaps a taking of land in some cases. There is no absolute right against such control or deprivation; but such an interference must be in accordance with the law, and in the public interest. Assuming that the interference is prima facie in the public interest – as is, in this case, the provision of electronic communications services to end-users – the means used must be proportionate. The interference must strike a "fair balance" between the general interest of the community and the individual's rights.[3]

2.7 Clearly the rights of Site Providers, as owners or occupiers, are to be respected; at the very least there can be no imposition of rights over land unless it is necessary and proportionate to do so. Nor can that be done without compensation. There must be cases where, even so, it is not right to force access on an unwilling landowner; equally, there must be cases where a landowner's refusal to allow access must be overridden. This might be to avoid disproportionate expense; or in some cases it may be the only way to get an electronic communications network to a particularly remote area. We discussed in the Consultation Paper the reasons why compulsion must remain a possibility.[4]

2.8 The 2003 Code is thus conceptually based on agreement, in line with its historical origins;[5] but there is a place for compulsion, which must be based on a test that provides a fair balance of the interests of Site Providers, Code Operators and the public. It is in keeping with the spirit of Article 1 of the First Protocol that the 2003 Code is built on the regulation of consensual relationships rather than on compulsory acquisition or imposition of rights, but there is a place for the latter.

2.9 In the Consultation Paper we regarded this as beyond dispute, and did not specifically ask consultees whether there should continue to be a Code.[6] Indeed, it was clear from consultation responses that there is widespread agreement that a Code is needed, even by those who did not want it to apply to their own business relationships.

2.10 We are therefore making recommendations for the revised Code using a similar conceptual basis; it is intended to regulate relationships between Code Operators and the owners and occupiers of land,[7] and those relationships will normally come into existence by agreement. But the revised Code must also provide for the creation of those relationships where agreement cannot be reached. However these relationships arise, the revised Code must then specify the consequences that arise automatically once certain rights exist.

[3] See further Consultation Paper, paras 2.6 to 2.17.

[4] Consultation Paper, paras 2.2 to 2.5.

[5] See para 1.23 above.

[6] Consultation Paper, para 2.5.

[7] We use "land" in the usual legal sense, meaning the land itself and the buildings and fixtures upon it; see para 2.55 below.

2.11 What we have just described is what is known as the "General Regime". It refers to the Code's regulation of relationships between Code Operators and almost all owners and occupiers of land in the UK. The 2003 Code also provides for a number of "special regimes" where the nature of the land or of the landowner triggers a different basis of regulation.[8] We consider the special regimes in Chapter 7. In this Chapter, we make recommendations both about the relationships to be regulated by a revised Code and about the definitions that that Code should employ.

THE CODE RIGHTS

Paragraph 2(1) of the 2003 Code

2.12 Paragraph 2(1) of the 2003 Code is a crucial provision, although its effect is not immediately obvious from its wording. It states:

> The agreement in writing of the occupier for the time being of any land shall be required for conferring on the operator a right for the statutory purposes–
>
> (a) to execute any works on that land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus; or
>
> (b) to keep electronic communications apparatus installed on, under or over that land; or
>
> (c) to enter that land to inspect any apparatus kept installed (whether on, under or over that land or elsewhere) for the purposes of the operator's network.

2.13 The bare wording of the paragraph does not reveal its precise effect, let alone its whole purpose. A more transparent proposition is revealed by paraphrasing it and breaking it up. We can analyse it as saying that:

(1) a right for a Code Operator[9]

(2) to do the things listed in sub-paragraphs (a), (b) and (c)

(3) for the purposes of the provision of that operator's network or conduit system[10]

[8] This terminology comes from the judgment of Lewison J in *Geo Networks Ltd v The Bridgewater Canal Company Ltd* [2010] EWHC 548 (Ch), [2010] 1 WLR 2576. His Lordship's use of the term "special regime" encompassed paragraphs 9 to 14 of the Code. We see the power to install overhead lines connected to existing apparatus (which may pass over third party land) at paragraph 10 of the 2003 Code as a right ancillary to the existence of a regulated relationship, and it is discussed at para 8.3 and following below. We also include within Chapter 7 discussion of the limitations on Code Operators' powers and rights under paragraphs 15 (use of relevant conduits) and 23 (undertakers' works).

[9] This is the defined meaning of "operator" in paragraph 2(1); see paragraph 1.

[10] This again is the effect of the definition of "the statutory purposes" and of "the operator's network" in paragraph 1.

(4) can only be conferred[11] by the agreement in writing of the occupier[12] of that land.

2.14 So the only effect of paragraph 2(1) in isolation from the rest of the 2003 Code (and leaving aside its relationship with paragraph 5, for example[13]) is to state that certain rights – which we called the "Code Rights" – can only be conferred in writing, and only by the occupier of the land.

What paragraph 2(1) of the 2003 Code does not do

2.15 Paragraph 2(1) does not confer anything on any person. Taken by itself, it merely states a restriction on the way that certain rights can be conferred. It is important therefore to notice that any extension of the list of rights in paragraph 2(1) (and of any equivalent in the revised Code) will not by itself give Code Operators any additional rights. Moreover, the fact that an operator has one item on the list does not give that operator any of the others; a right to keep equipment on land does not give the operator the right to enter the land to inspect or repair it – although of course the agreement conferring the right to install equipment may, and generally will, address the issue of access.

2.16 Paragraph 2(1) says nothing about the legal vehicle by which rights are conferred. Indeed, the parties themselves may give no thought to this. But in legal terms a right to keep equipment on land might be conferred by a lease or an easement (both of which are property rights) or a licence (a personal permission, often known in this context as a wayleave, and generally arising as a matter of contract – which may include many other terms). We call these the regulated relationships; so if a lease confers Code Rights, for example to install a mast and to cross the landlord's land to access it, those Code Rights will trigger the operation of the Code and the lease will be a regulated relationship. At the other end of the scale, a licence to enter land for one day to maintain a neighbouring communications site is a regulated relationship, albeit a short-lived one. The 2003 Code did not address any of the consequences of the legal form of the regulated relationships,[14] but we have taken the view that the revised Code will need to do so in places.

The functions of paragraph 2(1)

2.17 Despite its uninformative content, we can say that paragraph 2(1) has three functions.

2.18 The first is to state that that the listed rights can only be conferred in writing by the occupier of the land.

[11] We take this to be the meaning of "shall be required".

[12] Defined in paragraph 2(8).

[13] See Chapter 4 below.

[14] Some consultees drew attention to this – in particular the Central Association of Agricultural Valuers (CAAV), and Peel Holdings Land and Property (UK) Ltd who said: "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."

2.19 The second is to generate consequences. These are primarily the provisions about the effect of those rights on third parties, in paragraphs 2(2) to 2(6), which are discussed in the second part of this Chapter,[15] and the provisions in paragraphs 4 and 16 about compensation.[16]

2.20 The third function of the list in paragraph 2(1) is to be the list of rights that the court can confer upon a Code Operator under paragraph 5. And while it is not, as a matter of logic, necessary that the rights (created by agreement) that generate consequences under the Code be exactly the same as the rights that the court can impose, it is clearly convenient that they should be. Both lists are – to put it colloquially – the sort of things that are needed for the operation of electronic communications networks, and it is the integrity and smooth running of those networks that the revised Code should be promoting.

The Code Rights in the revised Code

2.21 In the Consultation Paper we proposed to retain the list of rights set out in paragraph 2(1),[17] and asked for consultees' views on that proposal and on whether the list should be extended, or its scope reduced.[18] We did so on the basis that the list would continue to have the functions that it does in the current Code – requiring creation in writing, generating consequences, and being the list of rights that can be imposed upon an unwilling landowner or occupier.

2.22 So in this first part of this Chapter we consider, in the light of consultation responses, what should be the Code Rights in the revised Code. We have to ask "rights for whom?", "to do what?" and "for what purpose?" and we have to consider how they can be conferred (reflecting the analysis of the current paragraph 2(1) at paragraph 2.13 above).[19]

Rights for whom?

2.23 This is obvious but worth stating: the Code Rights, as defined in the 2003 Code, are rights for Code Operators only. Any or all of the same rights may of course be conferred by agreement on other operators who have not had the Code applied to them, but such rights will not be Code Rights. They will not trigger the protection of the revised Code, and they will not be able to be imposed by the tribunal pursuant to the revised Code.

2.24 However, this obvious point has some practical consequences.

[15] See para 2.82 and following below.

[16] There is also a provision about registration at paragraph 2(7), to which we revert at paras 2.114 to 2.115 below, and one in paragraph 4(2) about restitution of the site. Note that the provisions of paragraphs 20 and 21, about (broadly) moving and removing equipment, are not linked with the list at paragraph 2(1) because they depend not upon the existence of rights but upon the presence of equipment on land. We discuss the way that the revised Code should deal with alterations and security for equipment in Chapter 6.

[17] Consultation Paper, para 3.16. We did omit some of the wording in paragraph 2(1)(c), as some consultees commented, but did not thereby intend to narrow the list.

[18] Consultation Paper, para 3.17.

[19] We discuss the test for the imposition of Code Rights in Chapter 4.

2.25 Electronic communications apparatus may, of course, be installed by an operator that is not a Code Operator. The legal relationship that enables that installation may be a simple permission, or it may be a lease; if the latter, it is likely to be a business tenancy subject to the security of tenure regime of Part 2 of the Landlord and Tenant Act 1954, unless the parties have contracted out of that regime. Otherwise the legal relationship will be unregulated. What happens if that operator later becomes a Code Operator? We take the view that the rights do not at that point become Code Rights. Code Rights are those that are Code Rights at the outset because they were granted to a Code Operator.[20] Agreements negotiated on the basis that Code Rights were not being granted should not have that basis changed because of a change in status of one of the parties.[21]

2.26 A different scenario arises where a wholesale infrastructure provider holds a lease of land, installs infrastructure upon it, and then confers contractual rights upon mobile operators to install antennae on the mast. The terms of the provider's lease enable (explicitly or otherwise) the installation of electronic communications apparatus; but that is not a Code Right if the infrastructure provider is not a Code Operator, and in that case that lease will not be a regulated relationship. The infrastructure provider generally has the option of seeking to become a Code Operator – that is, to have the Code applied to it under section 106 of the Telecommunications Act 2003.

2.27 But it can only do so if it falls within the provisions of section 106(4) of the Communications Act 2003, which states:

> The only purposes for which the electronic communications code may be applied in a person's case by a direction under this section are—
>
> (a) the purposes of the provision by him of an electronic communications network; or
>
> (b) the purposes of the provision by him of a system of conduits[22] which he is making available, or proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks.

2.28 The infrastructure provider will not fall within these provisions if it does not itself operate an electronic communications network, unless its mast sites also involve the presence of cable or fibre within a system of conduits. It is perhaps strange that a provider of conduits for the use by others for electronic communications apparatus can be a Code Operator, but a provider of other infrastructure cannot. We consider that infrastructure providers should be eligible to have the Code applied to them, and therefore – as a result of the recommendation we make below concerning the purposes for which apparatus is installed or kept[23] – to

[20] See our recommendation at para 2.77 below.

[21] This is particularly important in the context of the protection that is given to Code Rights; our recommendations about the removal of apparatus in Chapter 6 are dependent upon whether or not the landowner is bound by Code Rights.

[22] "Conduit" is defined in the 2003 Code, para 1(1), to include "a tunnel, subway, tube or pipe".

[23] See paras 2.58 to 2.63 and para 2.78 below.

acquire Code Rights. This would enable the Code to be applied consistently across all infrastructure providers. We have discussed this suggestion with the Mobile Operators Association, who have indicated that they would support such a development, assuming that telecoms operators would remain able to enforce Code Rights against the infrastructure provider and other Site Providers where relevant.[24] The Association commented:

> Clearly ensuring that the rights are available to infrastructure providers would ensure that an infrastructure provider managing a site has the necessary Code powers to protect the site. This should simplify the practical application of the Code in such cases and greater encourage the use of site and infrastructure sharing through wholesale providers or joint ventures, in support of the government's public policy objectives on site sharing and re-use.

2.29 **We recommend that section 106 of the Communications Act 2003 be amended so that the revised Code may be applied to a person who provides infrastructure on the same basis as it may be applied to providers of systems of conduits.**

Rights to do what?

2.30 The Code Rights are a list of actions, which we set out above at paragraph 2.12. Our provisional proposal and question about the rights to be included in that list[25] were understood by a number of consultees to relate to the scope of rights to be conferred upon operators by the revised Code; but as we pointed out above, the list of Code Rights in itself confers nothing.

2.31 Most of the consultees who directly addressed this point agreed with our provisional proposal.

2.32 A number agreed, while noting that rights should be paid for. A number made helpful comments to the effect that certain ancillary rights should arise automatically once Code Rights have been conferred (relating for example to access rights or to the right to upgrade equipment, or to the right to install a power supply). These points are examined in Chapter 3.

ADDING TO THE LIST

2.33 Some consultees argued that the list should include rights to operate electronic communications apparatus.[26] Clearly a right to keep electronic communications apparatus on land can be accompanied by an express right to operate it; arguably this is implicit in the keeping of apparatus on land. But we see the merits of the revised Code including a right to operate apparatus, in the list of rights that the tribunal might explicitly confer, for the avoidance of doubt.

[24] The infrastructure provider would normally be an occupier of land.

[25] Consultation Paper, paras 3.16 and 3.17; see para 2.21 above.

[26] Charles Russell LLP, reporting on the event of 1 October 2012, RICS, Mobile Operators Association, the UK Competitive Telecommunications Association (UKCTA), Batcheller Monkhouse and Shepherd & Wedderburn LLP.

2.34 We discuss later whether Code Operators should have an automatic right to upgrade apparatus that they are entitled to keep on land, and we conclude that they should not;[27] accordingly it is appropriate for upgrading to be a Code Right that can be conferred by agreement or imposed by the tribunal, and will then attract the protection of the Code. The same can be said for the right to connect to a power supply; this cannot be an automatic right ancillary to other Code Rights, because it is too complex to be conferred automatically – it raises issues about physical access and payment, for example. But it might be agreed expressly, or conferred by the tribunal, and so we think that it should be included in the list of Code Rights.

2.35 Other consultees wanted the Code Rights to include a right to access third party land. British Telecommunications plc (BT) said:

> it would help us to deliver and repair services faster if we could have a right to access private land, for or in connection with, the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus installed or to be installed pursuant to Paragraph 10 of the Code (so-called "flying wire" rights).

2.36 We agree that the tribunal may need to be able to confer on a Code Operator the right to access third party land.[28] Generally, access arrangements can be made by agreement, and some will be temporary so that the fact that they are Code Rights will have little practical effect. But a long-term installation may need an easement or wayleave over neighbouring land, and so the tribunal should be able to impose such a right when the test for doing so is satisfied.

2.37 The 2003 Code achieves this. Paragraph 2(1)(c) lists among the Code Rights the right to enter land to inspect apparatus kept installed upon that land *or elsewhere*, contemplating that a Code Operator whose apparatus is installed on X's land may acquire from Y, either by agreement or by order of the court, a right to enter Y's land to inspect that apparatus. So we think that that access to third party land is currently among the Code Rights; but the revised Code should make this clear.

2.38 Moreover, the definition of electronic communications apparatus[29] is wide enough to include, for example, a power line running across Blackacre to serve an installation on Whiteacre, so there is power under the 2003 Code for a Code Operator to acquire the right to install such a line.

SIMPLIFYING THE LIST

2.39 Some consultees[30] suggested that the words "the installation, maintenance, adjustment, repair or alteration" be removed, on the basis that they generate sterile argument about definitions. Arguably a right "to execute works on land in connection with electronic communications apparatus" includes those additional

[27] Save for the narrow recommendation we make at para 3.51 below.

[28] Whether such rights should be conferred automatically is a different matter, which we discuss at paras 8.67 to 8.80 below.

[29] See paras 2.48 to 2.54 below.

[30] Alicia Foo and Nicholas Vuckovic.

verbs. We agree; but of course in this Report we are not drafting the revised Code. Our recommendation below sets out our policy; the drafter of the revised Code will wish to bear in mind our suggestion that the list be kept as simple and inclusive as possible.

2.40 A different form of simplification would separate out some of the elements of the list. Currently the rights in paragraph 2(1) include a right to enter in order to do certain things, and it will be seen from our recommendation below that we have set out more directly the rights that the Code Operator may have, as well as a right to enter in order to exercise those other rights.

A RIGHT TO OBSTRUCT A NEIGHBOUR'S ACCESS

2.41 Paragraph 3 of the 2003 Code states that where a Code Operator has one or more Code Rights, that does not give the Operator the right to obstruct access to a neighbour's land. It then states that where a right to obstruct access is conferred in writing, a number of the sub-paragraphs of paragraph 2 of the 2003 Code apply. Of these, the most important are the priority provisions in paragraphs 2(2) and 2(4).

2.42 So, for example, a Code Operator that has a Code Right to install a mast on Blackacre, or to place a cabinet on the highway,[31] does not thereby have the right to obstruct access to or from Whiteacre. But if the occupier of Whiteacre allows the operator to obstruct access, that right to obstruct is for most purposes a Code Right. The right to obstruct might be a short-term permission to block a driveway onto a street, or it might be a long-term right to obstruct an easement giving access to Whiteacre across Blackacre. If conferred by the tribunal, the test for the imposition of Code Rights must be passed; again, these are not automatic rights.

2.43 We asked consultees to tell us whether a right to obstruct access to neighbouring land should bind others with an interest in that land.[32]

2.44 Consultees responded cautiously, and many were unhappy about granting wider rights to Code Operators. Some observed that such rights must not be conferred by the tribunal unless the test for their imposition is passed, and we agree. Others expressed caution about the effect of an occupier's permission on others with an interest in the land.

2.45 Cable & Wireless Worldwide Group said:

> Such right only binds for so long as the person giving consent is the occupier of the land unless the person with a superior interest agrees in writing to be bound. For the main part obstructions occur only on a temporary basis and it is therefore appropriate that the consent of the occupier only is obtained, as this will not affect the reversion. If the obstruction subsists beyond the occupation of the person giving

[31] By an arrangement with the owner of the highway; in the case of a highway maintainable at public expense, the cabinet could be installed pursuant to the rights conferred by paragraph 9(1) of the 2003 Code (see the 2003 Code, para 9(2) and paras 7.72 to 7.76 below).

[32] Consultation Paper, para 3.59.

consent or any successor to their interest, then the consent of the reversioner would be required at that point.

2.46 The majority of consultees echoed this comment, although a few (including the Mobile Operators Association and Arqiva) thought that the permission of the occupier to obstruct access should bind others with an interest in the land.

2.47 We take the view that the ability to obstruct an easement, or to obstruct access (for example, to the highway), might well be granted to a Code Operator by agreement (with those entitled to give it) or by the tribunal if the test for the imposition of Code Rights is passed, particularly where the obstruction is only temporary. For that reason we recommend its inclusion among the Code Rights. However, our discussion of priorities, below, leads us to take a narrower approach much closer to the general law than that seen in the 2003 Code and we think that the concerns of the majority will be mitigated by the position we take on the question of who can be bound by Code Rights.

THE DEFINITION OF ELECTRONIC COMMUNICATIONS APPARATUS

2.48 At the heart of the list of Code Rights is the term "electronic communications apparatus", and the scope of the Code Rights depends closely upon the definition of that term.[33] It can be set out as follows:

(1) any apparatus (which includes "any equipment, machinery or device and any wire or cable and the casing or coating for any wire or cable"[34]) which is designed or adapted:

(a) for use in connection with the provision of an electronic communications network; or

(b) for a use which consists of or includes the sending or receiving of communications or other signals that are transmitted by means of an electronic communications network;

(2) any line, defined as meaning "any wire, cable, tube, pipe or similar thing (including its casing or coating) which is designed or adapted for use in connection with the provision of any electronic communications network or electronic communications service";

(3) any conduit (which includes a tunnel, subway, tube or pipe), structure, pole or other thing in, on, by or from which any electronic communications apparatus is or may be installed, supported, carried or suspended.[35]

2.49 A "structure" is defined by the 2003 Code to exclude a building.[36]

[33] See para 2.12 above.

[34] Communications Act 2003, s 405(1).

[35] 2003 Code, para 1(1).

[36] 2003 Code, para 1(1).

2.50 In the Consultation Paper we asked for consultees' views on the definition of electronic communications apparatus.[37] It is essentially a purposive definition; as we put it in the Consultation Paper:

> This is a very general definition, with equipment defined by its purpose rather than described specifically. It is important that the range of protected apparatus should be broadly stated; the electronic communications industry is reliant upon a variety of different technologies and this is a sector where there are frequent, significant evolutionary developments.[38]

2.51 Most consultees agreed that the current definition works well. It was noted that any list of equipment "would be out of date before it is produced".[39]

2.52 Some consultees wanted a longer list.[40] For example, Dŵr Cymru Welsh Water and Mobile Phone Mast Development Ltd said:

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

2.53 Arguably, accessories or ancillary apparatus are already within the definition set out above, provided that one takes a wide view of "apparatus … designed or adapted … for use in connection with the provision of an electronic communications network". But we see the virtue of the express inclusion of items such as security features, and also – raised by some consultees – shrouding that reduces the visual impact of equipment.

2.54 The exclusion of a "building" from a structure is puzzling. Complex shared mast sites may well include, within a secure compound, buildings for air conditioning and power supply, and we take the view that these should be included within the apparatus that has the protection of the Code. Overall, the apparatus that is protected by the Code should include not only the core equipment – masts, antennae, cables, and so on – but also the additional items and facilities needed – typically within a secure area – to make it workable.[41]

[37] Consultation Paper, para 3.27.

[38] Consultation Paper, para 3.24.

[39] Tony Harris.

[40] Including Mobile Phone Mast Development Ltd, Dŵr Cymru Welsh Water, Mobile Operators Association, UKCTA, Cable & Wireless Worldwide Group (referring to plant supporting transmitting equipment), Falcon Chambers, RICS, and Batcheller Monkhouse.

[41] The potential for a Code Operator to install apparatus is not unfettered. The Electronic Communications Code (Conditions and Restrictions) Regulations 2003, SI 2003 No 2553, reg 3(3) and (5), requires a Code Operator to minimise the impact of apparatus on the visual amenity of properties and to install the minimum practicable number of items of apparatus consistent with the intended provision of electronic communications services and allowing for an estimate of growth in demand for such services.

THE DEFINITION OF "LAND"

2.55 "Land" is not defined in the 2003 Code, and it has been suggested that this might be clarified.[42] We take the view that it does not generally cause confusion; land is defined in the Interpretation Act 1978 to mean the earth together with buildings and fixed structures upon it.[43] Apparatus placed on land pursuant to the 2003 Code may or may not form part of the land.[44] However, even if it does not, it would be artificial to argue either that a wholesale infrastructure provider was not occupying land with a mast or that its customers were not doing so, in sharing the mast and keeping equipment on the ground either in standalone cabins or within the infrastructure provider's buildings.

2.56 Inevitably infrastructure providers and their customers have a wide range of different legal agreements; whether or not any given agreement contains Code Rights is a matter of construction of its terms and no generalised answer can be given.[45]

2.57 One point that does require clarification, however, is the ownership of apparatus that may have become a fixture; as we said above, the drafting of the 2003 Code leaves this unclear. We believe that the policy of the 2003 Code was to ensure that the ownership of electronic communications apparatus should not change despite its being attached to land. In most cases, this would mean that the apparatus would remain the property of the network operator or infrastructure provider in question; it would also preserve the property rights of others, for example where there is a charge in favour of a bank which financed the acquisition. We make a recommendation to effect that policy, at paragraph 2.80 below.

Code Rights: for what purpose?

2.58 Currently, rights to carry out the activities listed in paragraph 2(1) of the 2003 Code are Code Rights only if they are conferred for "the statutory purposes". This expression is defined by paragraph 1 as "the purposes of the provision of the operator's network", and "the operator's network" is further defined as "any electronic communications network or conduit system provided by that operator".[46]

2.59 This is for the most part uncontroversial. But it does mean that where an infrastructure provider which is a Code Operator (not all are, as noted above) has

[42] Wireless Infrastructure Group.

[43] Interpretation Act 1978, s 5 and sch 1: "Land includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude, or right in or over land".

[44] Under the general law, a movable item placed on land may form part of it, if it has become a "fixture"; this depends on the degree to which the item is attached to the land, and the purpose for which it was placed there. See *Elitestone v Morris* [1997] 1 WLR 687. Paragraph 27(4) of the 2003 Code states that "the ownership of any property shall not be affected by the fact that it is installed on or under, or affixed to, any land" pursuant to rights conferred by or in accordance with the 2003 Code. It is not clear what this means.

[45] For example, where a shared mast site is managed by means of a contract between the landowner and the infrastructure provider and also by agreements (sometimes leases) between the landowner and the mobile operators, each agreement may or may not contain Code Rights depending upon its terms.

[46] There are further words within the definition which are not relevant to this discussion.

the right to keep electronic communications apparatus – for example, a mast and the structure that supports it – on land but is not itself providing an electronic communications network, that right is not a Code Right and the infrastructure provider's relationship with the freeholder – which is likely to be a lease but may be a licence – is not a regulated relationship.

2.60 We have to consider whether that situation should continue. In other words, we need to ask whether the "statutory purposes" (whether or not the drafter of the revised Code chooses to use that phrase) should refer to the provision of "an" electronic communications network, rather than to "the operator's network" (meaning the network operated by the operator holding the right). A number of consultees wanted to remove the restriction to "the operator's network". Arqiva said:

> we have had direct experience of sites coming under risk where we own the infrastructure, but have no operational network apparatus. In these cases, we are left in the unsatisfactory position of having to rely upon the use of code powers by a third party, who may be unwilling, because of the liability for compensation. There are also uncertainties as to whether in such circumstances the code powers might protect a site in its entirety or be limited to the apparatus belonging to an individual operator.

2.61 We invited the Mobile Operators Association to comment on this point; they considered that reform would be beneficial:

> Infrastructure providers with Code Rights could use Code Rights (serve notices etc) for the benefit of any Code Operator using the Infrastructure. This would be simpler and more pragmatic generally than requiring multiple operators at a shared site all independently to seek to enforce Code Rights.

2.62 The Association argued that operators should still be able to enforce their own Code Rights against infrastructure providers and other Site Providers.

2.63 We think that removing the restriction to "the operator's network" would provide greater flexibility and would be consistent with the inclusion of the provision of infrastructure among the purposes for which Code Rights can be conferred.

How should Code Rights be conferred?

2.64 A number of consultees said if a right is to be a Code Right it must be conferred in writing, and we agree. This seems a useful provision for certainty.

2.65 However, the 2003 Code requires Code Rights to be conferred by the written agreement of the current occupier of the land concerned.[47] This provision perhaps reflects the original drafting, with a view to telephone wayleaves. In today's context it is in some circumstances unnecessary and in any event may be misleading.

[47] 2003 Code, para 2(1).

2.66 It is unnecessary in cases where the Code Rights are created by the granting of a property interest. If the Code Operator is granted an easement to run a cable across land, or a lease of a mast site, then such rights must be created in writing and will normally be created by deed.[48] But we agree that if a Code Right is granted by simple permission it is desirable for that permission (which can be referred to legally as a licence or wayleave) always to be expressed in writing.

2.67 The reason why the current provision may be misleading is that it may give the impression that the written permission of the occupier is enough to create a greater interest or right than that occupier is legally able to confer. This is not the effect of the 2003 Code; it does not say, for example, that a weekly tenant, being the occupier of the land, can confer on a Code Operator a ten-year lease, nor that a licensee of land can confer any property rights at all.[49] The revised Code should make this clear. Of course, provisions as to priority and as to security of tenure, which we address later in this Report, will have the effect that a Code Right will in some cases bind a landowner who would not otherwise be bound by it, but that is a separate issue.

2.68 For the purpose of defining the Code Rights, the two important points to be made are therefore, first, that they can only be created in accordance with the general law, and therefore either by the grant of a property right or by contract – the latter giving rise to a licence or wayleave. Second, where the general law does not require them to be conferred in writing, nevertheless the revised Code should require this.

PART 1 OF THE LANDLORD AND TENANT ACT 1987

2.69 Four consultees brought to our attention the interaction between the 2003 Code and the provisions of Part 1 of the Landlord and Tenant Act 1987. Those provisions can affect the grant of Code Rights by a landowner where they are granted in relation to a building containing flats occupied by, in particular, long leaseholders.[50]

2.70 Part 1 of the 1987 Act confers on the tenants of the flats rights of first refusal where the landlord proposes to make a "relevant disposal".[51] The general rule, in section 4 of the Act, is that any disposal by the landlord of his or her estate or interest in the premises constitutes a relevant disposal; but this is subject to a number of exceptions. For example, a sale of the landlord's reversion would be a relevant disposal, and the tenants of the flats would be entitled to be given first refusal to have the reversion sold to their nominee on the same terms. However, the grant of a new tenancy of a single flat falls outside that regime, and there is a list of other exceptions, such as a gift to a member of the landlord's family or to a charity.[52]

[48] Law of Property Act 1925, ss 52 and 54.

[49] This is traditionally expressed in the maxim *nemo dat quod non habet*: no one can grant an interest which exceeds his or her own.

[50] The definition of "qualifying tenants" is found in the Landlord and Tenant Act 1987, s 3.

[51] Landlord and Tenant Act 1987, s 1.

[52] Above, s 4(1)(a) and (b), (2); the example in the text is at sub-para (e).

2.71 It is a criminal offence to fail, without reasonable excuse, to comply with the requirements to give notice to leaseholders when making a relevant disposal.[53] Consultees suggested that landlords therefore seek to protect themselves against liability by serving notices on their tenants, even if it is arguable that this is not strictly required by the 1987 Act. This can delay or block the arrangement which the landlord wishes to make with the Code Operator: for example, a sub-lease of part of the rooftop for the installation of apparatus.

2.72 The Royal Institution of Chartered Surveyors (RICS) commented:

> 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.

2.73 We agree; the 1987 Act was not designed to enable tenants to veto attempts by the landlord to accommodate Code Operators on the premises. The grant of Code Rights is analogous for these purposes to the exception at section 4(2)(d) of the 1987 Act:

> a disposal in pursuance of a compulsory purchase order or in pursuance of an agreement entered into in circumstances where, but for the agreement, such an order would have been made or (as the case may be) carried into effect ... .

2.74 We consider, therefore, that the conferral of Code Rights should not be a relevant disposal for the purposes of the 1987 Act.

Recommendations

2.75 As discussed above, we are not recommending the wording of the revised Code, only the policy that it should embody; we have stayed relatively close to the wording of the 2003 Code, not least in order to make clear where we take the view that the revised Code should say something substantively different. With that in mind we bring together the various policy conclusions that we set out above in the following recommendation.

2.76 **We recommend that the revised Code should set out a list of Code Rights which, when validly conferred on a Code Operator (in writing, even if the law does not otherwise require that), or imposed by the tribunal, will be protected by the provisions of the revised Code.**

2.77 **We recommend that rights granted to anyone other than a Code Operator should not become Code Rights – and therefore should not be protected by the provisions of the revised Code – even if the holder of the right later becomes a Code Operator.**

2.78 **We recommend that the Code Rights should be:**

(1) **to keep electronic communications apparatus installed on, under or over land;**

[53] Landlord and Tenant Act 1987, s 10A.

(2) **to inspect, maintain, upgrade or operate electronic communications apparatus on land;**

(3) **to execute any works on land for or in connection with the installation or maintenance of electronic communications apparatus;**

(4) **to enter land in order to inspect, maintain or upgrade any apparatus kept installed on that land or elsewhere;**

(5) **to connect to a power supply; and**

(6) **to obstruct access to land (whether or not the land to which access is obstructed is the land on which electronic communications apparatus is installed)**

for the purposes of the operation of one or more electronic communications networks, or of providing a conduit system or infrastructure for electronic communications apparatus.

2.79 **We recommend that the revised Code should define "electronic communications apparatus" as:**

(1) **any apparatus (which includes "any equipment, machinery or device and any wire or cable and the casing or coating for any wire or cable"[54]) which is designed or adapted:**

(a) **for use in connection with the provision of an electronic communications network; or**

(b) **for a use which consists of or includes the sending or receiving of communications or other signals that are transmitted by means of an electronic communications network;**

(2) **any line, meaning "any wire, cable, tube, pipe or similar thing (including its casing or coating) which is designed or adapted for use in connection with the provision of any electronic communications network or electronic communications service";**

(3) **any conduit (including a tunnel, subway, tube or pipe), structure, building, pole or other thing in, on, by or from which any electronic communications apparatus is or may be installed, supported, carried or suspended;[55] and**

(4) **any security installations or shrouding for electronic communications apparatus.**

2.80 **We recommend that the revised Code should provide that property rights in electronic communications apparatus installed by a Code Operator do not change by reason of their being attached to land.**

[54] Communications Act 2003, s 405(1).

[55] 2003 Code, para 1(1).

2.81 **We recommend that the conferral of Code Rights should not be a relevant disposal for the purposes of Part I of the Landlord and Tenant Act 1987.**

THE PRIORITY PROVISIONS IN THE 2003 CODE

Introduction: the current provisions and their effect

2.82 The 2003 Code contains complex provisions in paragraph 2 as to who is "bound" by the Code Rights. The complexity of the provisions is such that we found – as we did on the subject of Code Rights themselves – a high level of misunderstanding among consultees. We can summarise the effect of paragraphs 2(2) to 2(4) as follows.[56]

2.83 Some are bound by Code Rights because they have agreed to the conferral of the right or because their position derives from someone who has agreed. They are as follows:

(1) the occupier who conferred the right;[57]

(2) anyone with a freehold or leasehold estate in the land who has agreed in writing to be bound by the right;[58]

(3) successors in title of interests that were owned by the occupier who agreed to the right and all those who agreed to be bound by it;[59]

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

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

2.84 Other third parties may also be bound by Code Rights. This happens where:

(1) an occupier gives a right to a Code Operator for purposes connected with the provision, to the occupier from time to time of the land, of any electronic communications services; and

(2) either:

(a) the occupier conferring the right is the freehold owner or the owner of a leasehold estate for a term of a year or more; or

[56] See also the 2003 Code, para 2(6): if a right is varied, the variation binds others in the same way as the original right.

[57] 2003 Code, para 2(2)(a).

[58] 2003 Code, para 2(2)(b).

[59] This and the categories numbered (4) and (5) here are set out in the 2003 Code, para 2(4). These interests must be created after the paragraph 2(1) rights and must be ones that do not have priority to those rights.

(b) if the occupier is not the freehold owner or the owner of a leasehold estate for a term of a year or more, a person who is the freehold owner or the owner of a leasehold estate for a term of a year or more has agreed in writing that his or her interest should be bound.[60]

Where this is the case, the right binds every person owning an interest in the land as if they had agreed in writing to it, for so long as:

(1) the occupier who granted the interest is in occupation;

(2) any person who agreed to the right being conferred is in occupation; and

(3) any person mentioned in paragraph 2.83 is in occupation.

2.85 To understand the effect of these provisions in practice, we need to examine the categories of people they identify as bound by Code Rights, and in what circumstances they are bound; and what it means to be bound, or not bound, by Code Rights.

Who is bound by Code Rights under the 2003 Code?

2.86 In order to consider whether the revised Code should replicate these provisions we have to consider their purpose and effect, which is puzzling at first sight. If they are read with leases in mind they seem – with one important exception which we discuss in detail below – to reflect the general law, because leases will in any event (subject to land registration requirements) bind successors in title to the landlord, and also derivative interests. So if X grants a 40 year lease of a mast site to CO, CO's lease will bind X2, who buys the land from X.

2.87 But the 2003 Code, carrying forward for the most part the wording used in 1984, was drafted not with leases in mind but with a view to the protection of wayleaves.[61] Wayleaves are not property rights and will not automatically bind successors in title. So the primary purpose of the provisions in paragraphs 2(2) to 2(4) of the 2003 Code is to ensure that the sort of priority rules that work automatically (subject to registration) for leases will also apply to personal rights.

2.88 However, paragraph 2(3) sets up one further rule which ensures that Code Rights are in one respect stronger than conventional property rights. It provides that in limited circumstances an occupier of land, who has allowed equipment on to the land in order to ensure an electronic communications service for him- or herself, can bind superior interests. This can only be done:

(1) where the occupier holds at least a lease for a term of one year; or

(2) if the occupier has a lesser interest (a weekly tenant, or a licensee, for example), where the freeholder or a lessee for at least a year has agreed to be bound.

[60] This summarises the provisions of the 2003 Code, para 2(3).

[61] It will be recalled that we use the term "wayleave" to refer to an agreement that does not amount to a property right, ie it is not an easement or a lease; see para 2.16 above.

2.89 In either of these circumstances superior interests are bound by the Code Rights, but only for as long as the occupier, or anyone else who is otherwise bound by the right, is in occupation of the land.

2.90 Accordingly, a weekly tenant or a licensee of land (for example, a lodger or the holder of a grazing licence) cannot bind superior interests without the agreement of at least one person who is either the freeholder or a lessee for at least a year; and can only do so in those cases where the rights are conferred in connection with the provision of electronic communications services to the occupier.

What does "being bound by Code Rights" mean?

2.91 What does "being bound by Code Rights" mean? The 2003 Code simply states that a person who is bound by a Code Right also has the benefit of the terms subject to which it was conferred, since the Code Right is only exercisable in accordance with its terms.[62] The rest of the meaning of the phrase, however, is not known as it has not been tested in the case law; but we take the view that paragraph 2(2) to 2(4) of the 2003 Code has one clear effect. Someone who holds an interest in land and is bound by Code Rights is therefore not entitled to require the removal of the apparatus concerned and cannot take any steps under paragraph 21 of the 2003 Code to enforce removal.

2.92 It is possible that "being bound by Code Rights" has a further effect, namely to prevent the person who is bound from objecting in a case where Code Rights have been granted in breach of a covenant. Suppose that T, who holds a 21-year lease of a shop, grants to a Code Operator, CO, a sub-lease of the roof space in order to install a transmitter for the sake of the service to the shop. T does this in breach of the covenant in his lease not to part with possession of any portion of the property. T's landlord, L, will be bound by that Code Right pursuant to paragraph 2(3) of the 2003 Code. It may be that that prevents L from taking action against T for breach of covenant. It may be that L is also prevented from suing CO in tort.[63] But, again, this has not been tested in the courts.

What does not *being bound by Code Rights mean?*

2.93 The converse of what we have said above is that someone who is not bound by Code Rights is free to apply under paragraph 21 of the 2003 Code to enforce the removal of the equipment.

2.94 But paragraph 21 is so protective of the Code Operator's apparatus that it may still be impossible to remove it. Accordingly, "not being bound" by Code Rights is of very little assistance to a landowner when he or she wants equipment to be removed; conversely, being bound by Code Rights cannot be said to be what prevents a landowner from getting equipment removed.

2.95 Despite that, many of the consultation responses to our question about who should be bound by Code Rights focused upon the difficulties that landowners encounter in getting equipment removed from land once they were entitled to do so – in other words, after they had recovered possession of the land on the

[62] 2003 Code, para 2(5). See our recommendation at para 2.131 below.

[63] As might otherwise be the case: see eg *Crestfort v Tesco Stores Ltd* [2005] EWHC 805 (Ch), [2005] 3 EGLR 25.

departure of a tenant or occupier who had granted Code Rights. The trouble identified by consultees was thus not paragraphs 2(2) to 2(4) but paragraph 21.

Our consultation question

2.96 We now turn to the consultation and to those responses in more detail. At paragraph 3.40 of the Consultation Paper we asked 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. Responses dealt with three issues:

(1) who can grant Code Rights;

(2) the position where Code Rights are granted by occupiers or tenants in breach of contract or of the terms of a lease; and

(3) the difficulties that are encountered in removing apparatus.

Consultees did not discuss the useful effects of these paragraphs in ensuring the continuity of wayleaves.

Who can grant Code Rights

2.97 A number of responses stressed the desirability of Code Operators' dealing with all the parties involved. The CAAV noted that one of the reasons for the inclusion of the priority provisions in the original Code was that it relieved Code Operators from having to undertake a search for the owners of all of the interests, however minor, in the land in which they sought to acquire rights. But it was pointed out to us that those seeking to invoke compulsory purchase powers are obliged to conduct such searches, and in any case the ability to find the owners of various interests in land has become easier since the reform of the system of land registration.

2.98 Code Operators themselves acknowledge that where there are multiple interests in land it is good practice to deal with the holders of as many interests as possible. Cable & Wireless Worldwide Group put it this way:

> Where [electronic communications apparatus] is installed for network purposes, we would generally seek to contract with both the occupier and superior interests (freehold) to ensure that the network can remain in situ beyond any period of occupation and indeed such network would not generally serve the occupier and/or the superior interest in any event.

2.99 The comments of the National Farmers Union (NFU) bring out the complexity of many situations:

> The NFU believes that the code rights should be created with the agreement of the occupier of the land, as they will be directly affected by the apparatus. The NFU believes that this should include the freehold owner and a long lease holder but not a short term tenant. As many tenants will be prohibited from granting such rights over the land by the terms of their tenancy, it is vital that the freehold owner is

always involved in negotiating agreements, even where there is a long term tenant on the land.

The NFU believes that code rights should not bind someone with a greater interest in the land than the person granting the rights (i.e. rights granted by a tenant should not bind a landowner).

2.100 Arc Partners (UK) Ltd commented:

> We believe that tenants should not be able to make agreements with Operators, with Landlords subsequently being bound by the Code. Aside from it seeming unfair to bind a Landlord to Code rights when they have not agreed to an installation, and probably do not even know of the installation. Practically, it complicates matters unnecessarily – in our experience, it has meant that leases (for the telecoms apparatus) have been created using false information (that the tenant had sufficient title) and it creates disputes as to whom the telecoms rent should be paid – the Landlord or Tenant.
>
> To allow a tenant to make an agreement with an Operator seems wholly unnecessary and against common law principles.

Code Rights granted in breach of contract or of a leasehold covenant

2.101 There was little sympathy with those who had granted Code Rights in breach of the terms of their own lease or occupation agreement. Cell:cm Chartered Surveyors said:

> If the Occupier has entered in to a defective lease which doesn't allow the connection of e-comms services then that should be a matter for the Occupier and its superior to resolve, without the interference of the Code.

Difficulties in getting apparatus removed

2.102 As we noted above, the vast majority of the concerns expressed about paragraphs 2(2) to 2(4), in response to our question about who should be bound by Code Rights, related not to provisions about who is bound but to the effects of paragraph 21. These included Dŵr Cymru Welsh Water and Mobile Phone Mast Development Ltd, who said:

> If an agreement is reached with an occupier on a voluntary agreement, the [Code Operator] must give notice of it to the owner by serving notice. If no notice is served, the landowner should not be bound by the agreement and the paragraph 21 provisions should not then apply: this will ensure that [Code Operators] serve notice on the landowner.

2.103 The concerns in this response, which are typical of many, are in fact two quite different issues – with whom should the Code Operator deal? And on what basis should the Code restrict the rights of landowners to get equipment removed from their land? Note that paragraph 21 at present operates where the person seeking the removal is *not* bound by Code Rights.

Discussion

2.104 We have found it helpful to separate out the issues consultees raise, and we take the view that the revised Code should address them separately and transparently. Certainly the revised Code should not duplicate the current provisions; they are too complex and their effect is opaque.

Who should be able to grant Code Rights?

2.105 Consultees were concerned about the question of who can grant Code Rights. The paragraphs that deal with the priority provisions (that is, the "who is bound" issue), namely paragraphs 2(2) to 2(4) are not about who can grant rights. The 2003 Code does not suggest that a one-year tenant, for example, can grant a three-year lease. It is and must remain the law that no-one can grant an interest greater than his or her own. We think that this is well-understood by Code Operators.

2.106 Inevitably, however, the provisions of the 2003 Code about who is bound by Code Rights do cause wayleaves to become more enduring than they would be under the general law. A lessee of land can grant a permission which will in practice confer Code Rights that will bind successors in title, and thereby endure long past his or her own period of occupation.

Who should be bound by Code Rights?

2.107 Where Code Rights are contained in a lease, we take the view that the lease itself must govern priority. Legal leases[64] bind successors in title to the lessor; leases for more than seven years must be registered at Land Registry in order to take full effect as legal leases.[65]

2.108 Where Code Rights are not contained in a lease, the legal position is that they may be granted as an easement, or they may simply be wayleaves. It may be difficult to ascertain which is which – whereas a lease for a term that requires registration is easy to identify, since a written lease will have been entered into. We take the view that it should not be necessary for the parties to have to determine whether an agreement is an easement (which will bind successors in title as a property right, subject to registration requirements) or a wayleave; so the revised Code should contain provisions that ensure that Code Rights that are not contained in a lease nevertheless bind successors in title as if they were property rights.

2.109 We see no need to provide for Code Rights to bind those who would not ordinarily be bound by prior property rights. So we do not recommend any provision to replicate the effects of paragraph 2(3) of the 2003 Code, whereby Code Rights may bind those who hold interests superior to that held by the person who granted them, subject to complicated prescribed circumstances.

2.110 As we are not making such a recommendation, it is clear that the revised Code is not giving a protected status to Code Rights where they are granted in breach of covenant. This may simply be a confirmation of the existing legal position – as we

[64] That is, granted by deed, if for a term of three years or more.

[65] Land Registration Act 2002, s 27(2)(b); 2003 Code, para 2(8); see paras 2.113 to 2.127 below.

said above, it is not clear that the 2003 Code does in fact prevent the enforcement of leasehold covenants in this way. However, despite that, where equipment has been installed pursuant to Code Rights granted in breach of covenant, as in the example set out in paragraph 2.92 above, the freeholder (in that example) has no automatic right to have it removed. Our recommendations on the subject of security for Code Rights are explained in Chapter 6, and we take the view that these continue to give Code Operators the protection that they need.

Code Rights granted in breach of contract or of a leasehold covenant

2.111 We take the view that the revised Code should make no provision about the position where Code Rights are granted in breach of a leasehold term or of any other obligation. The general law should take effect. Code Operators will be protected by the provisions for the security of apparatus which we discuss in Chapter 6;[66] but they will be better protected if they have checked the Site Provider's title and are confident that no breach of covenant is involved.[67]

The removal of electronic communications apparatus

2.112 This is addressed separately in Chapter 6, where we make recommendations for a regime that is more transparent – and better, we think, for both Code Operators and landowners – than the current provisions of paragraph 21.

The Land Registration Act 2002 and other registration requirements

Registration and the 2003 Code

2.113 The primary function of the registration of interests in land is to protect their priority – that is, to determine who is bound by them. Rights that are not interests in land are not registrable. Leases with a term of more than seven years are registrable in their own right at Land Registry;[68] easements must be noted on the register if they are to bind purchasers of registered land.[69] Leases for seven years or less are not registrable, but bind purchasers in any event;[70] where title to land is unregistered, legal easements bind purchasers in any event whereas equitable easements bind purchasers only if they are registered as Class D(iii) land charges.[71] Personal rights are not registrable and, as we noted above, do

[66] Save, of course, that where they install equipment knowing that it is a breach of the Site Provider's lease, they risk an action in tort: *Crestfort Ltd v Tesco Stores Ltd* [2005] EWHC 805 (Ch), [2005] 3 EGLR 25.

[67] In some cases the Code Operator will have no need to deal with the freeholder, because the Site Provider is a wholesale infrastructure provider who has a very long lease of the site and is trusted, within the industry, to have set up a situation where the Code Operators have no need to deal with the freeholder.

[68] Land Registration Act 2002, s 12.

[69] Above, s 13. The Land Charges Act 1972 provides for the protection of certain interests in land by enabling them to be registered in the Land Charges Register as land charges of a particular class. An equitable easement is an interest falling within Class D(iii): s 2(5). Note that in certain circumstances a legal easement may take effect as an overriding interest: see the Land Registration Act 2002, sch 3, para 3.

[70] Land Registration Act 2002, sch 3, para 1.

[71] Land Charges Act 1972, s 2(5)(iii).

not bind future owners of land unless there is a statutory mechanism to make them do so; which as we have seen, the 2003 Code provides.

2.114 Paragraph 2(7) of the 2003 Code states:

> It is hereby declared that a right falling within sub-paragraph (1) above is not subject to the provisions of any enactment requiring the registration of interests in, charges on or other obligations affecting land.

2.115 It is not clear what this means. It may mean that a lease conferring Code Rights is not registrable under the Land Registration Act 2002, but that would be a strange result because a lease is likely to contain far more provisions than just the rights listed as Code Rights. It may mean that a right to access land, amounting, say, to an equitable easement over unregistered land, will bind future purchasers of the land even though it is not registered as a Class D(iii) land charge.

Consultation

2.116 In the Consultation Paper we made a provisional proposal 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.[72]

2.117 Consultees expressed mixed views about this. One clear view was that the confusion inherent in paragraph 2(7) of the 2003 Code is unhelpful. RICS noted that:

> 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.

2.118 There was some support for the primacy of the normal registration requirements. Dŵr Cymru Welsh Water and Mobile Phone Mast Development Ltd said:

> There is no reason why rights created or granted should be exempt from the LRA 2002. It is in the public interest for the rights/obligations to be recorded on the register.

2.119 Some argued for an extension of the land registration system. The Agricultural Law Association took the view that in the interests of certainty not only should leases for longer than seven years require registration, but also that "leases for less that seven years and rights granted in agreements other than leases should be noted on the superior title". Charles Russell LLP submitted a response

[72] Consultation Paper, para 8.33.

reflecting discussions at the stakeholder event on 1 October 2012, in which it was argued that a better solution than our hybrid proposal "might be to create separate, searchable, registers to establish the location of electronic communications apparatus and to facilitate the raising of enquiries".

2.120 The Country Land & Business Association (CLA) and BT both suggested that a requirement to register would place an unwelcome administrative burden on Code Operators. The CLA added (and the Law Society made the same point) that to the best of their knowledge no material problems have yet been caused by "utility companies" not registering their rights; indeed they suggested that registration may rather cause problems for landowners where a registered Code Right is not removed from the register after it has come to an end.

2.121 The Land Registry took the view that Code Rights could, in so far as they give rise to proprietary rights, be overriding interests for the purposes of the Land Registration Act 2002. This would mean adding them to Schedules 1 and 3 to the 2002 Act.

Discussion

2.122 What the revised Code should say about registration, if anything, must depend upon what it says about who is bound by Code Rights.

2.123 We have explained, above, that leases that confer Code Rights should – to put it colloquially – look after themselves. The general law will apply; normal registration requirements should apply. Accordingly there is nothing that the revised Code need say about the registration of leases.

2.124 Other Code Rights will be conferred as easements or wayleaves. Easements are property rights and wayleaves are not, but it will often be unclear how a particular agreement is to be categorised and we do not think that it is appropriate for the parties to have to struggle to ascertain whether or not a Code Right (giving access, for example) is in fact an easement and needs to be noted at Land Registry. Instead, we are recommending that where Code Rights are conferred otherwise than in leases, the revised Code should provide explicitly for their priority.

2.125 It follows that where Code Rights are conferred otherwise than in leases, but are in fact (whether or not the parties appreciate it) property rights because they amount to easements, the priority rules in the Code should prevail.

2.126 That may, however, create an inconsistency with the Land Registration Act 2002. Some Code Rights will in fact be easements, where the Code Operator has benefitted land and the right is conferred in a form that can amount to a property right. We do not want to create a situation where a Code Right that is an easement has priority, according to the revised Code, but has lost priority for want of registration according to the Land Registration Act 2002. Accordingly we agree with Land Registry that Code Rights – necessarily, in view of what we have said above – that are not conferred by leases should be overriding interests so that they bind a purchaser of registered land whether or not they are noted on the register.

2.127 We see the force in arguments for enhanced registration requirements or even for a dedicated register of Code Rights, but we do not think that the administrative expense involved in creating an extended, or a separate, registration system can be justified.

Recommendations

2.128 We can draw the above discussion together in four recommendations.

2.129 **We recommend that where Code Rights are conferred by a lease, the revised Code should make no special provision as to who should be bound by the lease and its provisions, and should not amend or disapply the normal rules of land registration.**

2.130 **We recommend that where Code Rights are conferred otherwise than in a lease, the revised Code should provide for them to bind successors in title to the Site Provider who granted them, and those with an interest subsequently derived from the title of the Site Provider, as if they were property rights.**

2.131 **We recommend that the effect of paragraph 2(5) of the 2003 Code should be replicated in the revised Code.**

2.132 **We recommend that the revised Code should provide for an amendment to the Land Registration Act 2002 to the effect that Code Rights that amount to an interest in land, conferred otherwise than in a lease, will be overriding interests so that they are enforceable against purchasers of registered land despite not being registered.**

2.133 It will be seen that we have therefore made no recommendation for any special provision in the revised Code to bind interests superior to that of the person who granted the Code Rights. The general law – the priority rules for leases, and the analogous rules in the revised Code for Code Rights that are not contained in leases – will take effect. But landowners who are not bound by Code Rights will nevertheless be subject to some restrictions on the ability to remove electronic communications apparatus, which we discuss in Chapter 6.

CHAPTER 3
ANCILLARY RIGHTS AND OBLIGATIONS

INTRODUCTION

3.1 In Chapter 2 we discussed Code Rights and who is bound by them.

3.2 In the Consultation Paper we gave some consideration to the extent to which the revised Code should provide for rights and obligations that flow automatically from the existence of one or more Code Rights. Some of these are at the heart of the provisions of the 2003 Code, in particular the provisions about the priority of Code Rights (as discussed in Chapter 2) and payment (which we address in Chapter 5). But we have to ask whether the existence of Code Rights should generate additional rights and obligations that concern what is actually done on land. For example, if a landowner agrees with a Code Operator that the latter can keep a mast on a site, does that agreement by itself entitle the operator to share that mast with another operator, or to have access to the mast site? And does the right to keep the equipment on land place the Code Operator under an obligation to insure the site, for example? The 2003 Code makes no such provision, and we have to ask whether it should do so.

3.3 We look first at the question of assigning rights; then we consider sharing and upgrading together, as they raise similar issues. We then consider more generally a range of other possible ancillary rights and obligations such as access and insurance.

THE ASSIGNMENT OF CODE RIGHTS

3.4 The 2003 Code treats Code Rights as initially bipartite, conferred by an occupier of land upon a Code Operator, and then makes provision for other people to be bound by them. It does not entertain the possibility of more than one Code Operator being involved.[1]

3.5 The commercial and corporate world of Code Operators has moved on, and their business structures have evolved. There have been many instances of one operator taking over another's business, or merging, or wishing to assign agreements to subsidiaries and so on. Yet the 2003 Code regulates bipartite agreements and situations and makes no allowance for the addition or substitution of different business entities. Site sharing is also an important feature of electronic communications networks, allowing for fewer masts and the consolidated use of infrastructure.

3.6 A concern that we heard before publication of the Consultation Paper was that Code Operators wished to be able to share equipment with other Code Operators, and to assign Code Rights, without having to seek the permission of the Site Provider, and without having to pay more. Contractual terms often prevent assignment and sharing without the permission of the Site Provider, which is generally given only for consideration.

[1] Save to a limited extent in para 29 of the 2003 Code, discussed at paras 3.29 and 3.53 below.

3.7 In the Consultation Paper, we asked questions about assignment and sharing.[2] Here we look first at assignment, because sharing raises more complex and technical issues.

3.8 We asked in the Consultation Paper whether Code Operators needed to have a general right to assign Code Rights (so that a term in an agreement that restricted their ability to do so would be void) and whether they should have to pay additional consideration to the Site Provider for doing so.[3] We noted that where Code Rights are contained in leases, the lease itself may or may not be freely assignable; if it is not, it may contain a qualified covenant against assignment (preventing assignment without the lessor's consent) or a fully qualified covenant (preventing assignment without the lessor's consent, such consent not to be unreasonably withheld). Section 19 of the Landlord and Tenant Act 1927 converts a qualified covenant against assignment (or parting with possession of the premises) into a fully qualified one; but it has no effect upon a prohibition.

Consultation responses

3.9 This is an issue on which the interests of landowners and of Code Operators may be simply irreconcilable. The National Farmers Union (NFU) said:

> The NFU believes that Code Operators should not benefit from a general right to assign the benefits of their agreements. Where the operator wishes to have such a right it should be expressly recorded in the agreement with the landowner; the fact that there is such a right can then be taken into account when compensation is agreed.
>
> If Code Operators are to benefit from a general right to assign code rights then it is essential for there to be an additional payment to the Landowner.

3.10 In contrast, Level 3 Communications (UK) Ltd supported a right to assign to affiliate companies within a corporate group to "enable considerable simplification of legal entities and … reduce the administrative burden faced by landowners". Geo Networks Ltd suggested the introduction of a more general right to assign to another Code Operator:

> We believe that rights should be included in a revised code to allow the seamless transfer of rights between Code Operators without delay. We suggest a standard form notice for Code Operators to issue to landowners that includes a requirement to demonstrate the transferee Code Operator:
>
> (1) is registered with Ofcom, holding Code Powers; and
>
> (2) is sufficiently creditworthy to take on the obligations being transferred.

[2] Consultation Paper, paras 3.79 to 3.94.

[3] Consultation Paper, para 3.92.

> This is particularly relevant under the Government's vision for Next Generation Access networks in Britain and consistent with the approach taken by the European Commission. In procurements, it is common for a procuring authority to take ownership or control of a network either immediately or after a period of time. The authority might then appoint another Code Operator to run the network. Provided a Code Operator meets the basic criteria above, a landowner should not be entitled to withhold consent to the transfer. In all cases, the transfer rights must be quick and efficient and most importantly not disrupt the continuity of service for customers.
>
> We see no basis for an additional payment to landowners for these rights.

3.11 The Mobile Operators Association summarised their position as follows:

> (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.

3.12 Some consultees[4] felt that it was not right that a Site Provider, who was content to deal with one Code Operator, should have to deal with a different one. There was specific concern that an assignee might be in a weaker financial position, and thus less reliable when it came to performance of the Code Operator's obligations under the agreement. A number of consultees mentioned Ofcom's transfer of the Orange licence to Everything Everywhere Ltd, and said that problems had arisen from that.

3.13 However, others felt that the market was already allowing assignment. Telecoms Property Consultancy Ltd (TPCL) said: "In practice the vast majority of telecoms agreements have the right to assign the whole." The Bar Council pointed out that assignment may be impossible to prevent:

> We do recognise that Code Operators are often merged or taken over, so that there is an alteration in effective ownership which a landowner cannot prevent, and that this may be becoming more frequent.

[4] For example, the Law Society.

3.14 Others noted that assignment may lead to the presence of multiple Code Operators, and that the Site Provider's ability to remove them might therefore be compromised. Ian S Thornton-Kemsley observed:

> Once a right to assign a Code power is granted it may be assigned to more than one entity. There is no reason in principle to deny that it could be assigned to three, or to any number of operators; with every increase in the number of co-occupants, the additional burdens and the problems of construing and applying any existing written agreement would be further aggravated.
>
> The effect of an assignation to two or more operators may for example introduce a new Code Operator on to the site and accordingly affect the landlord's reversion due to the provisions of the Code.

3.15 Similarly, Babcock International Group plc said:

> Babcock's principal concern with this is preventing another Code operator from getting access to its land such that there may be two sets of Code Rights to be dealt with.

Discussion and recommendations

3.16 We begin by making it clear that we recommend no provision that might change existing agreements, negotiated and priced on a particular basis. In what follows we refer only to agreements entered into, and Code Rights created, after the introduction of the revised Code.[5]

3.17 We also distinguish assignment from sharing. In discussing assignment, we mean simply the case where one Code Operator comes to stand in the shoes of another Code Operator; not where a second Code Operator joins the first on site.[6] And we are discussing assignments only to Code Operators, who have therefore been approved by Ofcom to have the Code applied to them.[7] So assignment is a narrow concept.

3.18 Code Operators are invariably corporate bodies whose ownership may change and which may be the subject of purchase or amalgamation. An agreement with a Site Provider may prohibit assignment from one Code Operator to another, but still leave room for the effect of assignment to be achieved through corporate re-shaping; hence the impression among many consultees that assignment happens as a matter of fact, even where it is legally and practically undetectable.

[5] See paras 1.43 to 1.44 above.

[6] Depending on the terms of the lease or other arrangement assigned, the assignee may make different usage of the site than the assignor; and if it permits sharing, or the recommendation we make at para 3.51 below applies, the assignee may take advantage of the ability to share.

[7] Communications Act 2003, ss 106 and 107; see also a statement issued by the Director General of Telecommunications, *The Granting of the Electronic Communications Code by the Director General of Communications* (10 October 2003) p 48, available at http://stakeholders.ofcom.org.uk/binaries/telecoms/cop/ecc.pdf (last visited 20 February 2013).

3.19 We are impressed by the arguments of Code Operators to the effect that assignment may be necessary for external reasons.[8] It is arguable that in these circumstances the assignment need make no difference to the Site Provider and should not be prohibited, nor made subject to a price. We distinguish that proposition clearly from situations where Code Operators amalgamate, and seek to pay one rental where previously they have paid two (even though two agreements remain in effect), or where Code Operators wish to assign some but not all their rights on a particular site so as to achieve sharing. We address sharing separately below.

3.20 Assignment, conceived of narrowly in this way and contrasted with sharing, should not be a means for landowners to extract profit from the system. A change of Code Operator in itself should in most cases be immaterial to the Site Provider.[9]

3.21 We note consultees' concerns that the Site Provider may not be satisfied that the assignee is in the financial position to take on and perform satisfactorily the Code Operator's obligations under the lease or other arrangement. Since the assignee will be in all cases a Code Operator which has had the Code applied to it by Ofcom, we are not convinced that this is a realistic concern. So far as leases are concerned, the provisions of the Landlord and Tenant (Covenants) Act 1995 are designed to mitigate this sort of concern. That Act provides that although the assignor is released from liability under the covenants in the lease on assignment[10] the landlord may require the assignor to enter into an "authorised guarantee agreement". This is an agreement, by which the assignor guarantees the performance of the tenant covenants by the assignee; the terms are regulated by the statute, so that the guarantee is limited to the period during which the assignee holds the tenancy.[11]

3.22 The revised Code will need to make specific provisions as regards the assignment of other agreements conferring Code Rights, in order effectively to pass on the burden to the assignee. For example, the Code Operator to whom a wayleave is assigned should be responsible for the payment of rent for the period after the assignment, not the assignor.

3.23 It is also important that Site Providers should be kept informed about assignment. We therefore make a recommendation that the Code Operator will not cease to be liable for the performance of its obligations under the lease or other arrangement unless it has given notice to the Site Provider.[12]

[8] See the comments of Geo Networks Ltd at para 3.10 above.

[9] There are cases where a wholesale infrastructure provider has a special pricing deal for a particular customer. Terms as to payment are not Code Rights and we do not think that the recommendations we make below will prevent pricing arrangements or discounts that are specific to individual Code Operators. Contrast a penalty clause, or a clause which seeks in substance to prevent assignment by providing for enhanced fees from assignees.

[10] Landlord and Tenant (Covenants) Act 1995, ss 3 and 5; s 24 excepts liability for breaches arising before assignment.

[11] Landlord and Tenant (Covenants) Act 1995, s 16.

[12] In such a case, the liability of the assignor would be joint and several with the assignee.

3.24 **We recommend that the revised Code should provide that in relation to an agreement or lease that confers Code Rights and is entered into after the implementation of the revised Code, a Code Operator shall be entitled to assign all the benefit of the agreement, or the lease as the case may be.**

3.25 **We recommend that the revised Code should provide that any term in an agreement or lease between a Site Provider and a Code Operator that prevents, restricts, or requires payment for the assignment to another Code Operator of all the Code Rights conferred by the agreement shall be void, except for a term in a lease that requires the tenant to enter into an authorised guarantee agreement within the meaning of section 16 of the Landlord and Tenant (Covenants) Act 1995.**

3.26 **We recommend that the revised Code should provide that where a Code Operator assigns an agreement conferring Code Rights, other than a lease, to another Code Operator, the assignor shall have no liability for breaches of obligations under the agreement which occur after the agreement has been assigned, subject to the following recommendation.**

3.27 **We recommend that the revised Code should provide that on the assignment of the benefit of an agreement or the lease pursuant to the recommendations made above:**

(1) **either the assignor or the assignee shall give notice to the Site Provider of the identity, and address for service, of the assignee; and**

(2) **the assignor shall not be released from its obligations under the agreement or lease until this notice has been given (notwithstanding the provisions of section 5 of the Landlord and Tenant (Covenants) Act 1995).**

3.28 In Chapter 9 we make recommendations about the form of notices under the revised Code.[13] In Chapter 5 we make recommendations about the consideration to be payable to Site Providers. We do not want the assignability of Code Rights to raise prices generally, and so we make a corresponding recommendation at that stage about the consequences of our recommendations about assignment.[14]

THE UPGRADING AND SHARING OF ELECTRONIC COMMUNICATIONS APPARATUS

3.29 Regulation 3(4) of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 states that operators "where practicable, shall

[13] See paras 9.122 and 9.123 below.

[14] See para 5.83 below.

share the use of electronic communications apparatus".[15] That is an obligation upon operators, and not upon landowners. Sharing between operators is also envisaged at paragraph 29 of the 2003 Code, which concerns the effect of the Code on agreements between operators as to the sharing of apparatus.[16] But again, it does not override requirements to obtain the landowner's consent for the additional operator's use of the apparatus.[17]

3.30 It is common for agreements – whether leases or not – to restrict the ability of Code Operators to share equipment, or to upgrade it. They may impose an absolute prohibition, or require the consent of, and generally a payment to, the Site Provider. Again, where leases are concerned, section 19 of the Landlord and Tenant Act 1927 operates to convert qualified covenants against parting with possession of the demised premises, or improving them, into fully qualified covenants, so that the consent required cannot be unreasonably withheld by the landlord. But the section has no effect upon a prohibition, and it is not clear to what extent a Code Operator's sharing or upgrading of equipment would fall within the wording of the section.

3.31 The term "sharing" is used in various different senses. Code Operator A, which is occupying a site with a mast or conduit, may allow Code Operator B to install physical apparatus there, or to have access to the existing apparatus to route its electronic communications network (for example, for its customers' mobile phone calls). Sharing in a wider sense – A's infrastructure being used for B's business – may effectively be achieved by a variety of methods, subject to the terms of the agreement with the Site Provider where relevant. If Code Operator X is purchased by Code Operator Y, yet retains its corporate identity, the contractual arrangement with a Site Provider may be unchanged yet it may seem that an assignment has taken place; if Y then uses X's mast, that may seem like sharing, rather than the expansion of the Code Operator which is on site.

3.32 The question is whether the Code should make special provision to permit sharing of apparatus – say, a mast, or a conduit – irrespective of the terms of the agreement with the Site Provider.

3.33 Very similar considerations arise concerning the upgrading of apparatus, and so we group the two issues together here. Upgrading may be purposive, where the Code Operator expands the use of existing apparatus: for example, to transmit wireless signals on a different frequency or to pass increased traffic along a fibre. It may also be physical: for example, the replacement of copper wire with optical

[15] See also Article 12 of the Framework Directive (Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services), which concerns the ability of national regulatory authorities to impose the sharing of electronic communications facilities or of property. The issue of site and infrastructure sharing has been expressly included in governmental planning policy guidance for several years: see Department for Communities and Local Government, *National Planning Policy Framework* (March 2012), paras 43 to 45 (which has superseded *Planning Policy Guidance 8: Telecommunications* (August 2001)), available at https://www.gov.uk/government/publications/national-planning-policy-framework--2 (last visited 20 February 2013).

[16] See Consultation Paper, paras 3.81 and 3.82. The other operator need not be a Code Operator: 2003 Code, para 29(1), (5) and (6).

[17] See also Communications Act 2003, s 134, discussed at paras 3.55 to 3.59 below.

fibre, or one antenna with another. In a wider sense, upgrading may amount to adding apparatus to a site: an extra antenna, or more fibres within a duct, enabling the Code Operator to increase its capacity.

3.34 Again, there may be restrictions within the agreement with the Code Operator on its ability to upgrade equipment. And even where a right is conferred without limitation (for example, to install, keep and alter apparatus), it may not be clear that upgrading would be permitted in the future (depending on the definition of "alter"). The question is, therefore, whether the revised Code should make special provision about this so as to enable upgrading even where an agreement with a Site Provider forbids it.[18]

3.35 We asked questions about both sharing and upgrading in the Consultation Paper, again seeking consultees' views as to whether or not Code Operators should have the automatic right to share or upgrade their equipment.[19]

Consultation responses

3.36 Predictably, the questions attracted diametrically opposed views from landowners and from Code Operators and those who represent them. The "Code Operator members" of RICS said:

> 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.

3.37 Batcheller Monkhouse and the "landlord members" of RICS said, of sharing:

> 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

[18] As discussed, these are questions only about agreements entered into after the enactment of the revised Code.

[19] Consultation Paper, paras 3.78 and 3.83.

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.

3.38 Landowner consultees cited the need to be able to control what is happening, and who is present, on their land, and their right to consideration for changed arrangements. Ian S Thornton-Kemsley produced extensive evidence of the "payaway" deals currently in place to provide for consideration for sharing and consolidation. Arqiva presented their perspective as both a landlord and a tenant:

> As a landlord we are one of a number of infrastructure companies whose businesses are based on granting contractual rights to Code Operators to install network equipment. The core business model of such companies is that contractual revenues are typically linked to the level and type of equipment installed as well as the wider rights granted and so a proposal to grant ancillary rights to upgrade without a charge will cut across this and so damage such businesses. This is also a practical issue when upgrades take place in that it may be necessary to upgrade or strengthen the infrastructure as a result and the costs of these enhancements will have to be recovered from the relevant Code Operators.
>
> As a tenant we, of course, recognise the desire to upgrade equipment … . However … the relationship and contract with the landlord is usually with the first operator, or now often a wireless infrastructure company. The lease may contain restrictions on upgrading equipment, usually to trigger an additional rental payment and the agreement with the first operator or radio site management company may also make provision for payments, linked not so much to the right to use or occupy land, but for additional services and management fees. It would therefore be wrong for any revised code to allow either of these governing contracts to be circumvented without payments being made in line with those contracts.

Discussion and recommendations

3.39 What is very clear to us is that – quite apart from the commercial realities of the deals already agreed in the market place, and the impossibility of disturbing these – in the majority of cases both the sharing and the upgrading of electronic communications apparatus have serious technical implications. This means, with an exception that we discuss below, that they cannot be permitted as a matter of course by way of an ancillary right for Code Operators.

3.40 The upgrading of equipment – usually the substitution of equipment, sometimes the addition of more – generally involves physical change. Changing an antenna may or may not have implications for the structural integrity of the mast. Upgrading may mean a change to a base station or to a power supply. The possibilities are so complex that no general provision can make an automatic right to upgrade either feasible or safe.

3.41 The same goes, in general, for sharing. Many masts, for example, are not built to be shared and cannot simply have additional antennae added on, or different antennae substituted. Furthermore, sharing may have implications not merely for the Site Provider but also for the other Code Operators already using the mast.

3.42 So in general, it is not possible for Code Operators to have an automatic right to share or to upgrade equipment. Such rights must be negotiated for, or granted by the tribunal; it may be right for there to be additional consideration payable, depending upon the market itself. The same goes for rights to maintain and repair equipment, which cannot be conferred automatically; the range of technical implications, from access to safety to structural integrity, is such that automatic rights cannot be given and it is for the parties to negotiate them or for the tribunal to confer them.

Rights to share and upgrade in the revised Code

3.43 Set against those technical considerations, however, there is a concern that the lack of automatic rights may generate problems. As the UK Competitive Telecommunications Association (UKCTA) put it:

> 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.

3.44 Shepherd & Wedderburn LLP agreed:

> We believe that Code Operators should indeed benefit from an ancillary right to upgrade their apparatus. It is a very important right particularly with advances in technology which cannot be foreseen at the point of entering into any agreement (or having a court decide the terms of occupation in terms of Paragraph 5). We often come across landowners or occupiers refusing access, except at a ransom price, for Code Operators to upgrade their equipment when in fact the proposed upgrade has no detrimental effect on the landowner or occupier (in terms of taking up additional space). Such a right would allow faster rollout of new technology and increase the capacity of the existing apparatus and allow, for example, 4G services to be rolled out more quickly on a wider scale without delays or reaching stalemate with some landowners or occupiers.
>
> … We do believe that Code Operators should benefit from a right to share their apparatus with another, overriding any contractual terms. This is particularly the case as new technology may well mean less additional equipment is involved in sharing. It would allow additional Code Operators to share at lower costs and therefore offer services at lower cost to customers.

3.45 We take the view that there may be an exception to the concerns expressed in paragraphs 3.37 to 3.38, in that there are clearly identifiable cases where upgrading and sharing have no physical implications at all and cannot be seen because they are physically confined to a space controlled by the Code Operator. The obvious example is the addition of fibre in a duct or sub-duct, which can be achieved by simply "blowing" the fibre without impact on the land.

3.46 Ted Mercer put it like this:

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

3.47 This is an area where mast sites and cable give rise to very different considerations because of the difference both in structure and in visual intrusion. Geo Networks Ltd presented the cable/fibre perspective on sharing and upgrading, saying:

> Last year BT launched its product for duct and pole access, known as Physical Infrastructure Access, or "PIA". Operators using this product who lay their own fibre in BT's ducts should not be required to acquire their own wayleaves where BT already has permission to install apparatus. It would be helpful if an updated version of paragraph 29 of the Code could make clear that if a Code Operator obtains a right to install and keep its apparatus, which apparatus comprises both duct and cable, then any other Code Operator which installs its cable (copper, coax or fibre) within the existing duct, should not be required to seek a <u>new</u> right of way, but merely submit an intention to install notice. This is crucial in order to make infrastructure sharing, as promoted by the European Commission, Ofcom and the Government, viable in practice.
>
> … In many cases, an upgrade itself should not warrant an additional payment. For example, when a Code Operator blows additional fibre through ducts already in situ on land, there is no intrusion, no detriment to the landowner and no increase in the physical presence of the apparatus. Multi-tenanted buildings are another example where landlords often grant rights solely in respect of one tenant and one floor of the building. These practices would never be accepted in similar industries like electricity and water (in particular an electricity company would not have to pay to provide services to additional occupants in a multi-tenanted building). The Code should include express rights for operators to upgrade their apparatus without having to make additional payments unless there are clear grounds for compensation as a result of the upgrade.

3.48 We think that the situation where sharing or upgrading take place within the confines of a duct, or even of a cabinet on land, without physical or visual impact

on the Site Provider, without requiring a power supply or the addition of an antenna for example, and without conferring Code Rights on additional Code Operators, ought to be permitted. These are cases where there is no possible additional burden on the Site Provider and no technical or safety issues. If, in the case of sharing, the additional Code Operator requires Code Rights, it can negotiate these independently with the Site Provider, or apply for them to be imposed by the tribunal.

3.49 We have heard from Nabarro LLP that this would be consistent with the expectations of its landowner clients:

> 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.

3.50 Again, we do not consider that this additional right should raise prices, and so we make a corresponding recommendation when we discuss the consideration payable for Code Rights.[20]

3.51 **We recommend that the revised Code should provide that in relation to an agreement or lease commencing after the implementation of the revised Code:**

(1) **a Code Operator shall be permitted to upgrade or share electronic communications equipment within a physical structure of which the Code Operator has exclusive possession provided that the sharing or upgrading**:

(a) **cannot be seen from outside that structure, and**

(b) **imposes no burden on the Site Provider; and**

(2) **a term in an agreement, or in a lease between a Code Operator and a Site Provider shall be void if it prevents, or imposes an obligation to pay for, such upgrading or sharing of electronic communications equipment.**

3.52 Sharing, in this sense, of course generates no Code Rights because the additional Code Operator allowed on to the site because of this limited permission to share does not have any legal relationship with the Site Provider. The latter is bound by the same Code Rights as before, and once he or she is entitled to have apparatus removed he or she will encounter the provisions about removal which we discuss in Chapter 6 and which will replace the current

[20] See para 5.83 below.

paragraph 21.[21] It is important to ensure that where sharing has been allowed automatically, by way of exception to the general rule and within the confines of another structure, the Site Provider is not required to deal with an additional Code Operator. So where Operator 1 has shared its ducts with Operator 2 under the provision that we have recommended, the duct remains protected under the provisions we discuss in Chapter 6. But once the Site Provider has the right, under those provisions, to have the duct removed, he will be entitled to have it removed as a whole, along with Operator 2's fibres. The same would apply where the structure in question is a cabinet containing equipment.

Paragraph 29 of the 2003 Code

3.53 Paragraph 29 of the 2003 Code seeks to facilitate sharing between operators, by providing that the 2003 Code is not to be taken as limiting the sharing of apparatus installed by a Code Operator pursuant to an agreement with another operator. These provisions implement requirements of EU law regarding the sharing of apparatus between operators, and it is important that the revised Code is at least equally responsive to those requirements.[22] Whether this is done by way of a similar provision will depend on the structure adopted for the revised Code.

3.54 **We recommend that the revised Code should include provisions with the same effect as paragraph 29 of the 2003 Code.**

Section 134 of the Communications Act 2003

3.55 In the Consultation Paper we explained that section 134 of the Communications Act 2003 – which is not part of the 2003 Code – may be relevant to the sharing of electronic communications apparatus.[23] It applies where:

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

3.56 Where the section applies, the effect of the prohibition or restriction is modified in relation to things done inside a building occupied by the lessee or for purposes

[21] See para 6.76 and following below.

[22] Paragraph 29 is based on the Telecommunications Act 1984, s 10(3A), (3B) and (3C), inserted by the Telecommunications (Licensing) Regulations 1997 pursuant to the implementation of Directive 97/13/EC of the European Parliament and of the Council on a common framework for general authorisations and individual licences in the field of telecommunications services (the "Licensing Directive") and Directive 97/33/EC of the European Parliament and the Council on interconnection in telecommunications with regard to ensuring universal service and interoperability through the application of the principles of Open Network Provision (ONP) (the "Interconnection Directive"). As part of the implementation of the five Directives adopted by the European Union in 2002 (see para 1.17 above), those subsections were repealed by the Communications Act 2003 and re-enacted, with amendments, as paragraph 29 of the 2003 Code.

[23] Consultation Paper, paras 3.85 to 3.88.

connected with the provision to the lessee of an electronic communications service. Instead, the prohibition or restriction takes effect as though it were subject to the need for the landlord's consent, such consent not to be unreasonably withheld. We took the view that section 134 turns an absolute prohibition on sharing into a fully qualified covenant.

3.57 We asked to what extent consultees found section 134 to be useful in enabling apparatus to be shared, and whether further provision would be appropriate.[24] There were few responses to this question and many of those who responded said that they had no experience of the provision. But the Mobile Operators Association said: "This section is not useful to Code Operators in relation to sharing." The Central Association of Agricultural Valuers (CAAV) and Peel Holdings Land and Property (UK) Ltd said:

> 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.

3.58 The British Property Federation commented:

> We are not aware of any instances where section 134 has been used. It is usual practice for a landlord to permit competition between Code operators to provide services to the direct benefit of their tenants. In the unlikely event that this does not occur and where there may be a prohibition in a tenant's lease we can see the benefit of landlords having to be reasonable in considering whether or not to grant consent.
>
> In this context we would raise the issue of good spectrum management within the context of a shopping centre, airport or other multi-occupied large commercial premises where it should be considered reasonable for a landlord to refuse consent in the interests of good estate management, e.g. to avoid frequency conflicts between tenants and landlord WiFi systems.

3.59 Our reading of section 134 was to some extent speculative; and consultation points us to the view that it may not be directly relevant to sharing, but that it may have other functions. We therefore make no recommendation about this provision.

OTHER RIGHTS AND OBLIGATIONS FOR CODE OPERATORS

3.60 At paragraph 3.94 of the Consultation Paper we asked whether the revised Code should give to Code Operators any ancillary rights, and at paragraph 3.19 we asked whether it should generate obligations for Code Operators. These questions are the converse of the ones we asked about the Code Rights themselves. In creating ancillary rights and obligations the revised Code would be setting up a list of rights that would be conferred upon Code Operators, and

[24] Consultation Paper, para 3.88.

burdens imposed upon them, automatically by virtue of their having one or more Code Rights, whether or not they were expressly conferred.[25]

3.61 Consultees responded to these questions with some detailed suggestions.

Ancillary rights for Code Operators

3.62 As to ancillary rights for Code Operators, suggestions included rights of access, rights to operate equipment, the right to connect to a power supply, and emergency access. Some argued for a right to cross a third party's land in order to maintain equipment or indeed for safety purposes; Cable & Wireless Worldwide Group said:

> We have experienced being held to ransom (over passing over a third party farm track to a land locked radio site where urgent maintenance was required) on account of the fact that the Code has no express compulsion; although we would construe this to be implied for such purpose … whilst the court has discretion in respect of granting such a right … given the urgency in such cases this is not the most practical solution and as such, we are aware of ransoms being offered for one off urgent access.

3.63 Arqiva cited the need under health and safety regulations for a 50 metre drop zone around masts – a requirement that did not exist when some of the older masts were erected.

3.64 We do not think that it is realistic to suggest that the revised Code could impose, for the benefit of existing equipment, such rights for Code Operators on third parties; it would be difficult to specify the extent of access over third party land that might be conferred automatically, and in any event it would not be right for such a right to arise by compulsion without the test for its imposition being passed.

3.65 The Mobile Operators Association argued for additional rights to enable third parties to provide services, and to have local authorities close roads in emergencies. Emergency access was another theme. Arqiva referred to the major fires which occurred at its masts at Peterborough and Oxford; in both cases it had been able to arrange the access it needed, but concern was expressed about the potential for landowners to hold operators to ransom in these situations. Geo Networks Ltd said:

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

[25] The rights conferred by existing paragraphs 10 and 19 of the 2003 Code against third parties, which are not part of the regulated relationship with a Site Provider, are discussed at paras 8.3 to 8.16 and paras 8.53 to 8.66 below.

3.66 Shoosmiths LLP, among others, argued against ancillary rights of access:

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

3.67 We agree. The difficulty encountered by all the suggestions for ancillary rights is the impossibility of catering, in the revised Code, for the precise rights required. It is not practicable to specify the details of access, even in emergencies, without having the details of the site itself; and what is appropriate for a mast site serving half of a town may be wholly inappropriate for a cable serving a single property. The more complex the site, the more complex the rights required – and indeed the more sophisticated and able to negotiate the Site Provider is likely to be. Infrastructure providers are inevitably the most sophisticated Site Providers; they offer an impressive range of services and are well aware of Code Operators' need for security, access, power and other facilities. They and the operators they serve are well able to negotiate the rights and obligations needed.

3.68 Clearly a private Site Provider is in a very different position; he or she will not have the technical expertise of the commercial infrastructure provider. In these situations it is for the Code Operators to explain and negotiate provision for the rights they need, including emergency access.

3.69 Similarly, where Code Rights are conferred by the tribunal, additional terms can be added; the 2003 Code provides for this in paragraph 5(4), and in Chapter 4 we recommend a similar provision in the revised Code.[26] Ancillary rights can be imposed expressly where the tribunal has conferred Code Rights.

Obligations for Code Operators

3.70 Landowner consultees had strong views about ancillary obligations for Code Operators. Suggested obligations covered insurance, access, repair and reinstating,[27] compliance with safety and security measures. Some related to issues that are part of a Code Operator's legal obligations in any event, in particular health and safety. Some consultees' concerns were about compensation, with which we deal in Chapter 5. The British Property Federation

[26] See para 4.53 below.

[27] Paragraph 4(2) of the 2003 Code, which obliges a Code Operator to restore land in certain circumstances, is discussed at para 6.124 below.

said that Code Operators "should have to provide a bond to guarantee that redundant equipment will be removed", and the CAAV made the same suggestion. There was also a suggestion that Code Operators have an obligation to provide information to those who are to be affected by Code Rights.

3.71 Others sounded a note of caution. The Law Society was concerned about an obligation to insure:

> There are concerns in relation to this particular example that this may unwittingly lead to potential double insurance problems (where the owner also has insurance).[28]

3.72 Surf Telecoms summed up as follows:

> 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.

3.73 Cable & Wireless Worldwide Group said:

> The majority of wayleaves (consents in writing) entered into by operators including their standard terms (as a starting point) contain obligations on their part for e.g. our standard form contains restrictions as to exercise of the rights so that they are exercised in a manner that does not cause undue disturbance and that reasonable notice is given (save in the case of emergency) where works need to be undertaken; they provide for adequate insurance, to keep the [electronic communications apparatus] in a safe condition, to comply with planning etc and to make good damage. Rights granted by way of leases will on the whole contain standard full repairing insuring and usual tenant's covenants etc. The Code could not cover a full set of covenants in the Landlord & Tenant forum, but operators are unlikely to object to obligations as to standards of exercise, maintenance and due process as to notice etc in the majority of forms of consent.

3.74 We agree with these views. The range of obligations required is too detailed and too fact-specific for the Code to provide them. The answer to landowners' concerns about obligations upon Code Operators is to point out the extent of obligations under the general law; the implications of the Code's provisions about compensation, which mean that if a site is damaged or surrounding land is devalued then the Code Operator must compensate the landowner; and the opportunity that the parties have to negotiate appropriate terms. Indeed, it could be said to be a corollary of the recommendation that we make in Chapter 5 about market value consideration that Site Providers must themselves take responsibility – as responsible Code Operators will also do – for negotiating

[28] The same concern was raised by the City of London Law Society.

terms and conditions that are appropriate to the site and its surroundings, to the equipment involved, and to the Site Provider's own property.

3.75 Again,[29] when Code Rights are imposed by the tribunal it is important for the tribunal to impose appropriate terms and conditions for the exercise of the rights.

3.76 In Chapter 9 of this Report we make a recommendation addressed to Ofcom about optional standard form agreements which may prompt the parties to use well-drafted and comprehensive terms.[30] More importantly, we make a recommendation about a code of practice,[31] with the objective of ensuring good practice among both Code Operators and landowners as to the terms of agreements and the way in which they are negotiated.

[29] See para 3.69 above and para 4.53 below.

[30] See para 9.132 below.

[31] See para 9.140 below.

CHAPTER 4
THE TEST FOR THE IMPOSITION OF CODE RIGHTS

INTRODUCTION

4.1 We have seen in the earlier Chapters of this Report that the basis of the 2003 Code is the regulation of consensual relationships, and we have made it clear that we expect that basis to be reflected in the revised Code. However, another essential function of the 2003 Code is to provide for the compulsory grant to Code Operators of rights over land.

4.2 In the 2003 Code, this is achieved through paragraph 5, which provides that the rights described in paragraphs 2 and 3 can be conferred on a Code Operator by the court, on the basis of the test set out in paragraph 5(3). Accordingly, where a Code Operator requires a wayleave and the landowner's consent is not forthcoming, application can be made for that consent to be dispensed with. Where, say, a tenant of land has granted permission for a wayleave but the freeholder is unwilling to do so, and is not automatically bound under the provisions of paragraphs 2(3) or 2(4), the Code Operator can apply to the court for the freeholder's consent to be dispensed with.

4.3 Clearly the revised Code must provide for rights to be conferred on Code Operators against the wishes of landowners in some circumstances. We use the language of compulsion rather than of "dispensing with agreement", as the latter expression is unnecessarily opaque. The language of the revised Code should make it clear what is happening; this is indeed a compulsory overriding of an owner's right to control the use of his or her land. We bear in mind throughout the requirements of Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms, which requires that a deprivation, or control of use, of possessions should be in accordance with the law – that is, in accordance with the terms of the revised Code[1] – and in the public or general interest.

4.4 There is a clear public interest in the provision of electronic communications services. That fact is not, however, the end of the story; the means – the interference with possessions – used must be proportionate to achieve that aim. A fair balance must be struck between the community interest and the individual's rights, and several factors are relevant. These include the provision of compensation, the conduct of the state, the conduct of the individual, the effect of the interference on the individual, the strength of the benefit to the wider community and whether the measure effecting the interference has retrospective effect.[2]

[1] The interference must have a basis in national law which is accessible, sufficiently certain and provides protection against arbitrary abuses: R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 18.114, citing *The Former King of Greece and Others v Greece* (2000) 33 EHRR 21.

[2] Above, paras 18.118 to 8.119.

4.5 In Chapter 9 we conclude that the most appropriate forum for disputes regarding the imposition of Code Rights is the Lands Chamber of the Upper Tribunal. In this Chapter we discuss first the test to be applied by the tribunal as the basis of compulsion; we then make some further observations as to the legal consequences of the imposition of Code Rights.

THE CURRENT TEST FOR THE IMPOSITION OF CODE RIGHTS

4.6 Paragraph 5(3) of the 2003 Code states that the court "shall make" an order imposing Code Rights:

> if, and only if, it is satisfied that: any prejudice caused by the order–
>
> (a) is capable of being adequately compensated for by money; or
>
> (b) is outweighed by the benefit accruing from the order to the persons whose access to an electronic communications network or to electronic communications services will be secured by the order;
>
> and in determining the extent of the prejudice, and the weight of that benefit, the court shall have regard to all the circumstances and to the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services.

4.7 We discussed this test in the Consultation Paper.[3] One of our concerns was the fact that it is apparently possible for a landowner's consent to be dispensed with on no other basis than that he or she can be adequately compensated in money.[4] We expressed doubt as to whether this was appropriate, bearing in mind in particular the requirements under the European Convention on Human Rights that interference with possessions be proportionate and that the public interest be weighed against prejudice to individuals.

4.8 Where money cannot adequately compensate the landowner, the current test requires the court to balance the prejudice to the landowner and the public benefit, bearing in mind that "no person should unreasonably be denied access to an electronic communications network or to electronic communications services". We referred to this in the Consultation Paper as the Access Principle;[5] it appears only to be relevant to paragraph (b) of the test. The logical consequence is that, since paragraph (b) is an alternative to paragraph (a), an order can be made under paragraph (b) even if the prejudice to the landowner cannot be adequately compensated in money.

[3] Consultation Paper, paras 3.41 to 3.52.

[4] This is because the effect of paragraph 5(3)(a) appears to be that if the court is satisfied that the prejudice to be caused by the order can be compensated in money, it "shall make" the order without taking into account further considerations, and therefore without balancing the public benefit against the private prejudice.

[5] Consultation Paper, para 3.45, noting the terminology of "overriding principle" used by the Chancellor of the High Court in *Geo Networks Ltd v The Bridgewater Canal Company Ltd* [2010] EWCA Civ 1348.

4.9 We noted that the Access Principle is unclear; in particular, it poses but does not answer the difficult questions of what constitutes an unreasonable denial of access – or a reasonable denial. It is also, arguably, obsolete. Indeed, it may have been virtually obsolete when first drafted, in view of the fact that every property, or very nearly every property, in the UK has a telephone service via a landline.[6]

4.10 The tests used where rights are granted to the traditional utilities generally involve balancing public and private rights.[7] In relation to water, gas and electricity, rights may be acquired by the standard compulsory purchase procedure in the Acquisition of Land Act 1981.[8] Overriding a landowner's rights in this way requires a substantial public interest.[9] In the case of electricity, a wayleave for an electric line may be acquired by grant from the landowner or by application to the Secretary of State; here, the test is whether it is "necessary or expedient to install and keep installed an electric line through or over land".[10] If the matter proceeds to a hearing, evidence is given as to why this is necessary or expedient, and the effects of the electric line on the use and enjoyment of the land in question.

4.11 Only water undertakers are given the right to lay pipes without the permission of the landowner and without going through a procedure to acquire the right compulsorily, although "reasonable notice" must be given.[11] The undertaker may, however, be subject to a financial sanction if it exercises those powers unreasonably, causing the landowner to sustain loss or damage, or be subject to inconvenience.[12] In considering such a complaint, the Water Services Regulation Authority will take into account any contravention of the water undertaker's Code of Practice.[13]

4.12 In the Consultation Paper, we also discussed the tests used in Australia, Canada and Sweden for the compulsory acquisition of rights to install electronic communications apparatus.[14] All of these regimes use a procedure based on

[6] This observation was made to us by the Central Association for Agricultural Valuers (CAAV) in discussion.

[7] See, generally, Consultation Paper, Appendix A.

[8] Acquisition of Land Act 1981, ss 10 to 15; see Electricity Act 1989, sch 3, para 5; Water Industry Act 1991, s 155(4); Gas Act 1986, sch 3, para 4. These rights are often referred to as "statutory easements"; they are not true easements since they can exist without a dominant tenement.

[9] See *Prest v Secretary of State for Wales* (1982) 81 LGR 193, cited with approval by the Supreme Court in *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20, [2011] 1 AC 437 at [10]; Office of the Deputy Prime Minister, *ODPM Circular 06/2004: Compulsory purchase and the Crichel Down Rules* (October 2004), para 17 ("compelling case in the public interest"), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7691/1918885.pdf (last visited 20 February 2013).

[10] Electricity Act 1989, sch 4, para 6(1).

[11] Water Industry Act 1991, s 159(1).

[12] Above, s 181(4). The maximum fine is £5,000.

[13] Submitted to the Secretary of State pursuant to the Water Industry Act 1991, s 182.

[14] Consultation Paper, Appendix B.

weighing the public interest against private interests, as a last resort when commercial negotiations have failed. In Sweden, for example:

> A utility easement may not be granted if the purpose ought appropriately to be provided for in another way or the inconveniences of the grant from a public or private viewpoint outweigh the benefits which can be gained through it.[15]

4.13 Thus the starting point for reform must, we think, be that the test balances public and private rights. But the current test is – rightly – criticised as complex and difficult to understand and apply. One of the functions of the Code is to provide a backdrop against which parties can negotiate to create Code Rights by agreement, without resort to the tribunal. The difficulties and uncertainties inherent in paragraph 5(3) of the 2003 Code mean that parties have little guidance as to the test the tribunal would apply for the imposition of Code Rights. This makes it more difficult to reach agreement, and thus impedes the provision of services.

OUR CONSULTATION

The question in the Consultation Paper

4.14 In the Consultation Paper we asked 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, and focused on three particular issues:

(1) whether, where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised Code, it should 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) whether it should 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; and

(3) how a revised Code should express the weighing of prejudice to the landowner against the benefit to the public, and whether and how the Access Principle should be amended.[16]

4.15 We asked these three different questions in order to tease out views about the detail of compulsory access to land. We now look at these issues in turn.

[15] Utility Easements Act 1973, s 6, available at https://www.kth.se/polopoly_fs/1.158498!/Menu/general/column-content/attachment/Utility_Easements_Act.pdf (last visited 20 February 2013) and A Victorin, "Electronic plumbing – building the telecom infrastructure" in P Steipel (ed) *Law and information technology: Swedish views, an anthology produced by the IT Law Observatory of the Swedish ICT Commission* (2002) p 169, available at http://www.itkommissionen.se/dynamaster/file_archive/030116/7e0e41f75b311025949bac25873c241e/Swedish%20Views%20antalogi%20rapport.pdf (last visited 20 February 2013).

[16] Consultation Paper, para 3.53.

Should it ever be possible to impose Code Rights upon a landowner where monetary compensation is not adequate?

4.16 A number of consultees said that this should not be possible.

4.17 Some consultees felt that it was very unlikely that a situation would arise where monetary compensation was not possible. The National Farmers Union (NFU) said:

> As the code deals with rights to install apparatus on land, it is unlikely that there will be a situation when compensation cannot be sufficient.
>
> In the event that such a situation did arise the NFU believes that the operator should be required to show that there will be a very significant public benefit as a result of the proposal.

4.18 RICS said: "We cannot envisage a situation where a landowner expresses the view that no amount of compensation would be adequate." However, we agree with those who pointed out that there will be occasions when the visual effect of equipment, perhaps on a site of natural or architectural interest, will be such that monetary compensation cannot make up for the damage done. The National Trust noted that:

> Whilst certain specific types of land (such as sites of special scientific interest and conservation areas) are given certain protections under the Regulations (as discussed below), it is important to recognise that some special places that do not fall within these precise categories need protection. It is important for the Code to contain a statement recognising the value generally of our country's landscapes and scenery.

4.19 These cases will indeed be rare; as one consultee pointed out,[17] generally the planning system will prevent them. But we think that it must be important to address, in the revised Code, those rare cases where money will not be an adequate compensation, and provide that in those cases Code Rights will not be imposed. As Shoosmiths LLP put it:

> A landowner has a legal estate in land and is entitled to enjoy the benefit of its own asset or to adequate compensation if such rights are to be fettered. If it is not possible to adequately compensate then no order should be made. It is likely that such a scenario would be extremely rare in practice but that does not mean to say that the possibility would not arise and the fact that it is unlikely should not be a reason to include it in the Code in the first place.

4.20 What of the case where the site in question is the only one by which it is possible to get a particular form of electronic communications to an area or community, the landowner resists, money will not be an adequate compensation, and as a result that area will be denied access to those particular electronic communications services? We think this scenario is highly unlikely. It is implausible that the two unlikely cases – a unique site, and a site of such an

[17] Ted Mercer.

unusual nature that money will not make up for the presence of communications equipment – will coincide. If they do, the area or community will be denied access; and this is consistent with the position under the 2003 Code, which does indeed imply that there will be cases where it is reasonable for someone to be denied access to electronic communications. As Lewison J put it in *The Bridgewater Canal Co Ltd v Geo Networks Ltd*:

> 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.[18]

4.21 One situation where money cannot compensate for the grant of Code Rights is where the installation of apparatus would contravene statutory provisions that relate to the use of the land. We have in mind concerns raised by consultees about land used by other undertakers, such as those providing water and drainage services.[19] Clearly, Code Rights cannot be granted by the landowner where that would be illegal. Paragraph 27(1) of the 2003 Code provides that the Code "does not authorise the contravention of any provision made by or under any enactment passed before" the Telecommunications Act 1984, and an equivalent provision should be included in the revised Code. But in addition, the test for the imposition of Code Rights should not be passed where money could not compensate the landowner because the installation would be illegal due to the statutory provisions governing the operation of the undertaking.

4.22 We leave the final word on this with Surf Telecoms:

> 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.

Cases where money can adequately compensate the landowner

4.23 Many consultees were unhappy about the current test which apparently enables – indeed, requires – Code Rights to be imposed without the tribunal having regard to any further matters if money is an adequate compensation for the imposition of the rights.

4.24 Arc Partners (UK) Ltd said:

> … it seems unfair for a court to make an order as long as the Landowner receives some money, when there is little/no public

[18] [2010] EWHC 548 (Ch), [2010] 1 WLR 2576 at [28].

[19] For example, Dŵr Cymru Welsh Water noted that water undertakers and sewerage undertakers may not dispose of protected land (or any interest or right in or over protected land) without the consent of the Secretary of State, unless in accordance with a general authorisation given by the Secretary of State: Water Industry Act 1991, s 156. Protected land is land which originated with the statutory water companies, or has been acquired for purposes connected with water or sewerage functions.

> benefit, and the Landowner is clearly not motivated or satisfied with financial recompense.

4.25 The British Property Federation put it like this:

> We do not believe that the fact that the landowner can be adequately compensated (by the sum that the Code Operator could be asked to pay under a revised code) should be sufficient in itself for the Tribunal to make the order sought. An order should be dependent both on there being a sufficiently weighty benefit to the public interest and on the payment of adequate compensation. If the public benefit is small then it would be wrong to enforce code rights and cut across legitimate interests in property simply because some compensation can be made. If a landowner's rights are to be breached then there has got to be a significant degree of public benefit to justify this.

4.26 We agree. It is difficult to assess the effect of the test in the 2003 Code because it has so rarely been litigated; but it is clear that the revised Code must embody a test that balances the public benefit against the loss or damage to the landowner. The availability of compensation by itself is not an adequate test for the future.

Reform of the test for the imposition of Code Rights

4.27 So what test should the revised Code prescribe for the imposition of Code Rights by the tribunal? That test will only be relevant if money will provide adequate compensation, because we have concluded that if monetary compensation is impossible, Code Rights should not be imposed.

A more stringent test?

4.28 Our question about the test to be used in the revised Code provoked a wide range of views. Some consultees wanted a more stringent test than that found in the 2003 Code, requiring significant and demonstrable benefit to the public. The Central Association of Agricultural Valuers (CAAV), and Peel Holdings Land and Property (UK) Ltd, said:

> 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 … .

4.29 David King stated that:

> Our view is that there should only be extreme circumstances in which landowner's or occupier's consent should be dispensed with.

4.30 Some advocated a test of necessity. Varying views were expressed as to whether the test for the imposition of Code Rights should be more or less stringent than those applicable to the traditional utilities.

4.31 Cell:cm Chartered Surveyors argued:

> Under the current code, the burden falls with the landowner to demonstrate that his detriment outweighs the public benefit. This is an extremely difficult proposition for a landowner and one which could be costly. … [A Code Operator] should not use compulsory acquisition simply to make its network more profitable. The dominant aim is to better society as a whole.

A unique site?

4.32 Some consultees suggested that the Code Operator should have to prove that the site in question is unique, being the only one that would enable the provision of a service to an area. Telecoms Property Consultancy Ltd (TPCL) said:

> The operator should be required to test that there is no reasonable alternative to the land or property in question, as under planning law. Why should one rooftop or plot of land be blighted by a telecoms installation when an adjacent property is not?

4.33 If this test were adopted, we would also have to determine whether the site must be unique in the sense that it is the only way to get any service at all to an area, or the only way to deliver a service by the particular Code Operator in question. In either sense, we think that this requirement is impracticable and too stringent. For one thing, it would be very hard to satisfy, because sites are rarely unique (in either sense). For another, it would be likely to produce stalemate in a case where perhaps two or three sites or routes were possible; none could be shown to be unique and so Code Rights could not be imposed on any of the potential Site Providers.[20]

Compulsion only where there is no other service?

4.34 Some consultees suggested that we consider whether access should be imposed in any case where there are already services being provided. This links to another concern; the current test is geared to a situation where a "First Service"[21] is required. But in reality in a mature network there are very few "not spots"; access may be wanted not to "a" service, but to a choice of services or to an improved service. UK Competitive Telecommunications Association (UKCTA) commented:

> 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 [the] 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

[20] The test used for electricity wayleaves, which hinges on whether it is "necessary and expedient" to install and keep the apparatus on the land, was suggested by Alicia Foo and Nicholas Vuckovic. We prefer a more explicit balancing exercise between public and private rights.

[21] This term was used in the response of Wireless Infrastructure Group.

> 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 [Code Operators], landowners and customers.

4.35 The Mobile Operators Association argued:

> We are happy with the current two-limb structure of the Access Principle and the way in which the court is directed to make an order when implementing it. However, we feel that the wording of the Access Principle, in particular the second limb and the balancing exercise the Court is directed to have regard to in weighing the prejudice to the landowner against the benefit to consumers, is outdated in that it is concerned solely with securing access to communications services.
>
> As reflected in public policy, the quality and coverage of communications services is of paramount and increasing importance. This should be reflected in a revised Access Principle which recognises that, in today's world, customers expect to be able to choose which Code Operator's network to connect to for the provision of their communications services. Customers have high expectations of their networks of choice, demanding a high quality service; such services can only be provided by a robust, advanced and first rate network.

4.36 We take the view that it should be possible to impose Code Rights even where there is not a "First Service" (or "not spot") situation; the functions of the Code in preserving and facilitating electronic communications generally must be seen also as extending to the promotion of good quality services and choice. On the other hand, this aim should not be overriding; where there is already a choice of providers for an area, it may not be appropriate to introduce another. The CAAV and Peel Holdings Land and Property (UK) Ltd both said:

> It is the public's access to electronic communications that matters, not the interests of any specific operators.
>
> … 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?

4.37 The test for the imposition of Code Rights is in practice far more likely to be relevant where Code Rights have expired, and the landowner is resisting their renewal, than in cases where there have been no Code Rights before. To have a test that assumes a "not spot" would be futile and could lead to a reduction in established services; where the first Code Operator to extend services to an area wished to renew its Code Rights, it would become unable to satisfy such a test where another Code Operator had since begun operating in the area. So the test

must make it clear that compulsion is possible in the interests not only of a single provision of a service to an area, but also in cases where there is a need for a higher quality service or for a choice of services.

RECOMMENDATIONS FOR THE IMPOSITION OF CODE RIGHTS UNDER THE REVISED CODE

4.38 In the light of consultation responses and of the points made above, we make recommendations for the test, under the revised Code, for the imposition of Code Rights. We then go on to comment upon the effect of any order made by the tribunal, in terms of the legal relationship between Site Provider and Code Operator and the latter's status on the land, and on some consequential provisions that the revised Code needs to make. Finally we comment briefly on procedure.

The test for the imposition of Code Rights

4.39 We take the view that if there is to be a test, it must be possible for cases to fail. Whatever test is provided for in the revised Code, it must not be one that will be satisfied, even arguably, in all cases. However, we have rejected the view that the Code Operator must be required to show that the site or route in question is unique, in that no other one will do; and the view that the site or route must be required in order to deliver a "First Service" to an area or community. We have indicated that the test must make allowance for the importance of the quality of the service to be delivered, and of choice.

4.40 There must also be an explicit consideration of the public benefit and a weighing of that benefit against the loss or damage to the landowner.

4.41 The framing of the new test must also be done with a view to the range of Code Rights that may be granted. What is in issue is not only a right to lay a cable across a field, but also a right to install a mast on the field or upon a rooftop. The test in the 2003 Code has only been used, so far as we are aware, to impose rights to lay cables and never, in reported litigation at least, for mast sites.[22] Moreover, the consequence of what we have recommended about the definition of electronic communications apparatus in Chapter 2 is that Code Rights include a right to install cables or antennae, and also to install conduits (as under the 2003 Code) and infrastructure. The test must be sufficiently stringent to ensure that there is a true public benefit when apparatus is installed against a landowner's wishes (although we recognise that it is unlikely that a Code Operator would seek to install apparatus where public benefit is absent).[23]

[22] This has further implications: generally where a mast is erected the Code Operator has a lease of the land concerned. We revert to this at para 4.49 below.

[23] A point made by, for example, Telecoms Property Consultancy Ltd (TPCL). We also note the provisions of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003, reg 3(5). We think it unlikely in practice that the revised Code will be used by wholesale infrastructure providers to obtain Code Rights against the wishes of landowners. The contractual and proprietary arrangements required by wholesale providers are complex and commercially specific, proceeding typically from protracted negotiation, and we think it unlikely that the wholesale providers would wish to have the terms of their agreements created through, or vulnerable to, litigation.

4.42 Finally, the new test must take into account the grounds on which, in accordance with the recommendations we make in Chapter 6, a Site Provider may resist the renewal of Code Rights. It would not be appropriate for apparatus to be installed in circumstances in which a Site Provider would have grounds to give notice for its removal, under the provisions we recommend to take the place of paragraph 21 of the 2003 Code.[24] Again, it is unlikely in any case that Code Operators would wish to install apparatus in such circumstances.

4.43 **We recommend that the revised Code should enable the tribunal to grant one or more Code Rights to a Code Operator, or to make an order that one or more Code Rights shall bind a landowner, if:**

(1) **the prejudice to the landowner can be compensated in money; and**

(2) **the public benefit that is likely to be derived from the making of the order outweighs the prejudice to the landowner, bearing in mind the public interest in access to a choice of high quality electronic communications services;**

provided that none of the grounds for bringing Code Rights, or the lease conferring them, to an end which are specified in the recommendation at paragraph 6.110 below are made out by the landowner.

The legal effect of an order imposing Code Rights

4.44 The recommendation we have made above uses the concept of Code Rights, the list of rights examined and recommended in Chapter 2.[25] The tribunal's order may be for the grant of one Code Right or of a number of Code Rights, depending upon the nature of the Code Operator's requirements. The Code Operator's application may not be entirely successful if the test for the imposition of Code Rights is satisfied in respect of some but not of all the rights it has applied for.

4.45 So the tribunal's order may give the Code Operator the right to install a cable under land, or a mast on a field or a roof top, or to obstruct access, temporarily or permanently, to land other than that on which its apparatus is sited. The order may not confer rights at all; it may be that Code Rights have already been granted by agreement and that what is needed is for those Code Rights to bind (in other words, to have priority to the interest of) someone who would not ordinarily be bound by them: for example, a tenant, where the freeholder has granted the rights,[26] or the freeholder where the tenant or an occupier has created a wayleave.

4.46 In nearly all cases, further terms and conditions will be needed. Paragraphs 5(4) and 5(5) of the 2003 Code make provision for the court to impose terms and conditions, including terms to minimise loss or damages to those with an interest in the land, and the revised Code will need to contain similar provisions. In particular, the tribunal will in all cases have to consider the duration of the rights

[24] See para 6.76 and following below.

[25] See paras 2.12 to 2.18 below.

[26] Because if the lease is granted to the tenant before the Code Rights are granted, the tenant's lease will have priority over the Code Rights in the ordinary way; see paras 2.107 to 2.110 above.

to be granted, and the consideration payable in cases where that is appropriate.[27] Moreover, we explain in Chapter 6 the necessity for terms as to early termination, for example where the Site Provider wants to redevelop the land or indeed to repair buildings on the land.[28] We make a specific recommendation about this, below, in order to ensure that these points are drawn to the tribunal's attention.

4.47 One issue that we did not raise explicitly in the Consultation Paper is whether the imposition of Code Rights by the court in the 2003 Code can result in, or amount to, the grant of a lease or easement, or whether it can only ever amount to a wayleave (that is, a bare right to do something or keep something on land, without any interest in the land[29]). It has been argued that the latter is the case, on the basis that the Communications Act 2003 contains powers of compulsory purchase[30] and that if a Code Operator is to have a freehold or leasehold estate in land those powers must, or should, be used.[31]

4.48 We think the distinction to be drawn here is between acquisition and grant. The 2003 Code enables the court to grant Code Rights, but it does not in terms enable the court to order the transfer of a freehold, and it is unlikely that the transfer of a freehold, or the assignment of a lease, could be seen as among the "terms and conditions" that the court can impose alongside the Code Rights. If the Code Operator does wish to acquire the whole or part of the landowner's freehold or existing lease, then the compulsory purchase provisions should be used. We are not aware of this having been done, and we are aware that Code Operators view those provisions for compulsory acquisition as being too procedurally cumbersome.

4.49 The Telecommunications Act 1984 was enacted in order to create and regulate the market in landline telephone services, and it is likely that it was drafted with only wayleaves in mind. No fundamental changes were made in 2003 to the provisions of Schedule 2 to that Act, and so the 2003 Code reads as if the rights to be granted by the court are likely to be wayleaves. But we have noted that the Code Rights might include the right to install a mast on land, and that consideration must in every case be given to the duration of the Code Rights conferred on the Code Operator and imposed on the landowner. It is likely that in some cases the Code Rights, together with the terms and conditions imposed by the court, give the Code Operator exclusive possession of the land concerned, for a term, and therefore amount to a lease.[32] Indeed, in many cases the grant of a lease will be what the Code Operator wants; and the landowner too may take the view that if Code Rights are to be imposed, he or she wishes to be in the position of landlord (with the associated rights, in particular to remedies for

[27] As to consideration, see Chapter 5 below.

[28] See paras 6.65 to 6.68 below.

[29] See para 1.27 above.

[30] Communications Act 2003, s 118 and sch 4: this provision applies where "land … is required by the operator (a) for, or in connection with, the establishment or running of the operator's network; or (b) as to which it can reasonably be foreseen that it will be so required". Authority is required from the Secretary of State, with the consent of Ofcom; the Acquisition of Land Act 1981 is applied.

[31] N Taggart, "Thinking Outside the 'Phone Box?", lecture given at the RICS Telecoms Forum Conference 2012, 14 November 2012, paras 2.10 and 2.11.

[32] *Street v Mountford* [1985] AC 809; *Ashburn Anstalt v WJ Arnold & Co* [1989] Ch 1.

breaches of leasehold covenants) rather than the Code Operator having a simple wayleave.

4.50 In such cases the parties are likely to make it known to the tribunal whether or not a lease is wanted, and the tribunal will be astute to consider, in the context of the terms and conditions to be imposed on the parties, whether or not a lease is being created and, if so, to ask the parties to make representations as to its terms. In practice it is likely that the parties will present the tribunal either with an agreed draft lease or with competing drafts.

4.51 In reality it will be rare that a lease is forced upon the Site Provider. The dispute between Site Provider and Code Operator is generally not about whether or not the Code Operator should have access to land (by way of a lease or otherwise) but what the rent should be. A lease is potentially a more interactive relationship than a wayleave (inasmuch as a mast site requires more maintenance and access than does a buried cable); the more active co-operation is required, the more reluctant the Code Operator will be to seek to impose that relationship against the Site Provider's wishes.[33]

4.52 Finally, the 2003 Code provides in paragraph 5(7) that rights imposed by the court "shall have the same effect and incidents" as rights conferred by agreement and shall be able to be released or varied by agreement; the revised Code needs to include similar provision.

4.53 **We recommend that the revised Code should contain provisions corresponding to those contained in paragraphs 5(4), 5(5) and 5(7) of the 2003 Code as to the terms and conditions on which Code Rights are imposed and as to the effect of the imposition of those rights.**

4.54 **We recommend that the revised Code should require the tribunal to consider in every instance the duration of the Code Rights to be imposed and whether terms and conditions should be imposed, in the interests of the Site Provider, as to early termination of the Code Rights or as to any right to require the Code Operator to reposition, or temporarily to remove, electronic communications equipment in any circumstances.**

The procedure for the imposition of Code Rights

4.55 The procedure for the imposition of Code Rights will largely be governed by the rules of the Lands Chamber of the Upper Tribunal. But the revised Code will need to make provision, analogous to that found in paragraph 5 of the 2003 Code, for the service of notice on the landowner where Code Rights are sought. Here we note one specific issue raised by consultees about the notice procedure where Code Rights are sought.

4.56 British Telecommunications plc (BT) said that paragraph 5(2) of the Code causes unnecessary delays where the Site Provider has clearly and immediately rejected its notice requiring agreement:

[33] Perhaps that is why the court apparently has never been asked to force a lease on anyone under the 2003 Code.

> Currently it is necessary to give 28 days' notice under Paragraph 5. Often the Para 5 notice is served following lengthy negotiations with the landowners. The landowners in question often reject the notice out of hand immediately. We must then wait for the expiry of the 28 day period before issuing proceedings. Delays could be minimised by permitting issue of proceedings immediately upon receipt of the rejection.

4.57 BT also suggested that the period for giving the required agreement following receipt of a paragraph 5 notice be reduced from 28 days to 14 or 21 days. We do not consider a reduction in this time limit appropriate. This is a reasonable amount of time for the landowner to make a decision. But we agree that if the landowner has rejected the notice then there seems to be no merit in an enforced waiting period for the Code Operator.

4.58 **We recommend that under the revised Code a Code Operator should be free to initiate proceedings for the imposition of Code Rights as soon as its notice requiring the grant of Code Rights has been rejected by the landowner.**

4.59 In Chapter 9 we make some recommendations about consistent notice periods under the revised Code, about the provision of information to landowners at this stage, and about the issues that might be covered by a code of practice. These would meet other concerns expressed by consultees about the procedure under paragraph 5 of the 2003 Code.

CHAPTER 5
PAYMENT FOR RIGHTS UNDER THE GENERAL REGIME

INTRODUCTION

5.1 The 2003 Code is primarily about the regulation of consensual agreements. However, as we have seen, it provides for the compulsory granting of rights to Code Operators under paragraph 5, and in Chapter 4 of this Report we made recommendations about the compulsory grant of rights in the revised Code. Paragraph 7 of the 2003 Code sets out the payments that are to be made when regulated relationships are imposed on landowners. Inevitably the provisions of paragraph 7 also colour the negotiation of the financial aspects of consensual agreements that are going to be regulated by the 2003 Code. The 2003 Code makes further provision for compensation, in paragraph 4 and elsewhere.

5.2 We have to consider how, if at all, payment should be regulated under the revised Code. We begin by explaining the 2003 Code provisions on payment; then we discuss, and make recommendations about, first consideration and then compensation. This Chapter focuses on payment for rights under the General Regime; in Chapter 7 we consider the provisions of the 2003 Code for payment in relation to the special regimes.[1]

THE 2003 CODE PROVISIONS ON PAYMENT

5.3 The provisions in the 2003 Code relating to financial awards concern mainly payments by Code Operators to Site Providers and third parties: compensation for a defined group, and consideration in addition for a smaller group. In some circumstances, Code Operators may be eligible to receive compensation. Those instances are discussed below.[2]

Compensation and consideration

5.4 The term “compensation” is used in the 2003 Code to indicate a payment that compensates for a loss. There are two main cases.

(1) Reduction in the value of land because it has become subject to a right. The value of the land subject to the acquired right may be less than it was beforehand, in which case the difference may be payable in compensation.

(2) Loss or damage sustained as a result of the exercise of rights. This would include the cost of disruption to a business, or physical damage to a building, caused by an installation.

[1] In particular, in relation to the linear obstacles regime in the 2003 Code, paras 12 to 14.

[2] See paras 5.116 to 5.117 below.

5.5 Consideration is something more than compensation, and can be best described as a "price" for the grant of rights. The 2003 Code states that consideration is to be assessed as a figure that "would have been fair and reasonable if the agreement had been given willingly".[3] We discuss this further below.[4]

Entitlements to compensation and consideration under the 2003 Code

5.6 As noted above, in some cases the 2003 Code makes provision for the payment of both compensation and consideration; in others, only compensation is payable.[5] We can summarise the categories of those entitled to payment from Code Operators under the General Regime of the 2003 Code as follows:

(1) Site Providers on whom Code Rights are imposed by the court;

(2) persons who are bound by Code Rights;

(3) persons who suffer depreciation in the value of an interest in neighbouring land;

(4) persons who are required by a Code Operator to lop trees that overhang a street; and

(5) persons who are entitled to require the removal of a Code Operator's apparatus.

Site Providers

5.7 Under paragraph 7 of the 2003 Code, compensation and consideration are both payable to those against whom Code Rights are created under the General Regime.[6] So, for example, if a Code Operator wishes to site a mast on A's land in such a way as to block the access from B's neighbouring land, consideration and compensation will be payable by the Code Operator to both A and B, as appropriate.[7]

(1) Under paragraph 7(1)(a), "fair and reasonable" consideration is payable.[8]

(2) Paragraph 7(1)(b) specifies that the court's order must include appropriate terms to ensure that such persons "are adequately compensated … for any loss or damage sustained by them in

[3] 2003 Code, para 7(1)(a).

[4] See paras 5.15 to 5.20 below.

[5] There is no provision in the 2003 Code for compensation and consideration to be payable to persons who create Code Rights by agreement, or who agree to be bound by Code Rights; but of course they will not create the rights or give their agreement unless they receive the payments that would be theirs if an order was made under para 5. See further para 5.82 below.

[6] Whether directly under the 2003 Code, para 5, or as a result of another landowner's application for alteration of apparatus under para 20. Note generally the 2003 Code, para 7(4) and (5), concerning the court's powers in relation to the payment of awards and the possibility of referring issues to, for instance, arbitration.

[7] To A in respect of the right under the 2003 Code, para 2, and to B in respect of the right to block access under the 2003 Code, para 3.

[8] See paras 5.4 to 5.5 above and paras 5.15 to 5.20 below.

consequence of the exercise of those rights". Loss can include diminution in the value of the land affected by the rights or of other land.[9]

5.8 Code Rights may be imposed after a period during which the person in question would have been entitled to have the apparatus removed if it were not for paragraph 21 of the 2003 Code. The court is directed to take any such period into account "to such extent as it thinks fit" in assessing the financial award.[10]

5.9 Where there is an entitlement to both compensation and consideration, it is common nevertheless for the parties to an agreement to settle on a single sum that encompasses both.

Other entitlements to compensation under the General Regime

5.10 Others who are entitled to payment for rights under the General Regime have only an entitlement to compensation, not consideration.

5.11 Those who are bound by Code Rights due to the effect of paragraph 2(3) or (4) of the 2003 Code are entitled to compensation.[11] Paragraph 2(4) applies to those who are successors in title to, or hold interests derived from, those who have granted Code Rights or have agreed to be bound by Code Rights. Persons who are bound under paragraph 2(4) are entitled to compensation for loss or damage arising from the exercise of the Code Rights, under paragraph 7(1)(b) of the 2003 Code.[12] Others are bound by Code Rights due to the effect of paragraph 2(3) (which can have the effect of binding superior interests in the land), where an occupier has conferred the Code Rights in connection with the provision of electronic communications services to him or her. The owners of the superior interests are entitled, under paragraph 4(4) of the 2003 Code, to compensation for depreciation in value of the land over which a right has been conferred due to the effect of the 2003 Code's security provisions in paragraph 21.[13] Paragraph 4(4) applies where there is "a depreciation in the value of any relevant interest in the land"; a "relevant interest" in the land is one by which the owner of the interest, who is bound by reason of paragraph 2(3) of the 2003 Code, may become the occupier of the land in future (and is not so at present).

5.12 Compensation is also payable to persons who suffer depreciation in the value of an interest in neighbouring land. This is sometimes known as injurious affection, and compensation is payable (pursuant to paragraph 16 of the 2003 Code) in accordance with section 10 of the Compulsory Purchase Act 1965. Compensation for injurious affection cannot be claimed by a freehold or

[9] 2003 Code, para 7(2). See also para 7(3).

[10] 2003 Code, para 7(3).

[11] See paras 2.82 to 2.90 above.

[12] See para 5.7 above.

[13] This does not apply to those who are bound under para 2(4); as successors in title to, or holders of interests derived from, those who created or were bound by Code Rights, they would have taken the land at its reduced value. If Code Rights are later awarded, by the paragraph 21 procedure, against a person who has received compensation under para 4(4), that payment may need to be taken into account in the award of compensation and consideration under paragraph 7(3).

leasehold owner who has agreed in writing to be bound by the right, or by anyone who is bound under paragraph 2(4).[14]

5.13 Two special cases in which compensation is payable should also be mentioned. Where an occupier is required to lop a tree which overhangs a street pursuant to a notice served by a Code Operator, he or she may recover compensation for the expenses incurred in doing so. There is also provision for compensation for loss or damage sustained by a person in consequence of the lopping of a tree.[15]

5.14 Finally, persons who are entitled to require the removal of a Code Operator's apparatus pursuant to paragraph 21 of the 2003 Code may, where the Code Operator does not effect that removal, apply to court for authority to remove it themselves. They may reclaim expenses incurred in doing so, and may also be authorised by the court to sell the apparatus and retain some or all of the sale proceeds on account of those expenses.[16]

How is consideration assessed under the 2003 Code?

5.15 As noted above, the 2003 Code states that consideration is to be assessed as a figure that "would have been fair and reasonable if the agreement had been given willingly".[17]

5.16 This statement was considered in *Mercury Communications Ltd v London and India Dock Investments Ltd*.[18] It was decided that "fair and reasonable" consideration goes beyond the diminution in value of the claimant's interest in his or her land, and therefore does involve an element of price; but it does not involve an element of profit share or ransom.[19] A ransom price would be based purely on the value of the right to the Code Operator, and involve asking how much the operator could pay in the light of the anticipated profit from the development. The concept of a "ransom" comes from the example of a landowner who controls the only possible land which could be used for the apparatus.[20]

5.17 In *Mercury*, His Honour Judge Hague QC considered that what is "fair and reasonable" consideration is best determined by looking at comparable transactions, bearing in mind the bargaining strengths of both parties and the importance and value of the proposed right of the grantee.[21] He stated that:

[14] 2003 Code, para 16(2), referring to those who are bound by virtue of para 2(2)(b) or (d).

[15] 2003 Code, para 19(5).

[16] 2003 Code, para 21(7) and (8).

[17] 2003 Code, para 7(1)(a).

[18] (1995) 69 P & CR 135.

[19] *Mercury Communications Ltd v London and India Dock Investments Ltd* (1995) 69 P & CR 135, 161 to 164.

[20] Although in an unregulated market the same can happen if, although there are alternative sites, all landowners demand a ransom price.

[21] *Mercury Communications Ltd v London and India Dock Investments Ltd* (1995) 69 P & CR 135, 159, 163 and following, and 168 to 169.

> … what I have to determine is not the same as what the result in the market would have been if the grant had been given willingly. That is, however, far from saying that the market result is irrelevant or can afford no guidance. Indeed, in my view the market result is the obvious starting point; and in most cases it will come to the same thing as what is "fair and reasonable" … . But there may be circumstances, of which the absence of any real market may be one, in which a judge could properly conclude that what the evidence may point to as being the likely market result is not a result which is "fair and reasonable".[22]

5.18 He described the decision required as involving "an element of subjective judicial opinion", not simply an "objective assessment of a factual matter" as regards the market value of the right.[23]

5.19 In the Consultation Paper,[24] we also noted the decision of the Supreme Court in *Bocardo SA v Star Energy UK Onshore Ltd*[25] on similar wording in the statutory framework for rights to extract oil.[26] In that case payment for the right to bore pipelines beneath land was assessed on compulsory purchase principles, even though those principles were not expressly incorporated into the legislation.[27] The value of the rights was therefore based on the value to the owner of the land at the time of the acquisition, rather than to the potential buyer; the fact that the rights were being used to extract oil from underneath the land was disregarded. This may cast doubt upon the approach taken by His Honour Judge Hague QC in *Mercury*, though – as many consultees reminded us – the statutory wording was not identical, and the factual situation differed from that of a Code Operator seeking Code Rights from a Site Provider.

5.20 On the present state of the authorities, therefore, it appears that consideration under the Code has been regarded as meaning something other than precisely market value. The two concepts may coincide, depending on the circumstances and other factors which are in play, but their relationship is not entirely clear.

Market value or fair value?

5.21 His Honour Judge Hague QC, in *Mercury Communications Ltd v London and India Dock Investments Ltd*, referred to "market value". Suggestions were made

[22] *Mercury Communications Ltd v London and India Dock Investments Ltd* (1995) 69 P & CR 135, 144 to 145.

[23] Above, 144. See also *Cabletel Surrey and Hampshire Ltd v Brookwood Cemetery Ltd* [2002] EWCA Civ 720 at [6], where these points of principle were adopted by the parties; the Court of Appeal emphasised that it had therefore not heard argument on whether the approach taken in *Mercury* was correct, and expressed no view on the point.

[24] See, generally, Consultation Paper, paras 6.45 to 6.56.

[25] [2010] UKSC 35, [2011] 1 AC 380.

[26] Petroleum (Production) Act 1934, s 3 (now repealed), applying the provisions of the Mines (Working Facilities and Support) Act 1966, s 8.

[27] This led to an award of £1,000, in contrast to the trial judge's assessment of £621,180. Lord Clarke, dissenting, approved the view of HHJ Hague QC in *Mercury* that because the Code did not expressly incorporate those principles, they could not apply. See *Bocardo SA v Star Energy UK Onshore Ltd* [2010] UKSC 35, [2011] 1 AC 380 at [138].

on consultation that a measure of "fair value" should be adopted;[28] paragraph 7(1)(a) itself refers to the price which would have been "fair and reasonable". "Fair value" is defined in the International Financial Reporting Standards (IFRSs), released by the International Accounting Standards Board, as:

> The price that would be received to sell an asset … in an orderly transaction between market participants at the measurement date.[29]

5.22 An alternative statement of "fair value" is given by the International Valuation Standards Council:

> The estimated price for the transfer of an asset … between identified knowledgeable and willing parties that reflects the respective interests of those parties.[30]

5.23 Both of these definitions are recorded in the "Red Book" produced by RICS, where it is noted that "the two definitions of fair value are not the same".[31]

5.24 Batcheller Monkhouse noted that:

> 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.

5.25 Further discussions with RICS have confirmed that it is not generally considered appropriate for valuers to use "fair value" where a market does exist which provides general comparators – or, arguably, where there is even one comparator. In such a case, "market value" should be used.[32]

5.26 We also note that The European Group of Valuers' Associations states that "one important consequence of the less specific assumptions of Fair Value is that it allows recognition of the individual value a property may have to one bidder" –

[28] NFU and the Agricultural Law Association.

[29] International Accounting Standards Board, IFRS 13 *Fair Value Measurement*, May 2011, effective for annual periods beginning on or after 1 January 2013. It was previously defined as "the amount for which an asset could be exchanged … between knowledgeable, willing parties in an arm's length transaction" (see, for example, International Accounting Standards Board, IFRS 1 *First-time Adoption of International Financial Reporting Standards*, November 2008, Appendix A (now superseded)).

[30] International Valuation Standards Council, *International Valuation Standards 2011, IVS Framework*, para 39.

[31] RICS, *RICS Valuation – Professional Standards, Incorporating the International Valuation Standards* (March 2012), para VS 3.5. See also The European Group of Valuers' Associations (TEGoVA), *European Valuation Standards*, 7th ed 2012, EVS2 para 4.1, which refers to the International Financial Reporting Standards statement as the definition "for accounting purposes" and puts forward a "general definition" as follows: "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." Available at http://www.tegova.org/en/p4fe1fcee0b1db (last visited 20 February 2013).

[32] See paras 5.47 to 5.50 below.

that is, of special value.[33] Such issues are disregarded in market value, and we return to that point later in this Chapter.[34]

Reform

5.27 We took the view in the Consultation Paper that, given the state of the current law, the necessary reforms in relation to compensation on the one hand, and consideration on the other are different. The meaning of compensation attracts little criticism, but the entitlement is complicated by the different provisions made for each category of persons to whom it may be payable. By contrast, the range of persons entitled to consideration is relatively narrowly defined, and the issues are whether or not it should be paid at all and, if it should, how it should be calculated.

5.28 In the Consultation Paper we discussed first compensation and then consideration. We reverse that order here, so as to make clear first the basis of consideration and to allay concerns – evident in many consultation responses – that provisions relating to the basis of compensation might be regarded as restricting the basis of consideration to be payable under the revised Code. That is not the case. Consideration is a price, and is conceptually and practically different from compensation. A small subset of those entitled to compensation are also entitled to consideration. In many cases of course a single payment is made to those who have granted Code Rights and the parties do not endeavour to separate out the two payments. But the Code must do so.

5.29 Accordingly in this Chapter we first discuss the price payable to those who have Code Rights imposed upon them. Then we go on to discuss the compensation payable to those persons and also to a much wider group. Finally we discuss the instances where compensation is payable to Code Operators under the Code.

CONSIDERATION

The proposal in the Consultation Paper

5.30 In the Consultation Paper we discussed whether consideration should still be payable under the revised Code.[35] We expressed the view that whilst consideration should remain payable, some reform was required to the basis on which it is assessed. We did so because we were aware of the following arguments, all expressed to us in the course of the meetings we held prior to the publication of the Consultation Paper:

(1) that the 2003 Code definition of consideration was unclear; and

(2) that the 2003 Code provisions were unworkable because of the unavailability of comparators, which meant that a market or fair value could not be ascertained in many cases.

[33] The European Group of Valuers' Associations, *European Valuation Standards*, 7th ed 2012, para 4.2.5. See also International Valuation Standards Council, *International Valuation Standards 2011*, para 42.

[34] See paras 5.78 to 5.80 below.

[35] Consultation Paper, paras 6.42 and 6.43.

5.31 We were also aware of concerns about the level of payments and whether it struck the right balance between landowners and Code Operators.

5.32 Our proposal in the Consultation Paper for the measure of consideration was for the adoption of the "no-scheme" basis used in compulsory purchase valuation:

> 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.[36]

5.33 The intention was to produce a balanced solution, retaining the element of price but taking out the special market attributable to the need for land for electronic communications. Clearly this was going to mean a reduction in payments by Code Operators to landowners. Our objective was to strike a better balance between the rights of the two groups, so as to enable a more efficient and cheaper electronic communications service for the public. Negotiations between the parties, in the shadow of the provisions of the revised Code, might, of course, result in their agreeing something nearer to market value as the price of avoiding litigation.

5.34 In the Consultation Paper we also invited consultees' views on alternative approaches to the assessment of consideration. In particular, we referred to the possibility of a statutory uplift on compensation, with a minimum payment figure for situations where no compensation would be payable. This would ensure some form of payment for the right, but rest primarily on compensation principles.[37]

Consultation responses on consideration

5.35 We received 76 responses to our proposal that consideration be assessed on a compulsory purchase basis with a "no-scheme" rule.[38] Of these responses around three-quarters were opposed to our proposals. We have not generally reported numbers of responses to questions in this Report; the numbers are not statistically significant, and are in any event misleading as single responses may represent a number of interested parties, whilst a number of responses were copies of others. In view of the crucial nature of this issue we have reported on numbers here, but no great significance should be attached to them.

5.36 Support for our proposal focused on the well-established nature of compulsory purchase valuation principles. Arqiva said that:

> … this is an established and well understood basis. If adopted, it would make the code consistent with general compulsory purchase valuation principles, with the practical benefit that it would be easier for all parties to understand and indeed reach agreement upon. This is also appropriate because the powers of compulsory purchase and

[36] Consultation Paper, para 6.73.

[37] Consultation Paper, para 6.74. The four options set out in the Consultation Paper, paras 6.61 to 6.69, were profit share or ransom, market value, market value assessed using compulsory purchase principles, and uplift on compensation.

[38] Consultation Paper, para 6.73.

> the valuation principles have been devised on the basis that public projects that rely upon the use of compulsory acquisition should not pay an unduly high burden, otherwise projects in the public interest could be rendered uneconomic. As recognised in your consultation paper 2.2 onwards the same factors apply to electronic communications networks and we point out that under Section 107 (4) (a), the first criteria considered by Ofcom in determining applications for Code Powers is the public benefit of the system.
>
> The basis is also a fair basis and maintains an incentive for otherwise reluctant or opportunistic landowners to reach agreement at market value without pushing an operator to use code powers.

5.37 Some who supported our proposal argued that electronic communications should be treated in the same way as the traditional utilities rather than being subject to a market price.

5.38 Some respondents did not favour either our proposal or a market value basis. Mobile Phone Mast Development Ltd and Dŵr Cymru Welsh Water said:

> No. This still leaves the problem of assessing "market value". A percentage uplift would provide greater clarity and minimise disputed claims.[39]

5.39 Odell Milne argued for a profit share to be paid to landowners:

> 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.

5.40 British Telecommunications plc (BT) had a different perspective:

> We do not agree that it would be appropriate for compulsory-purchase principles of market value to be adopted for the revised Code. For a variety of reasons, BT is often obliged to provide services which strictly commercial considerations would not support. To be asked to pay consideration on a compulsory-purchase basis, particularly related to land value would impose a large financial burden upon BT in relation to such scenarios.

5.41 The majority of responses argued for a market value basis for consideration. What is significant here is not the numbers, but the fact that consultation responses revealed a great deal of material from landowners to which we did not have access before the publication of the Consultation Paper. Whilst we do not accept all the arguments that consultees have put forward, we have found the economic data they provided very helpful, and sufficient to change our view about our provisional proposal.

[39] As discussed in the Consultation Paper: see paras 6.68 and 6.69.

5.42 The arguments raised against our proposal can be summarised under a number of headings, as follows.

Fairness to landowners

5.43 Prominent on consultation was the view, expressed to us on a number of occasions before publication of the Consultation Paper, that Code Operators are commercial entitles generating profits, and that it is therefore only fair that they should pay a market value for the rights they acquire. Cell:cm Chartered Surveyors said:

> We agree with the Country Land and Business Association's (CLA) views that the [Code Operators] are commercial entities who run their businesses on a competitive basis to generate profits for their shareholders. The CLA outline that most [Code Operators] are not obliged to provide a universal service, thus differentiating them from the traditional utilities. It would therefore be appropriate to leave the assessment of consideration entirely to the market so that it would amount to whatever [Code Operators] would be willing to pay for their rights to install apparatus. Public benefit is demonstrably improved via this method as national networks have been swiftly established via free agreement between [Code Operators] and [Site Providers] with "market value" transactions at their foundation.

5.44 This argument is not by any means conclusive in favour of a market valuation basis. We note in particular that BT has a universal service obligation. But we acknowledge the force of the argument; we accept that a landowner's right to profit from his or her land should not be restricted without a very good reason in the public interest. The landowner's ability to exploit land commercially is important, and should not be stifled unless there is confidence both that the public benefit substantially outweighs the individual's loss, and that this is a necessary and proportionate way to achieve that public benefit.

5.45 A more nuanced point was raised by Arc Partners (UK) Ltd, who pointed out that the effect of a compulsory purchase basis of valuation in this context would always favour one side in the negotiations:

> We would disagree that the proposed market value on compulsory purchase principles is the most appropriate measure. The 'Pointe Gourde' principle operates fairly in the event of a compulsory purchase, with each side benefiting from the principle. The landowner who is compelled to sell receives the open market value of the land, with no regard to how the value of the land will diminish once the scheme commences. The purchaser has the benefit of not being held to ransom because that particular land is of particular value to them, they simply pay what the land is worth having no regard to the scheme. However, when we apply the Point Gourde principle to landowners and operators, it seems that it only has a tangible benefit for the operators.

The well-established market

5.46 Contrary to what we had heard before publication of the Consultation Paper, many consultees asserted that the market currently works well.[40] There were acknowledgements that there are difficult cases and that disputes arise, but there was no general acceptance that the current basis is unworkable. RH & RW Clutton LLP said:

> There is no general problem over the valuation of telecoms apparatus. The current market based approach has led to a highly successful roll out of a wide range of telecoms services including mobile, cable and satellite based operations, and many hundreds of thousands of individual agreements have been made with willing landowners across the UK.
>
> … The implications of the proposed change are immense.
>
> It will unjustly enrich mobile telecommunications operators, who currently willingly pay between five and ten thousand pounds per annum for a 10 x 10 metre mast site, but who in a no scheme compensation world would pay the same as the National Grid for a pylon – currently between £87.61 and £147.93 per annum.
>
> It will unjustly enrich fixed line operators, who currently pay between 10p/metre per annum and 29.5p/metre per annum, but who would be entitled to argue that compensation should be limited to the amount that electricity companies generally offer for underground line of 2.3p/metre per annum.

5.47 There was general agreement that, as we said in the Consultation Paper, a market value basis cannot work in the absence of comparator transactions.[41] Many consultees disagreed with what we had heard prior to the Consultation Paper and said that there is no lack of comparators in the cell site and mast site market. Babcock International Group plc said:

> The Consultation Paper notes that the Code currently lacks clarity as to the basis of valuation. The Consultation Paper is set firmly against an allowance for profit share, and also excludes a "market value" because of the lack of comparable evidence. Babcock does consider though that although much comparable evidence may be in the hands of operators alone, nonetheless there is sufficient comparable evidence in the market for an assessment of consideration based on comparable evidence to be practically possible.

[40] In the context of mast sites, W R Avens commented "the current market approach has worked very well in the majority of cases and there has been good liaison and professional dealings between the parties concerned." Similarly, Susan Marriott said that "there is no reason to change the present arrangement which encourages landowners to welcome masts on their land. Derisory payments would negate this welcome and compulsory purchases are time consuming and breed ill feeling."

[41] Consultation Paper, para 6.63.

5.48 The Charities' Property Association and the Churches' Legislation Advisory Service agreed:

> We are unconvinced by the contention that there is a lack of comparators – or, at any rate, by the apparent assumption that this will remain the case in the future. Our expectation would be that in a growing and fast-changing market the number of comparators would grow fairly quickly.

5.49 Responses went beyond assertion; Batcheller Monkhouse said:

> Valuers, acting for both Site Provider and Code Operator, do have access to and share the raft of evidence available that might be needed to conclude negotiations for a new agreement or a novation to an existing agreement.
>
> The evidence that we have collected can and is gathered by all valuers who practice in this field. Valuers would also have evidence for the rents or Considerations paid for other situations such as:
>
> - A right of access across a third party's property to a telecom installation
> - The right to allow an agreement to be assigned
> - An extension to a lease term or the alteration to either party's break clause provisions
> - The extension to a demise
> - Various beneficial or onerous site share provisions
> - The changes in the height of a mast or the addition of an extra mast
> - The rental values of equipped and unequipped Green Field and Roof Top sites
> - The rental value of particular items of equipment added to a third Party structure (i.e. Rate Card evidence – an extract of which is attached in the Annexe).
>
> We set out the above because there is some suggestion that market evidence is lacking or not available and that might be a good reason to alter the valuation method. The reality is that there is plenty of evidence and this has been established over a long period of time (in the context of telecoms).
>
> We have been responsible for collecting and analysing data on rents for telecom sites for many years. This is then published by us and made available to whoever might need to see it.

5.50 Other consultees made similar points. As a result of the evidence offered to us we are satisfied that there is no lack of comparators in the cell site and mast site market.

5.51 The position may be different for cables. A number of consultees said that there is a market in cable wayleaves, and that it functions well but on a different valuation basis from that for mast sites. The British Property Federation and Telecoms Property Consultancy Ltd (TPCL) both said:

> 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.
>
> The main distinction between fixed and wireless apparatus is that wireless installations always have another option so the market is more open than for fixed fibre/duct links. If one landlord refuses access to his rooftop then a landlord next door may do so. Thus there is competition. Contrast this to fibre service to a block of flats (as depicted in paragraph 3.95 [of the Consultation Paper]) 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").

5.52 Surf Telecoms agreed:

> It also appears that the consultation focuses 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.

5.53 However, there was also some consensus that it is more difficult to find comparators in the cable/fibre market because of the widespread use of confidentiality clauses. A number of consultees suggested that the revised Code should invalidate such clauses, and we return to that suggestion below. But it is not the case that there are no comparators at all: Rafe Staples, for example, explained his own experience:

> My clients … operate a large commercial estate in East London. This estate includes … some of the largest colocation data centres in the UK [which] are fundamental in terms of the UK's internet capacity and to international traffic. The majority of these buildings can be accessed directly from the public highway; however the majority of operators choose to go through our estate and all pay rentals which are consistent with each other. These rentals are based on rates per metre of duct per annum. We have installed an extensive network of apparatus within our estate, in addition, and higher rates are paid for the use of our apparatus.
>
> Routing is inevitably the choice of telecommunications companies and if they wish to come onto our estate they recognise that our standard published payments apply. We have circa 20 recent wayleave agreements all on comparable figures.
>
> … The rental or financial return should be determined by the Market on the basis of a willing landlord and a willing tenant, reflecting the value to the grantee (ie not disregarding the Scheme).

5.54 In view of the consensus among consultees that the revised Code should be technology neutral[42] we cannot recommend a different valuation basis for cable/fibre wayleaves. Therefore, this discussion continues on the basis that both should be treated in the same way by the revised Code but that the sums of money generated by a market price valuation are likely to be very different in the two sectors.

Arguments about impact upon the electronic communications network

5.55 Perhaps the main objective of the 2003 Code and of the revised Code is to facilitate the availability of electronic communications, and so we attach particular importance to what consultees said about the effect on the networks of our proposal.

5.56 One major concern raised by consultees was that landowners' willingness to reach agreement with Code Operators would be substantially affected. Henry Aubrey-Fletcher said:

> There is considerable potential for damage contained in the general proposal to tighten up codes relating to telecoms equipment being installed in rural areas. Rents have already reduced due to pressure on consumer pricing, any code changes that led to further reduction in rents to site owners or increase in costs, especially professional

[42] See paras 1.28 to 1.34 above.

> fees, would make some of us decide not to accommodate masts and other equipment on our land.[43]

5.57 The Central Association of Agricultural Valuers (CAAV) and Peel Holdings Land and Property (UK) Ltd both argued:

> If … a no-scheme approach … 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.

5.58 Ian S Thornton-Kemsley argued:

> … if such a proposal were enacted operators would seek to terminate existing agreements at the earliest opportunity in order to renegotiate terms on more the advantageous rates that would prevail under a Code so amended. In my opinion landowners are likely to baulk at the substantial rent reductions that would be sought as a consequence of such revised wording. I consider that the effect of this would be a substantial increase in disputes as landowners resist the imposition of such rates by operators and a therefore a substantial increase in cases before the Courts. This is likely to make any new roll out slower and more difficult to achieve.

5.59 The British Property Federation, Telecoms Property Consultancy Ltd (TPCL) and the landlord members of RICS all referred to a potential impact on the current availability of sites which landowners are content to see used for electronic communications apparatus:

> In a no scheme world rents for a 10m x 10m area of a field for a mobile mast may be valued as grazing land at £50 per annum. A rooftop may command £500 per annum. It is difficult enough to persuade landlords to deal at current market rental levels. At such low income levels they simply will not deal with Code Operators.
>
> If compulsory purchase provisions are introduced the telecoms property market could disappear overnight. Landlords will withdraw all properties that they have made available for telecoms use and for existing sites where they can expect a greatly reduced rent on renewal they will seek vacant possession. The rent payable has to reflect the reality of the occupation. This is not just a rent for space

[43] Fiona Beale agreed: "We would vehemently oppose any attempt by … any … operator to seek rights on such a basis on any property owned by us given the impact of the rights. We suspect that we would not be alone on this."

> underground but for large visible steel structures, intrusive rooftop installations and for access rights across adjoining land or through buildings to access a roof.

5.60 The implication of the change in landowners' attitudes would, it is argued,[44] mean that many more installations would have to proceed by compulsion: and that that will greatly overload the court or tribunal system and indeed the resources of Code Operators themselves. Batcheller Monkhouse said:

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

5.61 Others pointed out that compulsory purchase valuation is unfamiliar in the context of electronic communications apparatus, and that adjustment to a new basis would be difficult and disruptive. The British Property Federation, TPCL and the landowner members of RICS all warned that:

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

5.62 Some consultees argued that the impact of lower prices on Code Operators either would not be passed on to consumers, or would be too small to have an appreciable effect on pricing. Strutt & Parker LLP argued:

> 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.

5.63 It is notable that no Code Operator told us that lower prices would be passed on to the consumer or would be ploughed back into research and development. Nor did any consultee except Arqiva[45] suggest that a no-scheme basis in the Code would incentivise Code Operators to reach agreement at market value or at least at a level higher than the no-scheme basis so as to avoid litigation.

[44] Desmond Hampton and Guy's & St Thomas' Charity.

[45] See para 5.36 above.

5.64 A number of consultees stressed that lower prices are not necessary to get the network to function well; it is already well-established. Wireless Infrastructure Group (WIG) suggested comparisons with international markets:

> The wireless real estate market is well established in the UK and in this regard the UK is identical to other developed wireless markets. WIG has been involved in reviewing a number of markets including Germany, USA, Netherlands, France, Spain, Italy and Ireland all of which operate on a similar basis for the provision of sites for wireless network equipment. Pricing for wireless real estate in the UK market is in line with most other markets and contains no material differences than would be found in other classes of real estate. Recent research conducted by Savills for example indicated agricultural land in the UK was 50% more expensive than in Germany (where WIG believes land for cell sites is marginally cheaper due to significant deployment on government land) and more than twice as expensive as in the US (where land for cell sites is actually significantly more expensive than in the UK). By way of further example, WIG owns towers in Ireland and the average price of land under these towers is higher than for WIG's UK portfolio.

5.65 Another warning came from the British Property Federation, TPCL and the landowner members of RICS, with arguments that our proposal would result in a two-tier market:

> A further issue with the proposal to use compulsory purchase principles is that not all rooftop users or tower users are Code operators. This will result in the creation of a two tier market. Those paying a market rent and those paying well below market rent. A landlord will seek out and have a preference for non-Code operators, if at all possible.

5.66 Some of the argument relating to consideration was directed at the fact that the revised Code will not be starting from scratch. The market, and many business relationships, are already established and so we do not, in this respect, start with a blank piece of paper. Kingsley Smith Solicitors LLP summed it up:

> There is no new infrastructure scheme requirement here and the proverbial horse bolted a few short years ago.

Arguments about economic impact

5.67 Alongside those arguments about potential detriment to the provision of electronic communications services, consultees presented a number of arguments about the economic impact of a "no-scheme" basis upon landowners.

The following text is taken from the responses submitted by a number of consultees:[46]

> Substantial income is generated from licences and leases to mobile phone network operators, broadcasters, wireless broadband operators and other private sector organisations. The value of these licences and letting 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.
>
> … 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 … will vastly reduce their capital values … .

5.68 Mike Tristram referred specifically to the impact on small rural businesses:

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

5.69 Caroline Tayler made a similar point:

> Proposed changes to the Electronic Communications Code described in the Consultation Document appear mainly designed to reduce long established income of small businesses and in particular rural ones, in order to increase the profits of the telecommunications industry.

[46] Aberdeen Asset Management, Bruntwood, Northern Trust Company Ltd, UK Land Estates, Highcross Strategic Advisers, and Bizspace (the latter two consultees referring to "our infrastructure properties" in the penultimate sentence quoted); similar passages appear in the responses of Leicestershire Police Authority, Leeds City Council, Nottinghamshire Police Authority, Central Scotland Police, WM Housing Group, and Glasgow Housing Association.

> The rural economy is fragile whereas the telecommunications industry is not.

5.70 RH & RW Clutton LLP argued:

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

5.71 Observations were also made about the effect upon some larger businesses, and in particular on the wholesale infrastructure providers. Shoosmiths LLP put it in this way:

> Companies such as [Wireless Infrastructure Group], Shere and Arqiva are in effect a vehicle by which capital funds are invested into the sector – they invest money in creating the network themselves and then provide sites available to be used by all Operators. The existing valuation basis supports those vehicles and their models should be recognised and supported as an essential part of the creation of a strong network. They should not be removed from the sector.

5.72 Ian S Thornton-Kemsley raised a further financial issue:

> The proposed revisal away from open market value to compensation would also affect local government finances through rates. The average rateable value for a radio mast is approximately £1,300. Assuming rates of 50p in the £ and extrapolating that over the UK the drop in local government finances represented by this proposed change is in the order of £31M per annum. I do not see how this is in the wider public interest as opposed to the business interest of the [mobile network operators].

Recommendation about consideration

5.73 In Chapter 1 we discussed the place of this consultation within Government's wider programme for the improvement of the UK's electronic communications network.[47] The Law Commission's focus is solely on the need for a revised Code that will function as an effective legal tool, facilitating electronic communications networks while striking a fair balance between the interests of landowners, service providers and the public. We have no specific objective either to reduce prices or to redistribute resources save insofar as that would produce a fair and efficient system.

5.74 Our provisional proposal for a "no-scheme" basis of valuation was made as a result of the evidence then available to us about the perceived lack of clarity in the 2003 Code definition of consideration, the asserted absence of the comparators needed to assess a market value (and the consequent difficulty in

[47] See paras 1.7 to 1.8 above.

reaching agreements), and concerns raised with us about the effect upon operators of the level of rents. To some extent those concerns remain; we do not doubt that there have been instances where operators have found it very difficult to agree consideration with a landowner, and that there have been ransom demands. There appears to be some lack of comparators in the cable/duct market.

5.75 But consultation responses have told a very different story. We have set out above the arguments raised in favour of a continuing market value basis, and by and large we accept them. There is a functioning market in this context and it would be inappropriate to stifle it.

5.76 Accordingly, our consultation has not produced evidence that could justify our recommending a "no-scheme" pricing basis in the public interest. Even if we could be sure that that change would not have the adverse effects for which consultees argue, it would be risky to recommend a "no-scheme" basis merely in the hope that it would speed up deals or would result in lower prices or better investment in electronic communications. Change is likely to be costly in itself and the market would take some time to settle; there would inevitably be some disputes even if consultees proved to be wrong in their prediction of widespread unwillingness to reach agreements. But as it is, the evidence with which we have been presented is such that we take consultees' concerns very seriously. We conclude that the risks of economic damage, to individuals, businesses, the public purse and the electronic communications industry itself far outweighs the potential benefit to that industry, on the basis of the evidence we have.

5.77 The wording of the definition of market value in the revised Code is for the drafters of that Code, but in our recommendation we adopt the wording used in the "Red Book" (*RICS Valuation – Professional Standards*).

5.78 A number of consultees who favoured a market value definition also proposed that the Red Book definition be modified so as to make it clear that unique sites are to be valued on the basis that they are not unique, so as to ensure that consideration does not amount to the ransom value (or profit share) that might be extracted from a special purchaser. The Code Operator members of RICS expressed concern that in some cases:

> 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.

5.79 The landlord members of RICS, Telecoms Property Consultancy Ltd and the British Property Federation all said:

> 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 [of the Consultation Paper][48] are valued on the basis that there is more than one option.

5.80 We agree, and have framed our recommendation accordingly.

5.81 We noted in Chapter 3 the need to embody within the definition of consideration an assumption to ensure that the Code Operator does not have to pay for the additional rights to upgrade or share apparatus or to assign Code Rights,[49] and so we make that provision in our recommendation below.

5.82 The provisions of the 2003 Code as to consideration appear in the context of court orders; where an order is made under paragraph 5, the court is required to award not only compensation but also consideration.[50] There are no provisions in the 2003 Code as to the validity or otherwise of consideration agreed in a consensual deal and the parties are of course free to agree what they choose. But the provisions in the 2003 Code as to the consideration payable when rights are imposed on landowners mean that negotiations take place against that background and in the knowledge that this is the default position. It has not been suggested to us that the structure of provisions about consideration in the revised Code should be otherwise. So we take it that the revised Code will make provisions about the consideration that could be awarded by the tribunal so that private negotiations can be conducted in the light of that.

5.83 **We recommend that the measure of consideration payable under the revised Code to those against whom an order is made for the imposition of Code Rights should be the market value of those rights, using the definitions in the "Red Book" (*RICS Valuation – Professional Standards*), modified so as to embody the assumptions:**

(1) **that there is more than one suitable property available to the Code Operator; and**

(2) **that the Code Operator does not have the entitlement to upgrade or share apparatus, or to assign the Code Rights, conferred by the revised Code in accordance with our recommendations at paragraphs 3.24 and 3.51 above.**

5.84 If that recommendation is implemented, it will be important to have comparables from which valuers can work. As we noted above, it is not clear that these are unobtainable. However, there was some consensus that it is difficult to find comparators in the cable/fibre market because of the widespread use of

[48] That is, an example where the only way for a Code Operator to provide a service to the tenants of a block of flats is to lay a cable across the landlord's retained land around the block.

[49] See para 3.50 above.

[50] 2003 Code, para 7(1).

confidentiality clauses. A number of consultees suggested that the revised Code should invalidate such clauses. We think that that is impracticable.

5.85 UK Competitive Telecommunications Association (UKCTA) referred to a different problem, namely:

> … 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 [Code Operators] 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.

5.86 We have heard other anecdotal evidence that the Office of Fair Trading (OFT) investigation has made valuers very wary of sharing information in the way that would normally be expected in a functioning and competitive market. If this is true, it is regrettable. Nevertheless, despite that wariness it is clear to us from conversations with valuers that information about pricing for cables is available to valuers, albeit indirectly because it tends to be passed to them by landowners rather than exchanged and discussed with other valuers as would normally be useful.

5.87 A different form of evidence which might be taken into account in assessing available comparators is provided by the standard pricing structures agreed between organisations such as the Country Land & Business Association (CLA), the National Farmers Union (NFU), Openreach and Cable & Wireless. These agreements do not, by their nature, define the market, and they are not intended to be exhaustive. They are specific to particular Code Operators, and members of the organisations are under no obligation to use them. They are also primarily intended for use in rural areas.

5.88 More recently, the CLA and NFU have published standard rates and agreements for rural broadband to be used in two situations. The first is where the service is to be provided by a community interest company on a not-for-profit basis. The second contemplates a connection to be made by a private service company for a "community broadband network" – that is, where delivering a service to a rural community would not otherwise be commercially viable.[51] Again, these rates do

[51] Country Land & Business Association press release, *CLA and NFU agreement paves way for superfast rural broadband* (10 January 2013) available at http://www.cla.org.uk/News_and_Press/Latest_Releases/Broadband/wayleave_payments/1012620.htm (last visited 20 February 2013).

not purport to represent the market as a whole, since they are restricted to these particular situations.[52]

COMPENSATION UNDER THE REVISED CODE

Compensation payable by Code Operators to Site Providers and other landowners

5.89 Clearly the revised Code has to provide also for compensation for a range of people who may be affected by the installation, presence and maintenance of electronic communications equipment. Compensation, as explained above, is not the same as consideration. For those who grant Code Rights or are bound by them, compensation is an additional entitlement (although in practice the two may be conflated in a single payment, without the parties' analysing how much of the payment is price and how much is compensation for loss). For others, for whom consideration is not available – for example, neighbours of Site Providers – compensation is an important standalone right.

5.90 The 2003 Code provides for compensation in a way that is quite complex and difficult to understand. Different provisions set out the entitlements of the person who granted Code Rights (or had them imposed), those who are bound by Code Rights, and neighbours who might suffer injurious affection to their land because of the siting of electronic communications equipment next door. Because of that complexity we provisionally proposed at paragraph 6.35 of the Consultation Paper that there should be a single entitlement to compensation under the revised Code. What we intended was to propose a single definition of compensation and a list of who should be entitled to it.

Entitlement to compensation: consultation responses

5.91 Responses to our question were difficult to analyse for two reasons.

5.92 Some consultees read our "single entitlement" as indicating that compensation would only ever be payable once when Code Rights came into being; that was not what we had in mind. Thus the British Property Federation said:

> Holdings in land and property can be complex and it would be very difficult for the Code to cater for all eventualities, existing now or created in the future. The Code should be flexible and be able to apply to all circumstances. A single entitlement may not achieve this.

5.93 We agree; we also concur with the CAAV and Peel Holdings Land and Property (UK) Ltd, who both said:

[52] See also the guidance given by the Office of Fair Trading in relation to this rate recommendation in August 2012, considering that the rate recommendation does place a restriction on competition under chapter 1 of the Competition Act 1998, but that it may be capable of meeting the criteria for individual exemption in s 9 of the Act, given its aim to facilitate the roll out of rural broadband: Office of Fair Trading, *Rural Broadband Wayleave Rates: Short-form Opinion of the Office of Fair Trading: Guidance to facilitate self-assessment under the Chapter I prohibition of the Competition Act 1998 and/or Article 101 of the Treaty on the Functioning of the European Union*, available at http://www.oft.gov.uk/shared_oft/SFOs/wayleave.pdf (last visited 20 February 2013).

> 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.

5.94 Many consultees linked compensation with consideration. Anxiety not to restrict consideration to a compulsory purchase basis led consultees to be very cautious about commenting on compensation. Thus Shere Group Ltd said:

> We agree with the principle that compensation for loss or damage should be paid to any person bound by rights granted by the Code.

However, the rest of their comments related not to compensation but to consideration. Similarly Carter Jonas LLP said, in answer to the question at paragraph 6.35 of the Consultation Paper:

> Not agreed. The landowner should have a consideration, rather than compensation.

5.95 It will be clear from the earlier sections of this Chapter that there is no question of our recommending that compensation should replace consideration for Site Providers.

5.96 A number of consultees simply agreed or disagreed with our proposal without comment. Others took on board what we had in fact intended; Shoosmiths LLP said:

> there should be one clear stand alone set of compensation provisions in one place in the Code which cover all potential persons who could be bound or affected by the Code.

The basis of compensation under the revised Code

5.97 There was little comment on the basis of compensation (in contrast to consideration). UKCTA said:

> 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.

5.98 No other consultee commented on the basis of compensation. This is understandable, as compensation is in essence a simple concept. It restores what has been lost, leaving the landowner no better off and no worse off than he or she was before. Payment to compensate for the use of one part of a field in connection with the installation of a mast on another part of it (perhaps while the mast is being installed) will be calculated by reference to the loss of use of the land, for crops or grazing; and it will include costs of reinstatement unless this has been done by the Code Operator. But the basis should be the same.

5.99 Some elements of compensation make reference to land values; for example, injurious affection to neighbouring land. The 2003 Code makes use of some of the current compulsory purchase legislation, stating that rules (2) to (4) in section 5 of the Land Compensation Act 1961 are to have effect. The 2003 Code makes use of section 10(1) to (3) of the Land Compensation Act 1973 so as to spell out entitlements to compensation in respect of mortgages and interests under trusts; it also provides that claimants who seek compensation should have their valuation and legal costs paid by the Code Operator.[53] These provisions are well understood by the professionals involved and should continue.

Entitlement to compensation under the revised Code

5.100 As to who should be able to claim, views varied. A small minority thought that there should be liability for compensation to an unlimited range of persons who might suffer loss. We think that is impracticable and indeed unfair because it disregards the benefit to so many from the presence of electronic communications equipment on land.

5.101 Others favoured an approach that fits with that in the 2003 Code. The British Property Federation said:

> compensation should be available to each party at the point that their diminution in value, loss or damage is realised. This could be on reversion or it could be sooner if a property is sold, for example. If a Code operator ensures that all interested parties are aware at the outset, then that would be the date of valuation for all parties with an interest in the land/property. If they do not then they should face a potential claim for diminution in value, loss and damages at some future point. This would encourage consultation with all interested parties from the outset.

5.102 Similarly the NFU said:

> The NFU believes that all individuals bound by code rights should be able to apply for compensation in respect of all losses that they are able to demonstrate.

5.103 BT said:

> We believe the current provisions on compensation, as distinguished from consideration, are adequate and have not led to disagreements or disputes.

[53] 2003 Code, para 4(9).

5.104 No consultee suggested specific additions to, or deletions from, the current list. It requires a slight adjustment for consistency with the recommendation we make in Chapter 8 concerning Code Operators' rights to lop vegetation (not only trees) overhanging the street.[54] The list in our recommendation below is modified, by comparison with the list in the 2003 Code, in accordance with the recommendations made elsewhere in this Report.[55]

Recommendations

5.105 The recommendations that we make below encapsulate the "single entitlement" that we had in mind in the Consultation Paper. We make no recommendation as to the time at which payment is to be made. Normally this will be at the point when Code Rights are conferred, whether by agreement or otherwise, and whether as a one-off payment or as a periodic payment. But there will be occasions when a fresh loss can be proved later, and in that event compensation can be claimed.

5.106 **We recommend that the revised Code should provide that compensation be payable by Code Operators to the following:**

(1) **persons against whom Code Rights are created;**

(2) **persons who are bound by Code Rights;**

(3) **persons who suffer depreciation in the value of an interest in neighbouring land;**

(4) **persons who are required to lop trees and vegetation overhanging a street pursuant to a notice served by a Code Operator; and**

(5) **persons who are entitled to require the removal of a Code Operator's apparatus, in respect of the period until the apparatus is removed or becomes the subject of Code Rights, and the expenses of removal, where appropriate.**

5.107 **We recommend that the revised Code should provide that Code Operators shall pay the valuation and legal costs of those claiming compensation, and should incorporate the provisions in rules (2) to (4) of section 5 of the Land Compensation Act 1961 and of section 10(1) to (3) of the Land Compensation Act 1973, as the 2003 Code does.**

Compensation for those who are not bound by Code Rights when they are created

5.108 At paragraph 6.36 of the Consultation Paper we asked a further question: whether the single entitlement 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.

[54] See para 8.63 below; Consultation Paper, para 6.80.

[55] Principally the recommendations in Chapter 2, as to those who are bound by Code Rights, see paras 2.129 to 2.132 above, and Chapter 6, as to those who are entitled to have apparatus removed from land and can, where no fresh Code Rights are created, recover expenses from a Code Operator who fails to effect that removal, see para 6.133 below.

5.109 The thinking behind this question was that even landowners who are not bound by Code Rights when they are created are affected by them, since they may later be unable to remove apparatus from their land due to the protection given to a Code Operator's apparatus by paragraph 21 of the 2003 Code. If the Code Operator does acquire fresh Code Rights under paragraph 5, after going through the paragraph 21 procedure, the landowner may at that point be awarded compensation (as well as consideration).[56] Otherwise – except for compensation for diminution in value of other land under paragraph 16 of the 2003 Code – they do not have an entitlement to compensation at the time of the grant of the Code Rights.

5.110 The question must now be seen in the light of the other recommendations we are making in this Report. First, our recommendations in Chapter 2 would reduce the categories of those who are bound by Code Rights when they are created, so that those who hold superior interests would not automatically be bound by Code Rights.

5.111 Secondly, we are making recommendations about how the revised Code should deal with the situations currently covered by paragraph 21 of the 2003 Code. The consultation responses to our question about extending the entitlement to compensation tended to mirror consultees' concerns about paragraph 21 itself. For some consultees, compensation for those not bound by Code Rights was justified by the inability of a landowner to remove apparatus installed by agreement with a tenant or other party with a lesser interest in the land. Others emphasised the need to sort out entitlements, and the parties to the regulated relationship, at the start; the British Property Federation commented that "the Code operator should be required to identify the superior interests and to ensure that they are party to any contract".

5.112 On the other hand, BT said:

> We would oppose such a proposal. We require certainty and finality as to the liabilities to be incurred so that business cases for network investment are accurate and predictable.

5.113 We have considered such arguments along with others which are relevant to the security to be enjoyed by Code Operators as against those with interests in land who are not bound by Code Rights. We have concluded that the revised Code should not restrict the rights of landowners who are not bound by Code Rights to have electronic communications apparatus removed from land. In such cases the Code Operator may be able to negotiate with the landowner for Code Rights to retain the apparatus on the land, and will also be free to apply to the tribunal for those rights. Otherwise, it will not be able to defend the action for possession.[57]

5.114 These recommendations mean that a landowner who is not bound by Code Rights will be in a much better position to have electronic apparatus removed from land. If there is a new agreement, or Code Rights are imposed, payment of

[56] 2003 Code, para 7; para 7(3) deals with the period during which the landowner was entitled to require the removal of the apparatus from the land, but was unable to enforce this removal due to para 21.

[57] See para 6.127 below.

consideration and compensation will date back to the point when the previous regulated relationship ended.

5.115 That being the case, we do not think that the reversioner who is not bound by Code Rights will need a special entitlement to compensation at the point when the apparatus is installed. Such a reversioner will be able later to enforce removal of equipment that he or she is not required to keep on the land, and, if the Code Operator does not comply with a request to do so, will be able to apply for an order entitling him or her to recover the costs of removal. To avoid this, a new relationship with the Code Operator may be negotiated or imposed by the tribunal, and compensation, as well as consideration, will be payable pursuant to the new arrangements and backdated to the expiry of the earlier arrangement.[58]

Compensation payable to Code Operators

5.116 Our discussion of compensation in the Consultation Paper encompassed payments by Code Operators to Site Providers, and payments to Code Operators. Here we discuss the latter separately. The 2003 Code makes provision for the payment of compensation to Code Operators in two circumstances:

(1) where they are ordered to alter their apparatus under paragraph 20 of the 2003 Code, in which case they can recover the expenses incurred in doing so;[59]

(2) where loss or damage is caused by alterations made necessary by a relevant undertaker's works, and for any expenses incurred in supervising or carrying out the alteration works.[60]

5.117 No consultees commented on the payment of compensation to Code Operators. We consider the provisions of paragraph 20 of the Code at Chapter 6, and conclude that those provisions should not be replicated in the revised Code for all cases under the General Regime.[61] However, alteration provisions will continue to be relevant in the special circumstances we discuss in Chapters 7 and 8.[62]

[58] Our recommendation at para 5.106(5) above covers this case, and also the case where apparatus was installed unlawfully – perhaps by mistake – and the landowner seeks to have it removed.

[59] 2003 Code, para 20(8) (generally) and 21(10) (street works).

[60] 2003 Code, para 23(5) and (6).

[61] See para 6.72 below. Similarly, the question we asked at paragraph 6.83 of the Consultation Paper, concerning potential repayment to the Code Operator of some of the consideration originally paid for the right, is no longer relevant.

[62] See para 7.47 and following, and para 8.25 and following, below.

CHAPTER 6
MOVING AND REMOVING ELECTRONIC COMMUNICATIONS APPARATUS

INTRODUCTION

6.1 In Chapter 2 of this Report we identified a list of rights which we call the Code Rights, which may be conferred upon Code Operators by agreement or by the tribunal. We made recommendations as to who should be bound by Code Rights, and who should not be; we refer to those who are bound by Code Rights as Site Providers. Many of the recommendations in the intervening chapters have focused on the ancillary rights and obligations which arise by virtue of the existence of Code Rights, the test for their imposition and the payment which should be made for them.

6.2 In this Chapter we examine the consequences of the presence of electronic communications equipment on land, and its implications for landowners whether or not they are bound by any Code Rights.

6.3 The 2003 Code contains provisions that enable landowners to have equipment altered, or moved to a different part of their, or another's, land; or to require its removal, temporarily or permanently. Those provisions are framed so as to protect Code Operators and their networks, and the services they provide, and also – where removal is concerned – so as to prevent a situation where apparatus is removed but then immediately reinstalled, with attendant unnecessary cost and disruption.

6.4 As a result, paragraph 21 (which is the principal provision about removal) can be regarded as one of the most important provisions of the 2003 Code and appears to be the one that generates most opposition. Certainly it is more important than the provisions as to who is bound by Code Rights[1] because, even where a landowner is not bound by the Code Rights that enable equipment to be placed on the land, he or she may be prevented, by paragraph 21, from having it removed. Telecoms Property Consultancy Ltd (TPCL), the British Property Federation and the landlord member of RICS said:

> … without doubt, Para 21 is the primary reason why a significant number of landlords refuse to entertain telecoms equipment on their land and property.

6.5 In this Chapter we first explain the provisions of paragraphs 20 and 21 of the 2003 Code; we then discuss the points made by consultees about those provisions; finally we make recommendations about the position that we think the revised Code should take.

[1] 2003 Code, para 2(2) to (4).

PARAGRAPHS 20 AND 21 OF THE 2003 CODE

6.6 These two paragraphs have to be discussed together because to some extent their provisions overlap.

Paragraph 20 and the "alteration" of apparatus

6.7 Paragraph 20 of the 2003 Code concerns the "alteration" of apparatus; "alteration" is defined to include "the moving, removal or replacement" of apparatus.[2] The paragraph 20 procedure can be invoked by any person with an interest in the land on, under or over which the apparatus is installed, or in adjacent land. Any such person can "require" alteration where it is "necessary to enable that person to carry out a proposed improvement of land in which he has an interest".[3] "Improvement" includes development and change of use;[4] we think it is likely to include repair.

6.8 We note in passing that "alteration" is a strange term for "moving", let alone for "removing". Moreover, there must be many circumstances where it is not technically realistic for a landowner to require a Code Operator to "alter" its equipment in the literal sense.

6.9 The landowner's rights under paragraph 20 can be exercised "notwithstanding the terms of any agreement binding that person";[5] yet paragraph 20 is not mentioned as one of those provisions that may override "rights or liabilities arising under any agreement to which the operator is a party" in paragraph 27(2) of the 2003 Code. So it is not clear whether a Site Provider and a Code Operator can agree terms more or less generous, to either party, than those of paragraph 20.

6.10 In order to require alteration, the landowner must give a notice to the relevant Code Operator, who must either comply with it or give a counter-notice within 28 days. If a counter-notice is given, the person requiring alteration must apply to court for an order that the alteration is to be made.[6] The court must make an order for alteration only if, having regard to all the circumstances and to the Access Principle,[7] it is satisfied that:

(1) the alteration is necessary to enable the person requiring it to carry out a proposed improvement of his or her land; and

(2) the alteration will not substantially interfere with any service which is or is likely to be provided using the Code Operator's network.[8]

[2] 2003 Code, para 1(2).

[3] 2003 Code, para 20(1).

[4] 2003 Code, para 20(9).

[5] 2003 Code, para 20(1).

[6] 2003 Code, para 20(1) to (3).

[7] That is, "the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services". See para 4.8 above.

[8] 2003 Code, para 20(4).

6.11 Moreover, the court must not make the order unless it is satisfied either:

(1) that the Code Operator has the rights needed for the purpose of making the alteration; or

(2) that the Code Operator could obtain those rights under the 2003 Code.[9]

6.12 This is because the "alteration" requested may be a removal, and the relocation of the equipment on someone else's land. Where the Code Operator needs Code Rights over other land in order to relocate, the court may exercise the same powers as it would have if the necessary application had been brought under paragraph 5; to that end, the court may under paragraph 20(6) direct the applicant to bring the application to the notice of other interested persons.

6.13 If the court makes an order, it may be on different terms to those sought by the applicant, with the applicant's consent; in the absence of such consent, the order may be refused. The default position, unless the court otherwise thinks fit, is that the applicant must reimburse the Code Operator for the expenses of alteration.[10] So although the Code Operator may be required under paragraph 20 to carry out a major relocation, the cost of this will fall upon the landowner requiring it; and, as we saw above, no order will be made unless the "alteration" will not substantially interfere with the service that the Code Operator is providing.

Paragraph 21 and the removal of apparatus

Summary

6.14 Paragraph 21 applies where someone is, apart from the 2003 Code, entitled to have apparatus removed from his or her land; for example, because he or she has granted to a Code Operator a lease which has now come to an end. Paragraph 21 restricts that right to have apparatus removed; its effect is that although a landowner has the right to require removal, he or she may be unable to enforce removal. Instead, fresh rights may be sought under the 2003 Code.

The scope of paragraph 21

6.15 Paragraph 21 applies to apparatus that is being used, is likely to be used, or has been used for the purposes of the Code Operator's network (whether or not it is owned by the operator). It therefore applies to equipment that has been abandoned.[11] Apparatus is deemed to be kept on land lawfully while paragraph 21 restricts its removal; so a landowner cannot pursue an entitlement to sue in trespass or nuisance until the restrictions of paragraph 21 have ceased to apply.[12]

[9] 2003 Code, para 20(5).

[10] 2003 Code, para 20(8).

[11] 2003 Code, para 21(11); see para 22.

[12] 2003 Code, para 21(9).

6.16 A person can be "for the time being entitled to require the removal" of apparatus from land under an enactment, or because the apparatus is there "otherwise than in pursuance of a right binding that person", or "for any other reason".[13] Thus, a person can invoke paragraph 21 if:

(1) rights exercisable against them that are regulated by the 2003 Code have expired (see the above example of a lease);

(2) he or she was never bound by the rights under the 2003 Code pursuant to which the apparatus was installed (for example, where a weekly tenant agrees to the installation, the weekly tenant's landlord is not bound by any rights conferred);

(3) the apparatus has been abandoned on the land (see paragraph 22 of the 2003 Code);

(4) the apparatus has been installed on the land by mistake (for example, because of an error over the position of a boundary) – or even where there has been a deliberate trespass; or

(5) the apparatus was installed pursuant to a right conferred by the 2003 Code without any need for agreement, which has now ceased to apply (for example, the right under paragraph 9 to keep apparatus installed in a maintainable highway, which is then stopped up).[14]

Procedure under paragraph 21

6.17 Where paragraph 21 applies, the person who is otherwise entitled to require removal of the apparatus must start by serving a notice on the Code Operator requiring its removal. The Code Operator can serve a counter-notice within 28 days, either stating that the person is not entitled to require removal, or specifying steps that the Code Operator proposes to take to secure a right against the person.[15] "Steps" may include applying to court under paragraph 5 to dispense with that person's agreement for the grant of rights pursuant to the 2003 Code.[16] If no counter-notice is served, the person who served the notice can enforce the removal; if it is, removal can only take place by virtue of a court order.[17] Once the counter-notice has been served, nothing will happen (and at this stage no payment is due to the landowner in respect of the equipment on the land) unless the landowner takes the initiative in commencing proceedings.

[13] 2003 Code, para 21(1). The 2003 Code does not distinguish in this regard between occupiers who are mere licensees and those with proprietary interests in the land. However, in practice, a licensee would not normally be entitled to require the removal of the apparatus.

[14] This is discussed in Chapter 7 below: see para 7.19 (concerning land which ceases to be a linear obstacle to which paragraph 12 of the 2003 Code applies) and para 7.76 (concerning land which ceases to be a street which is maintainable at the public expense).

[15] 2003 Code, para 21(2) to (4).

[16] 2003 Code, para 21(5). Temporary rights may be granted under paragraph 6.

[17] 2003 Code, para 21(6).

6.18 If the landowner takes the matter to court, the court cannot order the removal unless:

(1) the Code Operator is not intending to take steps to secure a right or is being unreasonably dilatory in taking them; or

(2) the taking of those steps has not secured, or will not secure, any right to keep the apparatus installed or to reinstall it if it were removed.[18]

6.19 If new rights are granted pursuant to the 2003 Code, compensation and consideration may be awarded in respect of the intervening period during which the apparatus remained on the land otherwise than in pursuance of rights to which the 2003 Code applies.[19]

6.20 A person who has been through the paragraph 21 procedure and is entitled to enforce the removal of the apparatus, either because there was no response to his or her original notice or because the court has made an order for removal, may apply to the court for authority to remove it. If a person removes apparatus under such an authority he or she may recover the expenses of doing so from the Code Operator and the court may in addition authorise him or her to sell the apparatus and set off the proceeds against those expenses.[20]

The relationship between paragraphs 20 and 21

6.21 There is a view that the scope of paragraphs 20 and 21 is unclear, and we understand that in many cases notices are served under both when a landowner wants apparatus removed.[21]

6.22 There are some things we can say about the distinctions between the two provisions. Paragraph 21 is only relevant where the landowner has the right to require removal; and to that extent its scope is narrower than that of paragraph 20 which is available to all landowners, including Site Providers. And clearly only paragraph 20 is relevant where what is wanted is the alteration to arrangements within the landowner's own land – often referred to as "lift and shift". Only paragraph 20 is available to the owner of land adjacent to that on which apparatus is sited.

6.23 However, there is a real overlap where the landowner wants to get rid of the apparatus altogether in order to redevelop the land, in circumstances where he or she is not bound by Code Rights. In those circumstances it is not clear which of the two paragraphs is the appropriate provision – although if the landowner is not bound by the Code Rights it is hard to see why he or she should pay for relocation and so paragraph 21 would be preferred.

6.24 Provisions in the revised Code should avoid the confusion caused by this overlap. But should the ideas found in paragraphs 20 and 21 be organised by the

[18] 2003 Code, para 21(6).

[19] 2003 Code, para 7(3); see para 5.8 above.

[20] 2003 Code, para 21(7) and (8).

[21] For example, TPCL and the British Property Federation said: "Currently solicitors take a belt and braces approach and serve both notices."

desired result or by the status of the applicant? In other words, in considering the provisions of the revised Code we could distinguish between:

(1) circumstances where a landowner wishes to have apparatus removed temporarily from the land, for example in order to repair the roof on which apparatus has been sited, or to have it moved to a different part of the land (and thus in neither case affecting the ongoing existence of Code Rights); and

(2) circumstances where a landowner wishes to have apparatus permanently removed from the land.

6.25 Alternatively, our discussion could be organised by distinguishing between Site Providers – who are bound by Code Rights – on the one hand, and on the other hand those who are not bound by Code Rights (and have, in the language of the current paragraph 21, the right to require removal of the apparatus).

6.26 Either approach could be supported.[22] However, when we turn to consultation responses we find that the views expressed depended upon the status of the applicant – between those who are bound by Code Rights and those who are not. For the reasons explained below we agree that the position of these two groups is very different so far as having apparatus moved or removed is concerned.

RESPONSES TO OUR CONSULTATION QUESTIONS ON PARAGRAPHS 20 AND 21

Consultees' views about paragraph 20

6.27 We proposed in the Consultation Paper that the revised Code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators' networks at risk. We also asked whether paragraph 20 of the 2003 Code struck that balance appropriately.[23]

6.28 Paragraph 20 was heavily criticised by consultees. Several pointed out that it is confusing, both because of the counter-intuitive definition of "alteration" and because of the overlap with paragraph 21. As Shepherd & Wedderburn LLP argued:

[22] For example, Charles Russell LLP, reporting on discussion at the seminar on 1 October 2012, said: "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." Surf Telecoms and the CAAV expressed similar views.

[23] Consultation Paper, paras 5.11 and 5.12.

> We do not consider that Paragraph 20 should allow removal of apparatus. Removal is sufficiently dealt with under Paragraph 21 in cases where the landowner or occupier is entitled to remove the apparatus. The landowner or occupier has granted a lease or licence of a certain term to the Code Operator, which the Code Operator will have relied on to plan and maintain its coverage throughout that time. Paragraph 21 (as revised) should have sufficiently clear procedures to go through when at a break option or expiry of the lease. Any proposed development can then be used at that stage to seek to remove the apparatus (under a revised Paragraph 21 which contains sufficient protections for Code Operators in terms of notice periods and evidence that the proposed development will progress) but until then the ability should only be to alter the apparatus.

6.29 We noted above that paragraph 20 may have dramatic effects, but in limited circumstances and at the landowner's expense. Clarke Willmott LLP said:

> It is rare for landowners to rely on paragraph 20 because of the resultant costs implications it has for the landowner.

6.30 Similarly, the Central Association of Agricultural Valuers (CAAV) and Peel Holdings Ltd said:

> … 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.

6.31 Shoosmiths LLP pointed out the restrictive nature of the protection given by paragraph 20:

> … a code operator can almost always prove that any requirement even to lift and shift apparatus will "substantially interfere" with its network service as, aside from minor relocation of cabling, any other action, including lift and shift will usually require a service to be shut down/suspended albeit temporarily.

6.32 Some landowner consultees were very supportive of retaining in the revised Code a provision along the lines of paragraph 20, giving special rights to landowners to require the repositioning or removal of apparatus where they wish to develop land. TDC Aberdeen Ltd and the Church of Scotland General Trustees said:

> We should not be prevented from legitimately improving or protecting our property interests purely to protect the commercial interests of an individual Operator.

6.33 The CAAV argued that the Code Operator's privileged status, with security of tenure, gives the landowner the right to special protection in terms of a right to require alterations:

> 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.

6.34 On the other hand many consultees argued that where there is an agreement in place between the landowner and the Code Operator, the terms of that agreement should prevail.

6.35 Consultees pointed out that those who need the provisions of paragraph 20 are those who are not party to agreements granting Code Rights. For example, TPCL argued:

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

6.36 The British Property Federation wrote in almost identical terms. Those two consultees and Dev Desai were the only consultees to refer to the protection given by paragraph 20 to owners of adjacent land; no instance of its use by such owners has been brought to our attention.

6.37 Batcheller Monkhouse noted that many of the current agreements between Site Providers and Code Operators, made some time ago:

> … failed to fully consider the implications of the Code and granted agreements to the Code Operator with no right to require alteration (including removal) in favour of the Site Provider.
>
> This has meant that if the Site Provider wants to remove the apparatus to redevelop a field for residential development or relocate the apparatus to renew asphalt on a roof, [they] may have had either to rely on Paragraph 20 of the Code or to wait until they are in a position to require the Code Operator to leave (such as at the end of the lease) at which point they might be able to proceed down the Paragraph 21 route.

6.38 Batcheller Monkhouse therefore argued that while the current provisions are needed for current agreements, the future should be different:

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

6.39 A number of consultees argued that the real usefulness of a provision along the lines of paragraph 20 is not for those who have granted or are bound by Code Rights but for those who come into possession of the property and find apparatus installed already, under Code Rights that do not bind them. They cannot remove the apparatus without going through the procedure imposed by paragraph 21; their real need may be not for removal (they may be content for Code Rights to be renewed) but they may require temporary removal; the need to carry out roof repairs was a recurrent concern raised by consultees.

Consultation responses on paragraph 21

6.40 In the Consultation Paper we provisionally proposed that the revised Code should, like its predecessor, restrict the rights of landowners to remove electronic communications apparatus.[24] Whilst this will in principle be unwelcome to landowners, it is inevitable; it promotes continuity of service to customers, and perhaps more importantly prevents a situation in which apparatus is first removed, at the end of a lease for example, and then reinstalled shortly afterwards because the Code Operator has applied for and been granted Code Rights – that would be a waste of resources. We asked consultees for their views about the procedure for enforcing removal,[25] and about the financial and other provisions needed to cover the period between the expiry of Code Rights and the removal of apparatus.[26]

6.41 Many consultees were vehemently opposed to any restrictions upon the rights of landowners to remove apparatus. The National Farmers Union (NFU) said:

> Once agreements have ended, it should be possible for landowners to compel Operators to remove their apparatus within a reasonable period of time. Operators could avoid this situation arising simply by negotiating new agreements in a timely manner, and therefore should not suffer any detriment if landowners are able to compel them, to remove equipment in these circumstances.

6.42 The operators' point of view was naturally different. British Telecomunications plc (BT):

[24] Consultation Paper, para 5.47.

[25] Consultation Paper, para 5.49.

[26] Consultation Paper, para 5.50.

> Investments in network build are capital-intensive and designed for the long-term. Networks would not be deployed if those investments were at risk from arbitrary demands for removal. Therefore, it is necessary for restrictions to be placed on the right to require removal and we believe that the existing provisions have been shown by experience to strike a proper balance here.

6.43 Two important procedural points were made. One was that it is unsatisfactory that the 2003 Code leaves the onus upon the landowner to initiate court proceedings once a counter-notice has been served. This was felt to be unfair and an unacceptable burden; Ian S Thornton-Kemsley pointed out:

> When a counter notice is served, the onus of progressing the matters then lies entirely with the landlord (by contrast to the position under Part 2 of the 1954 Act in England and Wales). As a result, there is no pressure on an operator to act further once it has served a counter notice.

6.44 On the other hand, it was pointed out that for Code Operators, the 28 days' notice provided for in paragraph 21 is far too short. Arqiva said:

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

6.45 Finally, some consultees pointed out that there is a great difference between those who want equipment to be removed, and those who are content for it to remain and for Code Rights to continue or be renewed, but are seeking new terms and conditions, and in particular new payment provisions.

Contracting out

6.46 We proposed that it should not be possible to contract out of any alterations regime in the revised Code;[27] our thinking was that since the role of paragraph 20 is to give additional rights to landowners, Code Operators should observe those provisions as a minimum.

6.47 However, a number of consultees pointed out that agreements conferring Code Rights might contract out of paragraph 20 in a different sense, by giving more generous protection to Site Providers. For example, the agreement might enable the landowner to require alteration or removal of apparatus in circumstances other than when redevelopment is in prospect. These consultees took the view that contractual provisions should prevail.

6.48 Turning to paragraph 21, we proposed that it should be possible to contract out of the provisions restricting a landowner's right to remove apparatus (in other words, the successor, in the revised Code, to paragraph 21).[28] This would enable Site Providers to agree to the installation of apparatus without giving security of tenure to the Code Operator.

[27] Consultation Paper, para 5.13.

[28] Consultation Paper, para 5.51.

6.49 Many consultees were strongly in favour of this, arguing that it would greatly increase the willingness of landowners to allow apparatus on to their land. Hogan Lovells International LLP said:

> We believe that landowners will be more willing to offer licences and tenancies to Code Operators, and therefore more sites will become available, if they are given the certainty of being able to contract out of the security of tenure type provisions of the Code in a similar way that a landlord and tenant can agree to exclude the provisions of sections 24 to 28 (inclusive) of the Landlord and Tenant Act 1954 in relation to a business tenancy.

6.50 The operator consultees took a different view. A number felt that if contracting out were allowed, it would become the norm, and that that would then cause substantial problems for the continuity of the network. The Code Operator members of RICS said:

> 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).

6.51 Shepherd & Wedderburn LLP agreed, adding:

> [Contracting out] would just produce another negotiation hurdle and delays to rollout and upgrading of technology and we believe that if procedures under the Code are made clearer this should be sufficient so that all parties know where they stand.

6.52 However, a number of operators had no difficulty with the idea of allowing removal where redevelopment is in prospect; they said that most operators would be willing to move in these circumstances provided that they had sufficient notice. Charles Russell LLP said:

> 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.

6.53 The Mobile Operators Association said:

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

The relationship between the 2003 Code and the Landlord and Tenant Act 1954

6.54 Closely related to the issues surrounding paragraph 21 is the question of the interaction between the 2003 Code and Part 2 of the Landlord and Tenant Act 1954 ("the 1954 Act").[29]

6.55 The 1954 Act gives security of tenure to business tenants, ensuring that a tenancy granted for business purposes will continue, despite the expiry of its term, unless and until it is either brought to an end on the grounds prescribed in section 30 of the 1954 Act or a new tenancy is granted by the parties or arises through a court order. Such an order may be made at the request of the tenant under section 26 of the 1954 Act, or in response to a failed attempt by the landlord to bring the tenancy to an end after serving notice under section 25. The parties to a lease can contract out of the provisions of the 1954 Act, so that the lease does not have security of tenure.[30]

6.56 At present, where Code Rights are conferred by the grant of a lease, that lease will be protected by the 1954 Act unless the parties have contracted out; and the apparatus itself will be protected by paragraph 21 of the 2003 Code.

6.57 It is not clear that having this dual protection is necessary or helpful to either party. Indeed, it has been argued that the two regimes interact to make it impossible, in theory, for the Site Provider to regain vacant possession. It is argued that a landowner whose tenant is protected by the 1954 Act cannot remove apparatus under paragraph 21 before he has obtained the right to require removal by bringing the tenancy to an end; yet under the 1954 Act the landowner cannot oppose a renewal on the ground that he intends to demolish or reconstruct the premises unless he is entitled to do so – and paragraph 21 prevents him from doing so.[31]

6.58 We understand that it is common practice for leases to Code Operators to be contracted out of the 1954 Act.

6.59 In the Consultation Paper we proposed that where a Code Operator has a lease of land for the installation or use of apparatus protected by the revised Code, the provisions of the 1954 Act should not apply to that lease.[32] In other words, we proposed a single security regime, deriving only from the revised Code.

6.60 Consultees' views on this varied. There was consensus that having dual protection was not acceptable, and that leases conferring Code Rights should have security, if any, either under the 1954 Act or under the revised Code. Some consultees agreed with our proposal; however, a number of consultees – both landowners and Code Operators – saw considerable merit in the 1954 Act security regime, which does provide for a number of grounds on which the

[29] There is no equivalent of Part 2 of the Landlord and Tenant Act 1954 in Scotland.

[30] Landlord and Tenant Act 1954, s 38A.

[31] N Taggart, "Thinking Outside the 'Phone Box?", lecture given at the RICS Telecoms Forum Conference 2012, 14 November 2012, paras 3.8 to 3.13; see also materials referenced in the discussion in the Consultation Paper, paras 8.12 to 8.17.

[32] Consultation Paper, para 8.22.

landowner can regain possession of the premises on expiry of the lease (or at a break clause).

6.61 The Property Litigation Association said:

> significant time and money could be saved by altering paragraph 20 so that it follows section 30(1)(f) of the Landlord and Tenant Act that simply requires the person to evidence the intention to redevelop at the Court hearing, thereby allowing a transfer in land after a notice has been served.

6.62 Others made similar comments supportive of a move to a regime looking much more like the 1954 Act. We bear those comments particularly in mind when we consider the extent to which the right to remove apparatus should be restricted by the revised Code.

Removal required by planning authorities

6.63 It appears that the provisions of paragraph 21 apply to planning authorities who would otherwise be entitled to require the removal of apparatus installed in breach of planning control. We proposed in the Consultation Paper that the revised Code should not restrict the rights of local authorities in these circumstances.[33]

6.64 All the consultees who commented on this proposal agreed with it, save that Geo Networks Ltd cautioned that planning authorities should not be able to require removal for minor breaches of the legislation.

AN EQUIVALENT TO PARAGRAPH 20 IN THE REVISED CODE?

Protection for Site Providers while Code Rights are current?

6.65 The first conclusion that we draw from consultation responses is that many – landowners as well as operators – see no need for the additional protection given by paragraph 20 of the 2003 Code to those who are bound by Code Rights. Consultees felt that those who grant Code Rights have the opportunity to negotiate appropriate terms and should be relied upon to negotiate "lift and shift" clauses, arrangements for structural repair of buildings on which apparatus is sited, break clauses in case of redevelopment, and so on. We agree.

6.66 Our agreement is fortified by the fact that we are recommending that those who grant Code Rights, or have Code Rights imposed upon them, are to receive consideration based on the market value of those rights. Along with market value consideration, and a revised Code based primarily upon the regulation of consensual arrangements, goes the responsibility to negotiate appropriate terms within the market place.

[33] Consultation Paper para 5.48.

6.67 Where Code Rights are not created by agreement but imposed by the tribunal, the tribunal can (and should be asked by the parties to) put in place appropriate terms and conditions; we have commented on this in Chapter 4.[34]

6.68 Others may be bound by Code Rights: we have recommended that the normal priority provisions should apply to leases that confer Code Rights, and also that the revised Code should make provision for Code Rights that are not contained in leases to bind successors in title to the original Site Provider and those who hold interests in the land subsequently derived from that of the original Site Provider.[35] These persons will not have had the opportunity either to negotiate terms with the Code Operator or to make representations to the tribunal about those terms. But the same is the case for any prior interest in land. Those who purchase the land or an interest in it will have investigated title and so will have had the opportunity to assess the burdens to which the land is subject and the terms on which any lessee or licensee – including a Code Operator – is present on the land. So, again, we make no special provision for them.

6.69 Existing arrangements will, of course, continue under the 2003 Code[36] and so paragraph 20 will continue to be available to assist landowners who are bound by Code Rights created in an era where proper provision for the modification or re-positioning was not always made in agreements.[37]

6.70 We noted above that although a couple of consultees mentioned the fact that paragraph 20 appears to give to owners of adjacent land the opportunity to require the "alteration" of apparatus on another person's land, there is no evidence of them taking advantage of this. Generally, landowners have no rights to require removal of anything built or placed on a neighbour's land provided that it does not contravene the planning legislation or the private law of nuisance. In most cases, we do not think that special provision should be made for electronic communications apparatus; accordingly we think that the position of neighbours must be left to the general law.[38]

6.71 **We recommend that the revised Code should not give to Site Providers any additional rights (beyond those expressly agreed or conferred on them as part of the terms and conditions upon which Code Rights are granted or imposed) to have electronic communications apparatus repositioned or removed.**

[34] See para 4.46 and our recommendation at para 4.53 above.

[35] See para 2.130 above.

[36] See para 1.43 above.

[37] We must assume that, in at least some cases, the absence of such terms is due to the existence of the statutory provisions of the 2003 Code.

[38] We make an exception to this policy in respect of particularly high apparatus, in relation to which paragraph 17 of the 2003 Code makes special provision: see paras 8.17 and following below. Otherwise, we note in Chapter 9 that a code of practice might usefully make reference to best practice for Code Operators where apparatus is sited on the highway and potentially obstructs access to new development: see.para 9.138 and our recommendation at para 9.140 below.

6.72 **We recommend that the revised Code should not, except as specified in our recommendations at paragraphs 8.37 to 8.40 below, reproduce the protection given to owners of adjacent land contained in paragraph 20 of the 2003 Code.**

Protection for landowners who are not Site Providers?

6.73 Consultees pointed out that paragraph 20 is needed to protect landowners who are not bound by Code Rights: those on whose land apparatus has been installed, but are not Site Providers (meaning that they are not party to or bound by regulated relationships). Thus a landlord taking vacant possession of a building after the expiry of a lease may find, for example, that a mast has been installed on the roof, pursuant to permission given by the tenant under the now expired lease. The landlord may have no objection to the mast continuing to be there and be willing to negotiate terms with the Code Operator, but may need to have the mast removed temporarily, and urgently, in order to repair the roof.

6.74 We can address this need in our discussion of the provisions that we recommend to replace paragraph 21. The current paragraph 21, and our recommended new regime for security for electronic communications apparatus, addresses the need to restrict, to some extent, the rights of those who are entitled to require the removal of apparatus. Landowners who are entitled to require removal must, by reason of that entitlement, also have the right to require temporary removal or repositioning. So we revert to this problem below.

Alteration and removal of apparatus installed under the special regimes

6.75 Electronic communications apparatus can in a number of cases be installed without any need for the Code Operator to seek express rights to do so by agreement or by order. We explain in Chapters 7 and 8 our conclusions on the right to have the apparatus altered or moved in some of these contexts.[39]

A NEW REGIME TO REPLACE PARAGRAPH 21: RESTRICTING THE RIGHTS OF THOSE WHO ARE ENTITLED TO HAVE APPARATUS REMOVED

General comments

6.76 It is unsurprising that landowners should be unwilling to have their rights to remove electronic communications apparatus, and to do as they wish with their property, restricted by the revised Code. Paragraph 21 of the 2003 Code gives rise to a great deal of opposition and indignation.

6.77 However, we see the need for provisions about removal, so as to prevent disruption to users and to Code Operators. It would be particularly unhelpful for landowners to have the right to remove apparatus without restriction, only to have it reinstalled shortly after removal as a result of an application for the imposition of Code Rights, as discussed in Chapter 4. Fundamentally paragraph 21 is about continuity of services.

6.78 That said, paragraph 21 is rightly criticised for its inefficient procedure. It holds hazards for both landowners and operators, giving the latter an impracticably

[39] See para 7.47 and following, and para 8.25 and following, below.

short notice period in which to remove their apparatus, while also imposing a disproportionate level of inconvenience and expense upon landowners who have to initiate court proceedings in order to secure vacant possession.[40] Code Operators, by contrast, need do nothing once they have served a counter-notice, secure in the knowledge that until the landowner takes proceedings the apparatus cannot be removed.[41]

6.79 We are impressed by the arguments in favour of the 1954 Act, which is well-respected and whose provisions appear to operate, for the most part, smoothly. We are also impressed by the observations made by Code Operators to the effect that they would be generally supportive of a right for landowners to have the apparatus removed when they wish to redevelop the land.

6.80 Accordingly we are attracted to the idea of adapting, and incorporating within the revised Code, the regime found in the 1954 Act, while eliminating the current dual protection.

General recommendations about security for electronic communications apparatus

6.81 In order to introduce the new regime that we recommend for the revised Code we first make two general recommendations.

6.82 We deal first with the 1954 Act; our recommendation of course relates only to leases granted after the enactment of the revised Code.

6.83 **We recommend that a lease granted primarily for the purpose of conferring Code Rights upon a Code Operator should not fall within the scope of Part 2 of the Landlord and Tenant Act 1954.**

6.84 It follows that where leases are granted not primarily for the purpose of conferring Code Rights, but where Code Rights are a minor element of the arrangement, the protection given should be that of the 1954 Act rather than of the revised Code.

6.85 **We recommend that where Code Rights have been conferred by a lease whose primary purpose is not the grant of Code Rights, the lease should fall within the scope of Part 2 of the Landlord and Tenant Act 1954 and the provisions of the revised Code for the continuity of Code Rights should not apply to the Code Rights within the lease.**

6.86 There is of course room for doubt and for dispute as to the primary purpose of a lease. But we think that difficulties will arise in only a few cases; the lease of a mast site falls clearly on one side of the line, the lease to a Code Operator of a

[40] Shulmans LLP said: "In practical terms the current regime can result in situations whereby a landowner who has made a site available to an operator for, say ten years at a rent of £5,000, who then requires the equipment removed at the end of the lease can be faced with litigation at a cost in excess of all the income they have earned from the site throughout the whole of the lease term."

[41] The Phone Mast Company Ltd stated that "counter-notices under the Code are the norm, with operators knowing that landlords have to commit a massive amount of money in legal fees to obtain a possession order under the Code to get them off site. Yes, there may be grounds for compensation but operators appear to be playing the system knowing that landlords have to pay legal fees upfront at risk."

retail unit, where the lease incidentally permits the tenant to install a cell site on the roof, falls on the other.

6.87 It follows that in a mixed use lease where Code Rights are not the primary purpose of the letting, which is contracted out of the 1954 Act, the Code Operator will have no security. Where security is important, therefore, the Code Operator will want a separate lease for the apparatus.

6.88 We commented above that consultees took the view that Code Operators should not have protection from the normal operation and enforcement of the planning system. We agree – subject, of course, to the special provisions made within the planning system for electronic communications apparatus.

6.89 **We recommend that the revised Code should not restrict the ability of the planning authorities to require removal of electronic communications apparatus installed in breach of planning legislation.**

A new security regime for the revised Code

6.90 Unlike the provisions of paragraph 21 of the 2003 Code, our recommendations differentiate between cases where electronic communications apparatus is on land because it was installed pursuant to Code Rights that bound the landowner who now wishes to remove it, and cases where it is present despite the fact that Code Rights either have not been conferred or have not been validly conferred vis-à-vis the landowner who now wishes to remove it.

6.91 Another way of putting that is to say that we differentiate between claimants who are or have been Site Providers, and those who are not and have not been Site Providers vis-à-vis the Code Operator. The fact that these two sets of potential claimants are in different positions under our recommended new regime recalls the discussion in Chapter 2 of who can confer Code Rights, and who is bound by them. It is in the interests of Code Operators to deal with all those who have an interest in the land, so as to protect its own position when Code Rights expire.[42]

6.92 A further innovation is that we have made provision for cases where the claimant does not object to the apparatus remaining on the land but wants new terms – in particular, new rent. This is in line with the comments of consultees who recommended the introduction of a twin-track procedure that distinguished between “hostile” and “non-hostile” notices.

6.93 We have not made any provision for contracting out of the recommended regime. Code Operators expressed great concern about the possibility of contracting out save (for the most part) in cases where the landowner wished to develop its land; our recommended regime mirrors the 1954 Act in allowing the landowner to regain possession where he or she intends to redevelop the land and so the issue of contracting out on that ground does not arise.

6.94 It will be recalled that we said in Chapter 2 of this Report that “Code Rights” are rights conferred upon Code Operators. Rights conferred on other operators who

[42] See paras 2.97 to 2.98 above. Note that in some cases this is not necessary, particularly where the Code Operator deals with a professional Site Provider, in particular a wholesale infrastructure provider; see para 2.111 above.

later become Code Operators are not Code Rights for the purpose of this Report and should not generate the consequences reserved for Code Rights in the revised Code.[43]

The continuity of Code Rights

6.95 We begin with a recommendation that draws on the analogy of the 1954 Act, by providing for Code Rights, and leases granted primarily for the purpose of conferring Code Rights, to continue when they would otherwise have expired, along with any terms and conditions on which they were conferred. This will bring to an end the situation where Code Rights expire but equipment remains on land, no longer subject to any obligation for the Code Operator to pay for its presence; where the Site Provider either wants the equipment to be removed or wants it to remain subject to new terms and conditions, he or she will still be able to accept rent pending the resolution of the claim for removal or for new terms.[44] Equally, the Site Provider who is content with the continuation of the Code Rights provided that current terms continue does not have to do anything at all in order to ensure the continuity of the situation.

6.96 **We recommend that the revised Code should provide that Code Rights, and leases conferred primarily for the purpose of granting Code Rights, shall not come to an end unless terminated in accordance with the provisions of the revised Code.**

6.97 This means that where Code Rights have been conferred for a term, they will continue, and will continue vis-à-vis those who conferred them and all who are bound by them,[45] until they are terminated in accordance with our recommended regime. Leases are by definition granted for a term. Code Rights granted for an indefinite period are unaffected by this recommendation.

Giving notice to determine Code Rights

6.98 As we explained above, our recommended regime has two branches. The first relates to Site Providers, defined in this Report as those who have conferred Code Rights, or have had Code Rights imposed upon them, or are bound by Code Rights.

6.99 In the absence of any provision to the contrary in the revised Code, Site Providers would be entitled to have electronic communications apparatus removed from their land only in accordance with the terms on which the Code Rights were granted (or of the lease where applicable). So they would be entitled to have the apparatus removed once the Code Rights expired, or in accordance with a "break clause" (that is, a clause entitling the Site Provider to terminate Code Rights early, either generally or in specified circumstances). Our recommendation is that that entitlement should be able to be exercised only after the giving of a notice, and only if one of the grounds to be set out in the revised Code is made out.

[43] This reflects views expressed in response to the question at para 5.56 of the Consultation Paper; see para 2.25 above.

[44] We have also made a recommendation about claims for the determination of an interim rent; see para 6.108 below.

[45] In accordance with the recommendations at paras 2.129 to 2.132 above.

6.100 We are mindful of consultees' comments about the length of notice required for a Code Operator to be able to relocate apparatus. TPCL and the British Property Federation, for example, suggested a minimum of 12 months; the Mobile Operators Association argued that:

> … 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.

6.101 We have, therefore, provided for a relatively long period; some Site Providers will regard this as too long, and we would remind them that this recommendation nevertheless gives them an important facility that is not available under the 2003 Code. We refer in our recommendation to a prescribed form of notice, in order to meet the concerns of consultees who indicated that, on occasions, it is difficult to ascertain whether or not a notice under the current paragraph 21 has been given.[46] The use of a prescribed form of notice in this context[47] reflects its use for the termination and renewal of business tenancies under Part 2 of the Landlord and Tenant Act 1954, where it is regarded as working well.[48]

6.102 **We recommend that a Site Provider – to be defined in the revised Code as a landowner who has granted Code Rights, or had them imposed upon him or her by the tribunal, or is otherwise bound by Code Rights – should be enabled by the revised Code to bring Code Rights to an end (or to bring to an end a lease conferred primarily for the purpose of granting Code Rights) by serving a notice upon the Code Operator.**

6.103 **We recommend that that notice:**

(1) **must be in a prescribed form;**

(2) **must give at least 18 months' notice of the ending of the Code Rights (or of the lease, as the case may be);**

(3) **must expire on a date on which the Code Rights (or the lease, as the case may be) could have been brought to an end,[49] or on or after the date on which the Code Rights (or the lease, as the case may be) would have come to an end by the passage of time, had the Code**

[46] The form of the notice can be prescribed in secondary legislation and we anticipate that the form will be agreed with Ofcom (by analogy with the non-statutory standard form notices that we discuss at para 9.120 and following below). We observe that it will be important to prescribe a single form of notice that does not require the Site Provider to state or decide whether the regulated relationship is a lease.

[47] See also our recommendations at paras 6.117 and 6.139 below.

[48] The prescribed forms are contained in the Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004, SI 2004 No 1005. RICS said that "the [2004 Regulations] work 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."

[49] Thus capturing the cases where Code Rights in a lease would have come to an end by effluxion of time, or could have been terminated by notice (whether under a break clause in a fixed term lease, or by giving notice to quit in the case of a periodic tenancy).

Rights or the lease not been continued in accordance with the recommendation we made at paragraph 6.96 above; and

(4) **must state that one or more of the grounds for termination, set out in our recommendation at paragraph 6.110 below, applies.**

6.104 **We recommend that the Code Rights, or the lease as the case may be, shall come to an end in accordance with the notice given by the Site Provider, unless:**

(1) **within three months of receipt of the Site Provider's notice the Code Operator serves a counter-notice, in a prescribed form, stating either that it does not want its Code Rights (or the lease, as the case may be) to come to an end, or that it wants new Code Rights on new terms and conditions; and**

(2) **within three months of the service of that counter-notice initiates proceedings in the Lands Chamber of the Upper Tribunal to claim that the Code Rights (or the lease) should continue, or should continue on different terms and conditions, or to claim new Code Rights (or a new lease).**

6.105 The notice to be given by the Site Provider is thus analogous to a notice under section 25 of the 1954 Act such that Code Rights will come to an end unless the Code Operator takes action not only by serving a counter-notice but also by initiating proceedings. Thus the incentive for the Code Operator to do nothing, and the burden on the landowner to take proceedings, under the 2003 Code both disappear.

6.106 In cases where the Code Operator accepts that its rights will come to an end, it need not respond to the notice – although we would expect there to be some correspondence. When the Code Rights come to an end there will then be no restriction upon the landowner's right to require and enforce the removal of the electronic communications apparatus.[50]

6.107 In practice, where the Code Operator seeks to remain on the site, we would expect that in the light of the need to take proceedings to secure its right to remain the Code Operator will enter into negotiations with the Site Provider. It may need to initiate proceedings before those negotiations have concluded, and it will be open to the parties to agree that those proceedings can be stayed pending negotiation if those discussions are proceeding well.[51] The commencement of proceedings will also give the Site Provider the opportunity to apply for an interim rent if the position is that the current payments are inadequate, again by analogy with the 1954 Act.[52]

[50] See our recommendation at para 6.127 below.

[51] We discuss the case management powers of the Lands Chamber of the Upper Tribunal, which include the power to stay proceedings, at para 9.90 below.

[52] For example when notice has been given at a point beyond the times when the Code Rights would have expired, in circumstances where the agreement conferring the Code Rights did not provide for a review of payments.

6.108 **We recommend that the revised Code should incorporate provision for the tribunal to determine an interim rent, by analogy with the provisions of section 24 of the Landlord and Tenant Act 1954.**

6.109 Crucial to the regime is the list of grounds on which Code Rights, or the lease that confers them, can be brought to an end. The grounds we have recommended will be readily recognised from section 30(1) of the 1954 Act, with the omission of three provisions that are not suitable.[53] It will be seen that the grounds encapsulate both the possibility of redevelopment and the cases where the Code Operator's conduct has been such that it ought not to be allowed to remain on the land. Finally, a further ground available to the Site Provider is that the test for the imposition of Code Rights would not be satisfied if the Code Operator were now to apply for the Code Rights in question; for consistency, clearly the Code Operator should not in those circumstances be entitled to resist removal.

6.110 **We recommend that the tribunal shall make an order bringing to an end the Code Rights, or the lease conferring them as the case may be, if one or more of the following grounds is made out by the Site Provider:**

(1) **that the Code Rights ought to be brought to an end in view of substantial breaches by the Code Operator of its obligations under the terms and conditions (or the lease, as the case may be) pursuant to which it has Code Rights;[54]**

(2) **that the Code Rights ought to be brought to an end because of persistent delay in payment by the Code Operator under the terms and conditions (or the lease, as the case may be) pursuant to which it has Code Rights;[55]**

(3) **that the Site Provider intends to redevelop all or part of the land on which the apparatus is sited, or neighbouring land, and could not reasonably do so unless the Code Rights are brought to an end;[56]**

(4) **that the Code Operator is not entitled to the Code Rights because the test for the imposition of Code Rights (our recommendation at paragraph 4.43 above) is not satisfied.**

6.111 These provisions make no mention of the material found in paragraph 21(6) of the 2003 Code to the effect that possession will not be given if the Code Operator is taking steps to acquire fresh Code Rights. The new regime does not require the Code Operator to start afresh and to claim new rights on the basis of the test for imposing Code Rights; rather, the Code Rights continue unless one of the grounds is made out.

6.112 It may be that changes in circumstances, technological requirements, or simply inflation (if the current arrangements do not provide for a rent review), or the

[53] Section 30(1)(d), (e) and (g).

[54] Compare section 30(1)(a) and (c) of the Landlord and Tenant Act 1954.

[55] Compare section 30(1)(b) of the Landlord and Tenant Act 1954.

[56] Compare section 30(1)(f) of the Landlord and Tenant Act 1954.

desire to have in place a certain term mean that the tribunal is asked by either party to amend the Code Rights themselves or the basis on which they are held. Consultees also observed that some Site Providers are themselves subject to statutory duties – the owners of water towers are the most obvious example but there are others; and so our recommendations below reflect this.

6.113 **We recommend that where the claimant fails to establish one of the grounds recommended above, the Code Rights (or the lease) will continue, but the tribunal may make an order conferring fresh Code Rights, amending the terms and conditions on which Code Rights are held, or for the termination of the current lease and the grant of a new lease to the Code Operator, having regard to all the circumstances of the case and in particular to:**

(1) **the business and technical requirements of the Code Operator;**

(2) **the use that the Site Provider is making of his or her land;**

(3) **any statutory duties of the Site Provider; and**

(4) **the level of consideration currently payable under the revised Code for the Code Rights that the Code Operator has or wishes to acquire.**

6.114 **We recommend that the revised Code should provide that the terms of a lease granted by order of the tribunal shall be such as may be agreed between the Site Provider and the Code Operator or as, in default of such agreement, may be determined by the tribunal; and in determining those terms the tribunal shall have regard to the terms of the current lease or other agreement and to all relevant circumstances.**[57]

6.115 We have to provide for two further possibilities; first, where it is not the Site Provider but the Code Operator who requires a change in the Code Rights or the terms on which they are held; and, second, where the Site Provider has no objection to the Code Rights continuing but wishes to change the terms and conditions – in particular the rent – or to bring the current agreement or lease to an end and put a new one in place.

6.116 **We recommend that Site Providers and Code Operators should be enabled by the revised Code to require either:**

(1) **that the terms and conditions on which Code Rights are held (or the terms of a lease by which they are conferred, as the case may be) are to be amended, or**

(2) **that the agreement or lease is to come to an end and a new one be granted,**

by serving a notice upon the other party.

[57] Compare section 35 of the Landlord and Tenant Act 1954. Consideration of course will be dealt with in other provisions of the Code and we have not thought it appropriate to impose a maximum duration where a new lease is granted.

6.117 **We recommend that that notice:**

(1) **must be in a prescribed form;**

(2) **must give at least six months' notice of the change of terms;**

(3) **must expire on a date at which the Code Rights (or the lease, as the case may be) could have been brought to an end,[58] or on or after the date at which the Code Rights (or the lease, as the case may be) would have come to an end by the passage of time, had the Code Rights or the lease not been continued in accordance with the recommendation we made at paragraph 6.96 above; and**

(4) **must set out the amendments required, or the details of the new lease or agreement required.**

6.118 **We recommend that the revised Code should provide that if the parties have not reached agreement within six months of the service of the notice, either party shall be able to apply to the Lands Chamber of the Upper Tribunal for an order effecting the amendment requested or requiring the grant of the new agreement or lease, as the case may be.**

6.119 **We recommend that on hearing that claim, the tribunal may make an order conferring fresh Code Rights, amending the terms and conditions on which Code Rights are held, or for the termination of the current lease and the grant of a new lease to the Code Operator, having regard to all the circumstances of the case and in particular to:**

(1) **the business and technical requirements of the Code Operator;**

(2) **the use that the Site Provider is making of his or her land;**

(3) **any statutory duties of the Site Provider; and**

(4) **the level of consideration currently payable under the revised Code for the Code Rights that the Code Operator has or wishes to acquire.**

6.120 Again, our recommendations improve the position of the Code Operator by providing a procedure for the amendment of terms without requiring it to apply afresh under the test for the imposition of Code Rights, while at the same time enabling a Site Provider to have the terms of the regulated relationship revised.

Cases where the claimant is not a Site Provider

6.121 The 2003 Code provides security for equipment after the expiry of Code Rights and equally in cases where there have been no, or no valid, Code Rights. We have explained above that we distinguish between cases where Code Rights have been validly created and those where that is not the case.

[58] Thus capturing the cases where Code Rights in a lease would have come to an end by effluxion of time, or could have been terminated by notice (whether under a break clause in a fixed term lease, or by giving notice to quit in the case of a periodic tenancy).

6.122 Our recommendations achieve this by making provision for the continuation of Code Rights until they are validly terminated in accordance with the provisions of the revised Code. But those recommendations have no effect upon landowners who are not bound by Code Rights, nor on cases where there have never been any Code Rights (for example, the apparatus has been installed on land by mistake due to uncertainty about a boundary).

6.123 In these cases we take the view that the revised Code should not restrict the landowner's rights to possession of the site (nor, therefore, to have the apparatus moved or temporarily removed). Thus in the following cases, for example, the revised Code will have no effect upon the landowner's ability to have the electronic communications apparatus removed in the same way as he or she would be able to remove any other material placed on his or her land by a stranger:

(1) where the apparatus has been placed on land pursuant to Code Rights granted by someone with a lesser interest in the land which has now come to an end – for example by an occupier who has left, or by a tenant whose lease has expired;

(2) where the apparatus has been placed on land pursuant to Code Rights granted by someone unlawfully – for example by a tenant but in breach of the tenant's covenant with the freeholder;

(3) where the apparatus has been placed on the land by mistake or in a deliberate trespass;

(4) where the apparatus has been placed on the land pursuant to Code Rights granted by, or binding upon the landowner but which have come to an end because the landowner established one of the grounds for termination recommended above;[59] and

(5) where the apparatus was installed under one of the special regimes, discussed in Chapter 7, and the circumstances that gave rise to the special regime have ended – for example because a road has been stopped up or a railway line has become disused.

6.124 The 2003 Code includes a provision at paragraph 4(2) that entitles such landowners to have the land reinstated by the Code Operator, but subject to paragraph 21. The revised Code should set out the landowner's right to reinstatement, consistently with the revised policy on removal.

6.125 Landowners may have apparatus installed on their land not pursuant to Code Rights, but by virtue of a standalone right conferred by the revised Code, under the special regimes, or in relation to the right to install overhead lines connected to apparatus on other land;[60] and of course those special provisions inevitably

[59] Also, where apparatus has been shared pursuant to the recommendation we made at para 3.51 above, the landowner will not be bound by Code Rights vis-à-vis the sharer; see para 3.52 above.

[60] 2003 Code, para 10.

restrict the landowner's right to remove the apparatus.[61] Where landowners have been subject to a special regime but are no longer – see paragraph 6.123(5) above – they should not be in a position to remove the Code Operator summarily. We make recommendations about this in Chapter 7.[62]

6.126 Finally, the 2003 Code includes provision at paragraph 22 for apparatus that has been abandoned. It states that Code Operators are not entitled to keep apparatus on land when it is not used for the operator's network and there is no reasonable likelihood that it will be so used. In such cases the existence of Code Rights should not restrict the Site Provider's ability to remove the apparatus, and so we make a recommendation that where apparatus has been abandoned the landowner should be in the same position as if he was not bound by Code Rights.

6.127 **We recommend that where a landowner is not bound by Code Rights the revised Code should not restrict the landowner's ability to require the removal of electronic communications apparatus from land, save as provided in our recommendations at paragraphs 7.68, 7.69, 7.88, 7.89, 7.129 and 8.16 below.**

6.128 **We recommend that the revised Code should include provisions that correspond to those of paragraph 4(2) in the 2003 Code, giving landowners who are not bound by Code Rights the right to require the Code Operator to reinstate the land to its original condition.**

6.129 **We recommend that the revised Code should provide that where electronic communications apparatus has been installed on land pursuant to Code Rights but is no longer in use, and there is no realistic prospect of its being used, either for the purposes of an electronic communications network or as conduits or infrastructure for a network, the Site Provider shall be able to require its removal as if he or she were not bound by Code Rights.**

6.130 Those recommendations do not mean that the Code Operator will be unable to retain its equipment on the land; it will be free to apply for Code Rights in accordance with the test we have recommended at para 4.43 above. In the absence of such an application the Code Operator will have no defence to an action for possession by the landowner; where the Code Operator wishes to retain the equipment and acquire Code Rights against the landowner it will have to take action to apply for those rights and also to apply to stay any proceedings taken by the landowner. The fact that action is required of the Code Operator in these circumstances means that there is an incentive upon Code Operators to regularise the legal position of their apparatus and to ensure that those whom they wish to be bound by Code Rights are party to the negotiations for initial installation – as is already acknowledged by Code Operators to be best practice.

6.131 In cases where the Code Operator is applying for Code Rights there will be occasions where it needs temporary rights to ensure the continuity of its service. Paragraph 6 of the 2003 Code enables the award of such temporary rights, and

[61] See Chapter 7 and paras 8.3 to 8.16 below.

[62] See paras 7.69 (linear obstacles) and 7.89 (street works) below.

we make a recommendation below that the revised Code contain a similar provision.[63]

6.132 In theory the landowner will not need to take proceedings in these cases; he or she is free to remove the apparatus. But it may be difficult or expensive to do so, and the revised Code needs to make provision for the landowner to recover from the Code Operator any costs incurred in the course of self-help.

6.133 **We recommend that the revised Code should enable a landowner to apply to the tribunal for:**

(1) **an order entitling him or her to recover from the Code Operator the costs of removing electronic communications apparatus;**

(2) **an order entitling him or her to sell any apparatus removed and to retain the whole or a part of the proceeds of sale on account of the costs of removing it;**

in cases where the Code Operator has not complied with a request (made by notice in a prescribed form) to remove the apparatus.

6.134 **We recommend the revised Code should provide that where a Code Operator has applied for Code Rights in respect of apparatus that is already situated on land, that operator should also be able to apply for such temporary rights as are reasonably necessary for securing that, pending the determination of the application for Code Rights, the service provided by the operator's network is maintained and the apparatus properly adjusted and kept in repair.**

The provision of information

6.135 What of the circumstance where the landowner does not know whether or not the electronic communications apparatus that he wishes to remove is present on the land pursuant to Code Rights – and therefore does not know which of the provisions in our recommended regime is relevant? It is easy to see that this is possible, when a reversioner regains possession of land after the departure of a tenant and finds electronic communications apparatus upon it. In those circumstances it is crucial for the landowner to know whether or not he is entitled to remove the apparatus after serving notice.

6.136 Normally enquiries would be made and the Code Operator identified. But it would be wholly unacceptable for the Code Operator to refuse to disclose whether or not its equipment was on the land pursuant to Code Rights. The Code Operator should also be prepared to provide proof of that where necessary: this should not be problematic, since Code Rights are to be conferred by order or in writing.[64] On the other hand, it may be difficult within a large organisation for correspondence to be directed to the right person or for records to be accessed quickly.

6.137 To assist both Code Operators and landowners we make a recommendation for a prescribed form of notice seeking information from the Code Operator; if these

[63] See para 6.134 below.

[64] See our recommendation at para 2.76 above.

requests are in prescribed form the operator should be better able to identify them and to make arrangements for them to be processed quickly.

6.138 Where a timely response is not made, however, the landowner should be able to proceed as if the Code Operator did not have Code Rights – and indeed in the absence of information there is nothing else he can do. In those cases where a Code Operator has failed to respond to the prescribed form, but then later establishes that it has Code Rights, the landowner will have to revert to the notice procedure prescribed above. But we recommend that if in such cases the landowner proceeds to give notice and to require removal under the procedure recommended above, the Code Operator will have to pay the landowner's costs in any event. The intention is to provide an incentive to the Code Operator to put in place procedures to ensure that the prescribed form is answered swiftly

6.139 **We recommend that the revised Code should provide that where a Code Operator is asked by a landowner on whose land electronic communications apparatus is sited to disclose whether or not the apparatus is there pursuant to Code Rights, and the Code Operator does not reply within two months of service of that request in a prescribed form, then:**

(1) **the landowner shall be entitled to proceed as if the Code Operator did not have Code Rights, but**

(2) **if it is later established that the Code Operator has Code Rights and the landowner proceeds to give notice and require removal, the Code Operator shall pay the landowner's costs incurred in the procedure for requiring removal in any event.**

CHAPTER 7
THE SPECIAL REGIMES

INTRODUCTION

7.1 We use the term "special regime" to describe instances where the 2003 Code sets out rights and obligations for Code Operators that differ from those under the General Regime described so far in this Report, due to a special context – whether a particular form of land or because a particular type of party is involved.[1]

7.2 Some of these confer rights on Code Operators independently of a regulated relationship. Under paragraphs 9, 11 and 12 of the 2003 Code, Code Operators have rights under the Code itself to install and keep apparatus in, over or under certain types of land: streets which are maintainable highways, certain tidal waters and lands, and railways, canals and tramways.

7.3 Others restrict Code Operators' rights in specified circumstances. The effect of paragraph 11(2) is that Code Operators have no automatic rights to put apparatus on, under or over tidal waters and lands which are subject to a Crown interest. Under paragraph 15, the use of certain existing conduits, such as water mains, is also limited so that the consent of the authority controlling the conduit is needed in order to place apparatus there.

7.4 The final special regime, under paragraph 23 of the 2003 Code, provides additional procedures for resolving conflicts between Code Operators and other statutory undertakers.

7.5 We begin this Chapter with some general observations about the special regimes following our consultation, and then go on to consider and make recommendations in relation to each of the special regimes.

THE GENERAL REGIME AND THE SPECIAL REGIMES

7.6 We come to this Chapter having made a number of recommendations in relation to the General Regime. Our recommendations change the way in which the General Regime operates in the 2003 Code; some also represent a change in our thinking since the Consultation Paper. We envisage that under the General Regime, a test will be applied for the imposition of Code Rights; those Code Rights will not automatically bind all those with interests in the land; they may be brought to an end by the landowner, on specified grounds, but are not otherwise vulnerable to alteration during the term; and market value will be payable for the rights.

7.7 This means that the special regimes are thrown into particularly sharp relief, to the extent that they permit a Code Operator to install apparatus without the consent of the landowner, or give the landowner the right to refuse consent; or confer additional rights to require the alteration of the apparatus; or cease to apply by a change in the use of the land; or make no or a reduced provision for consideration.

[1] See para 2.11 above.

7.8 In Part 4 of the Consultation Paper we discussed and presented provisional proposals and consultation questions on each of the special regimes, and asked consultees whether any new special regimes should be created. A persistent thread running through consultation responses was one of leaning against the creation or maintenance of special regimes. A strong majority of consultees who responded to the final question[2] considered that "there should be no more special regimes than are absolutely necessary",[3] and argued that the number of special regimes should where possible be reduced, not increased.

7.9 On the other hand, some comments were made which suggested special treatment for other situations which arise under the Code: notably, the use of land owned or used by utilities providers, particularly water undertakers. Dŵr Cymru Welsh Water, South West Water Ltd and Mobile Phone Mast Development Ltd argued that such statutory undertakers have specific requirements and concerns about apparatus causing interference with their functions. They therefore considered that such owners and occupiers of land should have more control over when apparatus is placed there and on its alteration and removal.[4]

7.10 We did not consider that a new special regime was justified for these situations, but that these arguments pointed to the need to have such issues taken into account within the General Regime. We have therefore incorporated these issues into our consideration of the recommendations made in the preceding Chapters; in particular, regarding the test applied for the imposition of Code Rights, and the circumstances taken into account by a tribunal deciding on what terms the Code Rights should be granted and any changes to those terms on renewal.[5]

7.11 We now consider the special regimes which exist in the 2003 Code. We turn first to the regime which applies to "linear obstacles".

LINEAR OBSTACLES

The provisions of the 2003 Code

7.12 "Linear obstacles" is the term commonly used for types of land to which paragraph 12 of the 2003 Code applies, defined as land which is used wholly or mainly as, or in connection with, "a railway, canal or tramway".[6] Under sub-paragraph (1), Code Operators have the right, without agreement or a court order, to cross such land with a line, and to install and keep the line and other

[2] Consultation Paper, para 4.43.

[3] The Central Association of Agricultural Valuers (CAAV), Peel Holdings Land and Property (UK) Ltd and Strutt & Parker LLP.

[4] In addition to the requirement for consultation under regulation 3(1) of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 (see para 8.96 and following below), and the provisions of the 2003 Code, para 23 (see para 7.141 and following below). Various approaches were suggested by consultees: the creation of a new special regime for properties used by statutory undertakers, or an extension to the regime for the alteration of apparatus crossing linear obstacles under the 2003 Code, para 14 (see para 7.16 and following below) or to the provisions of the 2003 Code, para 15 on relevant conduits (see para 7.131 and following below).

[5] See paras 4.21 and 6.112 above.

[6] 2003 Code, para 12(10).

apparatus on, under or over that land. There are ancillary rights to execute works and to enter and inspect.

7.13 This regime only extends to "crossing" the linear obstacle. The route of the line must not exceed the shortest route (on a horizontal plane) by more than 400 metres. Thus, it cannot be used simply to run a line alongside a railway, canal or tramway. In addition, the regime cannot be used where the apparatus to be installed would interfere with traffic on the railway, canal or tramway.[7]

7.14 The Code Operator must give 28 days' notice to the person with control of the land – that is, "the person carrying on the railway, canal or tramways undertaking in question"[8] – providing specified details of the proposed works. If this person objects within the 28 days, there is an arbitration procedure; although, if within 28 days of the notice of objection neither party has given further notice requiring agreement to the appointment of an arbitrator, the works may go ahead. Otherwise, the Code Operator may only proceed with the works in accordance with the arbitrator's award.[9]

7.15 Under paragraph 13, in considering what award to make, the arbitrator is to have regard to all the circumstances and to "the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services". However, since the right to cross the linear obstacle is given by the 2003 Code itself, this is different from the exercise undertaken by the court under paragraph 5 where there is an application to dispense with the agreement which would otherwise be required for the works to be carried out. The arbitrator has various powers to require the provision of information; the award may require modifications to the proposed works and control how they are carried out, and may also contain terms as to compensation and consideration for the person objecting to the works.[10]

Alteration and removal

7.16 The 2003 Code makes special provision for the alteration of apparatus crossing a linear obstacle, at paragraph 14.[11] The person with control of the linear obstacle may give notice requiring the Code Operator to alter its apparatus where it interferes or is likely to interfere with the carrying on of the railway, canal or tramway undertaking or anything done or to be done for the purposes of that undertaking.[12] If the Code Operator is not prepared to comply with the notice in some or all of its respects, it must give a counter-notice to that effect. The person with control of the linear obstacle may then apply to the court for an order requiring alteration.

7 2003 Code, para 12(2) and (3).

8 2003 Code, para 12(10).

9 2003 Code, para 12(4) to (6). There is provision for the Code Operator to carry out emergency works without observing the notice and arbitration procedure; in such a case notice must be given as soon as reasonably practicable after the works were commenced: para 12(7).

10 See paras 7.20 to 7.22 below.

11 "Alteration" includes "moving, removal or replacement": 2003 Code, para 1(2).

12 2003 Code, para 14(1). The ability to give a notice under para 14 does not entitle the controller of the linear obstacle to enforce the removal of the apparatus: para 21(12).

7.17 The court can only make an order if it is satisfied that it is necessary on the grounds of interference with the railway, canal or tramway undertaking as explained above. In considering whether to do so, it must also consider all the circumstances and the Access Principle.[13] But there is no requirement for the court not to make an order unless it is satisfied that the alteration will not substantially interfere with any service which is or is likely to be provided using the Code Operator's network; this is in contrast to paragraph 20(4) of the 2003 Code. Various terms and conditions may be included in any order made.[14]

7.18 The 2003 Code does not exclude the use of the general procedure for requiring the alteration (including the removal) of apparatus which appears in paragraph 20.[15] This is available to any person with an interest in the land on, under or over which the apparatus is kept installed, or in land which is adjacent to it. We have discussed the current scope and use of paragraph 20 in Chapter 6.[16]

7.19 The 2003 Code does not make provision for the removal of apparatus if the land ceases to be a linear obstacle as defined. However, in such a case the Code Operator will no longer have the right to keep the apparatus on, under or over it. The provisions of paragraph 21 will apply so that the removal of the apparatus is subject to a notice procedure, and the Code Operator will have the opportunity to apply for Code Rights to maintain the apparatus in position.

Compensation and consideration

7.20 Under paragraph 13 of the 2003 Code, if an objection is made to the carrying out of the works for the crossing of the linear obstacle,[17] the arbitrator may make an award in favour of the objector in respect of one or both of the following.[18]

(1) Compensation for "loss or damage sustained by that person in consequence of the carrying out of the works". This can include any increase in the expenses of carrying on a railway, canal or tramway undertaking.[19]

(2) Consideration for "the right to carry out the works". This is to be "determined on the basis of what would have been fair and reasonable if

[13] 2003 Code, para 14(4).

[14] 2003 Code, para 14(5).

[15] Paragraph 12 of the 2003 Code is made subject to "the following provisions of this Code": para 12(1). The provisions of paragraph 23, discussed at para 7.141 and following below, may also apply where alterations to the apparatus are necessary because of works to be executed by the undertaker controlling the linear obstacle.

[16] See para 6.7 and following above.

[17] Although para 12(8) of the 2003 Code refers only to compensation for loss or damage in respect of emergency works, it seems likely in view of the drafting of para 13(2) that both compensation and consideration are available, where appropriate, in respect of all works carried out under linear obstacles, whether emergency works or otherwise.

[18] 2003 Code, para 13(2)(e). Para 13(3) deals with the award of compensation in respect of loss or damage consequent on emergency works.

[19] 2003 Code, para 13(6)(a).

the person who objects to the works had given his authority willingly", on the same terms as in the arbitrator's award.[20]

7.21 Consideration is awarded only in respect of the right to carry out the works, and not for the retention of the apparatus on the land. This means that a financial award will only be made when works are carried out in relation to a linear obstacle, and not where, for example, an upgrade is carried out which does not require further works.[21]

7.22 This contrasts with the position under paragraph 7(1)(a) of the 2003 Code, where consideration is given for the Code Rights which the Code Operator is to have.[22]

Consultation

7.23 In the Consultation Paper we asked a number of questions about the linear obstacles regime, examining the need to maintain it as a special regime, the rights and obligations which it grants, and the special provisions on alteration and consideration.[23]

The right to cross linear obstacles

7.24 In Part 4 of the Consultation Paper, we asked whether it is necessary to have a special regime for linear obstacles or whether the General Regime would suffice; and to what extent the linear obstacle regime is currently used. Consultees differed as to both of these issues.

7.25 A popular view among consultees was that a special regime was not needed, and that the General Regime would suffice. Some consultees suggested that the linear obstacle regime is confused and tends to promote litigation. Surf Telecoms considered that Code Operators find it "difficult to use the powers and it is very often not cost effective to do so". The Central Association for Agricultural Valuers (CAAV) noted that the linear obstacle regime does not deal with all linear obstacles, and suggested that it may encourage litigation regarding the distinction between a canal and a river.

7.26 Ian S Thornton-Kemsley observed that although canals, railways and tramways form natural obstacles to the deployment of networks, the 2003 Code makes no special provision for long strips of private land which may similarly block development.[24] He also raised concerns about overriding property rights under the regime without undertaking the balancing exercise which is required for the imposition of Code Rights under the General Regime.[25]

[20] 2003 Code, para 13(6)(b).

[21] *Geo Networks Ltd v The Bridgewater Canal Company Ltd* [2010] EWCA Civ 1348, [2011] 1 WLR 1487.

[22] See paras 5.5 and 5.7 above.

[23] Consultation Paper, paras 4.30, 5.18 and 6.78.

[24] Alicia Foo and Nicholas Vuckovic also commented that "it seems odd to differentiate between the crossing of a linear obstacle and the installation of apparatus alongside it".

[25] See generally Chapter 4 above.

7.27 Consultees who favoured simplifying the Code by removing this special regime often did so on the condition that various amendments were made to the General Regime. In particular, it was felt that ransom situations – not simply for linear obstacles, but also for situations where a landowner controls large areas of land – could be dealt with under the test for the imposition of Code Rights in the General Regime. There was concern to ensure that the interests of the parties were balanced and – in some cases – that consideration for the rights was assessed on a market value basis.

7.28 Peel Holdings Land and Property (UK) Ltd set out a list of additional provisions which they considered would be required in order to make the General Regime appropriate for linear obstacles. These included special provisions for the termination of Code Rights and for alteration of apparatus, as well as for the payment of consideration and compensation, and indemnities.

7.29 We also heard from a number of consultees who considered that this special regime should be retained. British Telecommunications plc (BT) argued that the regime avoids "significantly greater barriers to efficient deployment of networks". Geo Networks Ltd stated:

> We believe strongly that a special regime for linear obstacles is necessary.
>
> Before the recent *Geo Networks Ltd v Bridgewater Canal Co* case, no one understood how the linear obstacle regime worked. Since the interpretation of paragraph 12 by the Court of Appeal, Code Operators have been using the regime and, in our case, find it extremely effective and appropriate to secure access rights across linear obstacles.

7.30 Cable & Wireless Worldwide Group agreed that the Court of Appeal's decision in *Geo Networks Ltd v The Bridgewater Canal Company Ltd*[26] had been important in clarifying the application of this special regime, and stated:

> … it is the maintainer/operator of the obstacle i.e. the person in control of the land and not the landowner that is affected here; although frequently they are synonymous. That maintainer/operator itself has statutory rights and has often acquired the land/exercised rights over it by reason of its statutory position.

7.31 Falcon Chambers commented that "our anecdotal evidence is that the regime is greatly used". The General Council of the Bar of England and Wales (the Bar Council) agreed that the regime should be maintained, stating that "it is necessary … given the public interest served by the infrastructure comprised in these 'obstacles'".

7.32 We agree that, on balance, it is right to retain a special regime for this situation in the revised Code. In particular, we note the responses from some Code Operators who state that the regime is being successfully used to enable them to

[26] [2010] EWCA Civ 1348, [2011] 1 WLR 1487.

make crossings which are necessary to the deployment of networks. As stated by Geo Networks Ltd:

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

7.33 The special regime meets that requirement. While the General Regime is capable of overcoming the problems of ransom strips which arise on private land, for these necessary crossings it is important to give Code Operators certainty that they will be able to cross the linear obstacles specified. Charles Russell LLP said:

> … 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.

This also makes the special regime more efficient for Code Operators, in that they need only deal with the occupier of the land who is carrying on the undertaking in question.

7.34 But the special regime also limits the effect of the rights granted by the Code in various ways. The rights under paragraph 12 only apply while the land is being used wholly or mainly as or in connection with what has been described as a "public facility".[27] They are also effective against the controller of the linear obstacle, not others who have interests in the land:

> There are no provisions applicable to this special regime comparable to those of the general regime for binding persons with an interest in the land in question or assessing compensation in respect of those interests.[28]

7.35 In addition, the extent to which the rights apply is limited by the provisions on the length of the crossing and the requirement not to use them in such a way as to interfere with the undertaking in question. As stated by Sir Andrew Morritt C in *Geo Networks Ltd v The Bridgewater Canal Company Ltd*, "the interference or intrusion on the land of others is minimal".[29]

7.36 And yet, as recognised by many consultees, that interference or intrusion must be balanced against the legitimate concerns of the undertaker in question. It is appropriate for this to be done within a special regime, rather than attempting to deal with those issues within the General Regime.[30] We come back to these

[27] *Geo Networks Ltd v The Bridgewater Canal Company Ltd* [2010] EWCA Civ 1348, [2011] 1 WLR 1487 at [28] by Sir Andrew Morritt C.

[28] Above, at [28] by Sir Andrew Morritt C.

[29] Above, at [28].

[30] See para 7.47 and following below.

issues below in connection with the alteration of apparatus crossing a linear obstacle.

7.37 We are conscious that, as noted by a few consultees, there may be difficulties in some cases in determining whether the special regime or the General Regime applies: whether a stretch of water is a river or a canal, or working out where a linear obstacle ceases and land subject to the General Regime begins. However, our consultation did not reveal general dissatisfaction on those issues from those who use the special regimes,[31] and we have therefore made no recommendations on these points.

Consideration

7.38 In the Consultation Paper, we provisionally proposed that there should be no distinction in the basis of consideration when apparatus is sited across a linear obstacle.[32] Read together with the provisional proposal we made about consideration payable for Code Rights under the General Regime, this would have meant that:

(1) consideration would be payable not only for the right to carry out works to place apparatus on, over or under a linear obstacle, but also for the right to keep it there; and

(2) the "no-scheme" compulsory purchase valuation of rights would have applied to assess the amount of consideration payable.

7.39 Many consultees agreed with (1), in many cases as the natural consequence of their arguments that consideration under the General Regime should be assessed on a market value basis. But in many cases, there was express disagreement with (2); instead, it was argued that that assessment should be carried out on a market value basis throughout.

7.40 Other consultees, however, argued to retain the current law on this point. Geo Networks Ltd said:

> Linear obstacles involve short land crossings where the competing interests of 2 statutory undertakers are under contention … and neither party has any long term ownership rights or claims to the land. There is little to no land value in these crossings, therefore the provision focuses on the important technical challenges … .
>
> The land in question is by its nature very different to the land under the General Regime, the linear obstacle land having already been acquired by compulsory purchase principles of the purpose of running the railway, canal or tramway. Hence the ownership is different to land owned under the General Regime and the statutory undertaker should not be entitled to the same financial award provisions that are given under the General Regime.

[31] Geo Networks Ltd suggested that the linear obstacle regime should be extended to cover waterways under non-riparian ownership, such as rivers.

[32] Consultation Paper, para 6.78.

7.41 Consultees who supported the current law referred to Sir Andrew Morritt C's words in *Geo Networks Ltd v The Bridgewater Canal Company Ltd*:

> 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 … .[33]

7.42 Given the conclusion we have reached that the special provisions of the linear obstacle regime should be retained, we consider that the current law on the payment to be made in respect of those rights should not be amended. The rights accorded under the special regime are not as extensive or durable as Code Rights under the General Regime. They apply only against the controller of the linear obstacle; they are limited to a short crossing; and they are vulnerable to alteration to accommodate the controller's operational needs, as we discuss below.[34] It would therefore not make sense to require market value consideration for those rights, as we have recommended in relation to Code Rights imposed on a Site Provider under the General Regime.

The rights granted and obligations imposed under the linear obstacle regime

7.43 In the Consultation Paper, we asked whether the rights that can be acquired under the linear obstacle regime are sufficient, and whether it should grant any additional rights or impose any other obligations.[35]

7.44 Some consultees did not respond to these questions, on the basis that they considered that the General Regime should apply. From those who did, there were few suggestions for substantive changes to the current rights and obligations (as opposed to introducing greater clarity in the drafting), and support was expressed for them to remain as they currently stand. Geo Networks Ltd, Cable & Wireless Worldwide Group and BT all expressed general satisfaction with the rights granted. Network Rail, from the perspective of a controller of linear obstacles, stressed the importance of the paragraph 12 procedure in providing appropriate notice of the works:

> The special regime is not unfair to operators and need not cause them undue delay in carrying out the works. It simply requires them to give [Network Rail] 28 days' notice of planned activities which will be well within their capabilities. This gives [Network Rail] the opportunity to negotiate modifications to the works, if considered necessary, and the safety net of being able to refer issues to arbitration if negotiations fail.

7.45 Cable & Wireless Worldwide Group suggested that the procedure for dealing with objections from the controller of the linear obstacle required reform, principally to

[33] *Geo Networks Ltd v The Bridgewater Canal Company Ltd* [2010] EWCA Civ 1348, [2011] 1 WLR 1487 at [28].

[34] See para 7.47 and following below.

[35] Consultation Paper, para 4.30(4) and (5). We expressly excluded consideration of financial obligations from the last question.

avoid the process stalling after objections were raised and to ensure co-operation in the works which were carried out. In the absence of detailed consideration of these issues by other consultees, we do not consider that it is appropriate for us to make recommendations for changes to this procedure.

7.46 We therefore make no recommendations for changes in the rights and obligations which currently apply under the linear obstacle regime.

Linear obstacles: the right to require alterations to apparatus

7.47 In the Consultation Paper, we asked a separate question about the right to require alterations to apparatus on, under or over linear obstacles, as part of our discussion of alterations and removals of apparatus under the 2003 Code. We sought consultees' views as to the provisions of paragraph 14, and asked about the balance that they strike between the interests involved and whether they should be modified in the revised Code.[36]

7.48 The responses we received to this question generally accepted that the current provisions are already appropriate. Carter Jonas LLP commented:

> It is important that landowners of linear obstacles have the ability to seek Operators to make alterations so as not to impede use of the linear obstacles where changes to how they are needed to be used for operational reasons is required … .
>
> Telecoms use should not hinder the original intended operational use of land, eg railways, tramways or canals.

7.49 We agree. This is particularly important in view of our conclusion above that the revised Code should continue to confer a right on Code Operators to place apparatus so as to cross linear obstacles.[37] This means that the operator of the linear obstacle does not have the opportunity to negotiate "lift and shift" provisions.

7.50 Some consultees suggested amendments to paragraph 14 of the 2003 Code: in particular, the test for requiring alterations, which is that the apparatus:

> … interferes, or is likely to interfere, with
>
> (a) the carrying on of the railway, canal or tramway undertaking … or
>
> (b) anything done or to be done for the purposes of that undertaking.[38]

7.51 These consultees considered that "interferes, or is likely to interfere with" sets an unfairly low threshold for requiring alterations which could be costly and impact on network continuity. We do not agree that an amendment is required on this

[36] Consultation Paper, para 5.18. The question itself inaccurately referred to "alteration of a linear obstacle", rather than "alteration of apparatus crossing a linear obstacle", as discussed in paragraphs 5.15 to 5.17.

[37] See para 7.32 above.

[38] 2003 Code, para 14(1).

point. A test of "interference" does not permit the controllers of linear obstacles to require changes simply on account of "inconvenience"; there is also the additional safeguard of requiring an order from the tribunal, which must be "satisfied that the order is necessary" on that ground, after considering all the circumstances.

7.52 In the Consultation Paper we drew attention to the fact that paragraph 14(4) does not require the court, in applying that test, to be satisfied that the alteration will not substantially interfere with any service which is or is likely to be provided using the Code Operator's network.[39] No consultees expressed dissatisfaction on this point.

7.53 However, the reference in paragraph 14(4) to "the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services" is problematic in light of our recommendations for the test for the imposition of Code Rights, which will not involve that "Access Principle". This is reflected in the recommendation we make below.

Linear obstacles: other rights to alter and remove apparatus

7.54 Paragraph 20 of the 2003 Code currently applies to apparatus which is installed on, under or over linear obstacles as it does in relation to other land. The provisions of paragraph 20 were considered in Chapter 6 of this Report.[40] We have there made a recommendation that paragraph 20 should not be replicated in the revised Code insofar as it applies to Site Providers – that is, those who are party to or bound by regulated relationships.[41]

7.55 We must now consider whether paragraph 20 should continue to take effect for those who own or occupy land on which apparatus has been placed pursuant to rights given automatically by the revised Code. Some consultees responding to our questions about this special regime discussed the possibility of incorporating protection comparable to that offered by paragraph 14 into a version of paragraph 20 in the General Regime. However, no consultees specifically discussed the role of paragraph 20, as separate from paragraph 14, in relation to linear obstacles.

7.56 Nor did any consultees specifically consider the procedure for removal outside paragraph 14. This is unsurprising; the Code Operator's rights under paragraph 12 are only lost where the land ceases to be a linear obstacle.

7.57 When considering Code Rights created under the General Regime, we have recommended that landowners who are not bound by those Code Rights should not have their right to require removal of the apparatus restricted;[42] and anyone entitled to require removal is also able to require temporary removal or repositioning. When a Code Operator no longer has the right to keep apparatus on land under paragraph 12, and does not have Code Rights to do so, the Code Operator is vulnerable to removal, and it is in the interests of all parties for the

[39] Consultation Paper, para 5.17.

[40] See para 6.7 and following above.

[41] See para 6.71 above.

[42] See para 6.127 above.

relationship between the Operator and the landowner to be regulated if the Code Operator wishes to stay on the land.

7.58 We envisage that in the majority of the few instances where this occurs, the Code Operator would either voluntarily remove the apparatus, or the parties would come to an agreement to confer Code Rights for the apparatus to remain there (perhaps subject to some alteration, or to an arrangement for it to be moved elsewhere on the site), on appropriate terms and conditions. If not, the Code Operator will need to apply for Code Rights to be granted by the tribunal.

7.59 However, it would be oppressive to allow the landowner summarily to remove a Code Operator in this situation. We consider that in such cases, the Code Operator's rights should continue until the landowner, or the person with control of the land, gives the Code Operator 12 months' notice to terminate them. At the end of that 12 month period, the Code Operator will have no rights to retain the apparatus on the land, unless a new arrangement has been made with an appropriate Site Provider.[43]

7.60 We do not consider that any further provision, additional to that recommendation and to our recommendation to retain the substance of paragraph 14, is required. Paragraph 20 currently gives a right to require alteration of apparatus to those with an interest in the land which is subject to the linear obstacles regime, and to those with an interest in adjacent land. This is limited by the requirement that the alteration is necessary for the development of the applicant's land and that it does not substantially interfere with the service provided; and it is usually at the cost of the applicant. Given these limitations and the nature of linear obstacles, it is not likely that it would be practicable for someone with an interest in the land – who is not the controller of the linear obstacle – to use this provision under the 2003 Code.

7.61 There may be occasions where someone with an interest in neighbouring land finds that a proposed development is frustrated by the existence of apparatus crossing the linear obstacle. Again, given the nature of the linear obstacle this will be unusual. In addition, where apparatus crossing a linear obstacle has caused injurious affection to neighbouring land, the provisions of paragraph 16 of the 2003 Code would currently apply and we contemplate that under the revised Code, compensation will remain payable to persons who suffer depreciation in the value of an interest in neighbouring land.[44]

7.62 We consider, therefore, that the revised Code does not need to include provisions comparable to paragraph 20 in respect of the linear obstacle regime. But we anticipate that it may be appropriate for this possibility to be covered by a code of practice.[45]

[43] See para 6.127 above.

[44] See our recommendation at para 5.106 above.

[45] See our recommendation at para 9.140 below and preceding discussion.

The criminal offence of carrying out works not in accordance with the linear obstacle regime

7.63 Under paragraph 12(9) of the 2003 Code, it is a criminal offence for an operator to commence the execution of works in contravention of the provisions of paragraph 12. In the Consultation Paper we asked whether this should continue to be a criminal offence, or alternatively be subject to a civil sanction.[46]

7.64 Views on this question were divided. Some consultees felt that there was no real warrant for keeping a criminal offence and that a civil sanction would be more appropriate. Others considered that the scope of the criminal offence should be reduced, so that only serious or deliberate interference with the operation of the linear obstacle should be sufficient. However, Network Rail argued to retain the current law, on the basis that unauthorised works on the railway could have serious consequences, including health and safety issues and service disruption resulting in the imposition of fines.

7.65 We make no recommendation for reform on this point.

Forum

7.66 In Chapter 9 of this Report we make recommendations as to the forum for disputes under the revised Code. At present, objections to works to be carried out under paragraph 12 of the 2003 Code are referred to arbitration under paragraph 13. The fact that this occurs, rather than referring the dispute to the court or tribunal, did not attract criticism on consultation. We recommend in Chapter 9 that arbitration should continue to be used in this context.[47]

7.67 Disputes as to the alteration of apparatus under paragraph 14 are currently to be resolved by the county court; in doing so, the court must weigh up the interest in making the alteration against the interest in maintaining the network and public access to services. We think that these disputes should be referred to the Lands Chamber of the Upper Tribunal, in keeping with its role in determining disputes concerning the application of the test for the imposition of Code Rights under the General Regime.

Recommendations

7.68 **We recommend that the effect of paragraph 12 of the 2003 Code should be replicated in the revised Code.**

7.69 **We recommend that where those provisions cease to apply to land by virtue of a change in its use, the rights granted by them shall continue to apply to a Code Operator in respect of apparatus already installed there, until they are brought to an end by a notice served on the Code Operator by the landowner or person with control of the land giving at least 12 months' notice of the ending of the rights.**

[46] Consultation Paper, para 4.30(3).

[47] See para 9.47 below.

7.70 **We recommend that the revised Code should provide for objections as to works which a Code Operator proposes to execute to cross a linear obstacle to be referred to arbitration, and that the provisions of paragraph 13 of the 2003 Code should accordingly be replicated in the revised Code.**

7.71 **We recommend that the effect of paragraph 14 of the 2003 Code should be replicated in the revised Code, except that where the tribunal is considering whether to grant an order for the alteration of apparatus kept installed on, under or over a linear obstacle, the tribunal should be required to have regard to all the circumstances and to the public interest in access to a choice of high quality electronic communications services.**

STREET WORKS

7.72 Under paragraph 9 of the 2003 Code, Code Operators are able to carry out certain works in streets[48] without requiring any agreement or court order under the 2003 Code, as would be needed under the General Regime.

7.73 Paragraph 9(1) confers the right to install or keep installed electronic communications apparatus; to inspect, maintain, adjust, repair or alter any such apparatus that is installed; and to carry out "any works requisite for or incidental to the purposes of" all such works, including breaking up, opening, tunnelling or boring under a street, and breaking up or opening a sewer, drain or tunnel.

7.74 Under paragraph 9(2) of the 2003 Code, these rights are only exercisable in streets which are maintainable highways; that is, highways maintainable at public expense for the purposes of the Highways Act 1980.[49] Paragraph 9(2) further circumscribes the rights by reference to other provisions of the 2003 Code. They are made subject to paragraph 3, which prevents Code Operators from exercising their rights in a way that obstructs access to other land, unless pursuant to agreement.[50]

7.75 In addition, they are subject to the provisions that follow paragraph 9. Of particular relevance is paragraph 15, which relates to activities in "relevant conduits", such as public sewers and water mains. The agreement of the authority controlling a "relevant conduit" is required in order for the Code Operator to carry out any works inside such a conduit. This is considered further below.[51]

[48] Streets are defined as the whole or any part of (a) any highway, road, lane, footway, alley or passage, (b) any square or court, and (c) any land laid out as a way whether it is for the time being formed as a way or not: New Roads and Street Works Act 1991, s 48(1) (see the 2003 Code, para 1(1)).

[49] 2003 Code, para 1(1), excepting footpaths, bridleways and byways that cross agricultural land (or land that is being brought into use for agriculture. For the definition of "maintainable highway", see the New Roads and Street Works Act 1991, s 86(1).

[50] See para 2.41 above.

[51] See para 7.131 and following below.

7.76 A maintainable highway may cease to exist, in particular if a highway is stopped up or diverted due to an order made under the Highways Act 1980.[52] If a highway is stopped up or diverted by an order of a magistrates' court under section 116 of the 1980 Act, the Code Operator must be given notice. The Code Operator can either remove the apparatus which was located where the highway previously subsisted, at the expense of the authority which applied for the order, or abandon it.[53] In other cases of stopping up or diversion, the person entitled to the land over which the highway used to run is entitled to require the alteration or removal of the apparatus, and paragraph 21 of the 2003 Code applies. The Code Operator may require that person to reimburse the expenses of removal or alteration.[54]

Consultation

7.77 In the Consultation Paper, we provisionally proposed that the right in paragraph 9 of the 2003 Code should be incorporated into the revised Code, subject to the limitations in the existing provision; that is, the fact that they are subject both to paragraph 3 and to the provisions subsequent to paragraph 9.[55] We discussed the suggestion that the paragraph 3 limitation might be too restrictive, since it does not cater for the possibility that works under paragraph 9 might obstruct future access to a property.

7.78 We considered that access to the highway network is essential for Code Operators' development of electronic communications networks. Similar views were expressed in responses such as that from BT. The Mobile Operators Association and the UK Competitive Telecommunications Association (UKCTA) agreed with the proposal and expressed concern about adding any further regulation to the existing legal framework controlling street works.

7.79 Some consultees argued that paragraph 9 should be extended to private highways. Not all streets have been adopted so that they have become publicly maintainable; some are dedicated to the public use but otherwise remain the responsibility of their private owners.[56] These consultees cited difficulties in identifying and working with those responsible for private highways, the

[52] For example: an order of a magistrates' court for the stopping up or diversion of a highway (Highways Act 1980, s 116); an order under s 14 or 18 of the Highways Act 1980 authorising a highway authority to stop up or divert a highway; or a public path extinguishment order (Highways Act 1980, s 118). In addition, a conveyance by a highway authority pursuant to an exchange of land under section 256 of the Highways Act 1980 in order to straighten or adjust the boundaries of a highway will extinguish the public right of way. See also Town and Country Planning Act 1990, ss 247 to 261, concerning powers to stop up or divert highways to enable development or the working of minerals.

[53] Highways Act 1980, s 334(4) and (5). See also Town and Country Planning Act 1990, s 260, concerning orders made under s 251, 257 or 258.

[54] Highways Act 1980, s 334(2), (3), (12) and (13) (applying 2003 Code, para 1(2)); 2003 Code, para 21(10). Until required to alter the apparatus, the Code Operator has the same powers in respect of the apparatus as if the order had not been made: Highways Act 1980, s 334(3). In relation to orders made under s 14 or 18 of the Highways Act 1980, the highway authority may also be entitled to require the alteration of the apparatus: Highways Act 1980, s 334(6) (see also s 334 (7) and (8)). See also Town and Country Planning Act 1990, s 256, concerning orders made under s 247, 248 or 249.

[55] Consultation Paper, para 4.11.

[56] Highways Act 1980, s 36(6) requires lists of streets which are highways maintainable at the public expense to be kept by the relevant county council, metropolitan district council, London borough council or the Common Council.

advantages of treating all highways consistently and the possibility of private highways constituting ransom strips.

7.80 We acknowledge that such a reform could have those advantages. However, we do not consider that it is appropriate to make this extension to streets which have not been through the adoption procedure so as to become maintainable at the public expense. As we noted in the Consultation Paper, the difficulties in identifying streets which are maintainable at the public expense are not confined to the Code.[57] Including privately owned highways in the special regime of paragraph 9 would be a significant step which we are not convinced, on the response we received on consultation, that we would be justified in taking.[58]

7.81 Other consultees were concerned about the width of the special regime, and in particular that it could permit Code Operators to install apparatus which could block the highway and invade private subsoil. We agree that a balance needs to be struck between the primary purpose of the highway to allow passage, and the installation of apparatus in, on or under it. However, we do not think that it is appropriate to specify within this special regime the apparatus which may and may not be installed under it. Issues concerning highway works and avoiding obstruction to the highway are best dealt with in legislation which applies consistently to all undertakers who may install equipment there. Also common to such undertakers are concerns about installation of equipment under the highway in parts of the soil which go beyond the interest of the highway authority in the land.[59]

7.82 Several consultees argued that consideration should be payable in respect of installations of apparatus in the highway. It was suggested that the current provision encourages Code Operators to use the highway instead of private land because it is cheaper to do so, and that the payment of consideration could provide a revenue stream for highway repairs. We do not, however, think that it would be appropriate for us to make such a recommendation in the light of the significant additional expense this would represent for the acquisition of rights which are very useful to the development of operators' networks.

[57] For example, electricity licence holders' powers to open or break up streets which are not maintainable highways are subject to consent requirements: Electricity Act 1989, sch 4, para 1(4).

[58] Similarly, we have not made any recommendation as suggested by RICS for an automatic right under the special regime for Code Operators to place apparatus on street furniture. In the absence of more general concern on this point, we think that it is more appropriate for suitable street furniture, maintenance obligations, etc to be established by agreement with the relevant highway authority in each case.

[59] Consultees noted that where an existing private highway becomes maintainable at the public expense, the highway authority's interest in the land is limited to the extent necessary for the protection and maintenance of the highway: see *Tunbridge Wells Corporation v Baird* [1896] AC 434. That limitation does not, without more, affect statutory rights to install apparatus under the street: see *Schweder v Worthing Gas Light and Coke Company (No 2)* [1913] 1 Ch 118. For the procedure for adoption of a street, see Part XI of the Highways Act 1980.

Alteration, moving and removal of apparatus

The paragraph 3 limitation on paragraph 9

7.83 Paragraph 9 is made subject to the provisions of paragraph 3. This means that Code Operators cannot exercise their rights under paragraph 9 in a way that obstructs access to other land, unless Code Rights to do so have been conferred.[60]

7.84 In the Consultation Paper we discussed the suggestion that the paragraph 3 limitation might be too restricted, since it does not cater for the possibility that works under paragraph 9 might obstruct future access to a property.[61] We noted that paragraph 20 also applies, giving landowners limited rights to request alteration of apparatus;[62] and the provisions of paragraph 16, requiring a Code Operator to pay compensation where the exercise of a right on adjoining land causes injury to the landowner's land.[63] Four consultees commented on the point; no clear view emerged as to whether reform is required, and consultees did not suggest that the point has caused difficulty in practice.

7.85 Under the 2003 Code, the circumstances in which a landowner can successfully apply for the alteration of apparatus installed in the street are very limited. We do not think that the revised Code needs to include provisions for such situations, since they are likely to occur rarely; it is more appropriate for this to be dealt with by a code of practice, and we make a recommendation to that effect in Chapter 9.[64]

7.86 When land ceases to be a street which is maintainable at the public expense, the situation is different; the Code Operator then no longer has the right to keep the apparatus installed there under paragraph 9. This is akin to the case discussed above, where the Code Operator loses the right under paragraph 12 of the 2003 Code to keep apparatus installed because the land no longer constitutes a linear obstacle.[65] We make a similar recommendation in relation to street works. This will require reconsideration of the existing statutory provisions which extend the Code Operator's rights to keep the apparatus by reference to the provisions of paragraph 21 of the 2003 Code.[66] The recommendation we make includes a grace period for the Code Operator to make alternative arrangements, and therefore it will not be necessary to duplicate this in the Highways Act 1980.

7.87 Under the 2003 Code, where a landowner becomes entitled to require the alteration or removal of apparatus in consequence of a street having been stopped up, closed, changed or diverted, or a right of way having been extinguished or altered, the default position is that the landowner pays the expenses of that alteration or removal. The court may make contrary provision if

[60] See para 7.74 above.

[61] Consultation Paper, paras 4.7 to 4.10.

[62] See para 6.7 and following above.

[63] See para 5.12 above.

[64] See paras 9.138 to 9.140 below.

[65] See para 7.19 above.

[66] In particular, Highways Act 1980, s 334 and Town and Country Planning Act 1990, s 256.

it thinks fit.[67] We envisage that this will be continued in the revised Code, since we are not aware of any dissatisfaction with these provisions.

Recommendations

7.88 **We recommend that the effect of paragraph 9 of the 2003 Code should be replicated in the revised Code, subject to the limitations in the existing provision.**

7.89 **We recommend that where land ceases to be a street which is a maintainable highway for the purposes of the revised Code, the rights granted by the revised Code should continue to apply to a Code Operator in respect of apparatus already installed there, until they are brought to an end by a notice served on the Code Operator by the landowner or person with control of the land giving at least 12 months' notice of the ending of the rights.**

Issues outside the scope of this project

7.90 Some consultees in response to this question made points which raise wider issues of the regulation of street works and Code Operators' rights under the planning legislation. For example, the London Borough of Hackney raised concerns about "the erection of telephone boxes which do not contain working apparatus but contain an advertisement display".[68] These issues fall outside the scope of this project, but we draw them to Government's attention.

TIDAL WATERS AND LANDS

7.91 International connections are vital to the success of an electronic communications network.[69] Given the UK's geography, this most obviously raises the issue of submarine cables which must make landfall here.

The provisions of the 2003 Code

7.92 Paragraph 11 of the 2003 Code confers rights on Code Operators in connection with "any tidal water or lands". This phrase includes, by virtue of sub-paragraph (11), "any estuary or branch of the sea, the shore below mean high water springs and the bed of any tidal water". Accordingly, some of the areas covered by this special regime lie further inland than might be expected. For example, the

[67] 2003 Code, para 21(10).

[68] Councillor Vincent Stops, of Hackney Borough Council, raised similar concerns.

[69] "Submarine cables are part of the backbone of the world's power, information and international telecommunications infrastructure, and socially and economically crucial to the UK. Submarine telecommunication cables carry more than 95% of the world's international traffic including telephone, internet and data, as well as many services for the UK's local communities, major utilities and industries. The transatlantic cables landing in the UK carry more than 70% of Europe's transatlantic internet traffic": Department for Environment, Food and Rural Affairs, *UK Marine Policy Statement* (March 2011) para 3.7.1, available at http://www.defra.gov.uk/publications/files/pb3654-marine-policy-statement-110316.pdf (last visited 18 February 2013).

definition applies to a tidal river inland; whether a river, or part of a river, is tidal is assessed by reference to the ordinary state of the tides.[70]

7.93 Under sub-paragraph (1), a Code Operator may execute works to install electronic communications apparatus, and keep it installed; works relating to adjustment, repair or alteration are also expressly included, as are powers to enter the tidal waters or land to inspect the apparatus. Paragraph 11 is, however, made subject to the subsequent provisions of the 2003 Code, and to paragraph 3. Thus, paragraph 11 does not give a Code Operator the right to obstruct access to or from other land, and it is subject to provisions such as paragraph 16, concerning the obligation to pay compensation for injurious affection to neighbouring land. However, there is no requirement to pay consideration for the rights accorded under paragraph 11(1).

7.94 By virtue of paragraph 11(1), works to tidal waters and lands in general do not require authorisation under the General Regime of the 2003 Code. However, where a Crown interest subsists in the tidal waters or land in question such rights can be exercised only with the relevant Crown body's agreement.[71] Paragraph 26 sets out the meaning of "Crown interest" and the relevant Crown body in each case; for example, where the interest belongs to a Government department, consent must be given by that department.[72] This means that the Crown body can negotiate the terms and conditions on which its consent will be given.

7.95 While there are private owners of tidal waters and lands, much of the area to which paragraph 11(1) would otherwise apply is subject to Crown interests. The Crown Estate manages "virtually all the UK's seabed from mean low water to the 12 nautical mile limit", and "around half of the UK's foreshore".[73] Substantial parts of the remainder of the foreshore are vested in the Duchies of Cornwall and Lancaster, which are also Crown bodies.

Other legislation affecting tidal waters and lands

7.96 There is general legislation controlling the right to carry out works in marine areas: in particular, the Marine and Coastal Access Act 2009.[74] The Act applies to the "UK marine area", which includes:

[70] *Reece v Miller* (1882) 8 QBD 626.

[71] 2003 Code, para 11(2).

[72] 2003 Code, para 26(3)(e).

[73] The Crown Estate, *Schedule of the Crown Estates property rights and interests* (July 2012) pp 9 and 10, available at http://www.thecrownestate.co.uk/media/206857/schedule_of_properties_rights_and_interests.pdf (last visited 20 February 2013). The area of sea adjacent to the United Kingdom to a breadth of 12 nautical miles is known as the territorial sea. Some areas of the sea bed are owned by third parties, for example by virtue of a grant by Royal Charter or statute. The foreshore is generally defined as the area between mean high water and mean low water marks.

[74] The Marine and Coastal Access Act 2009 replaced previous legislation regulating marine works in general, principally the Coastal Protection Act 1949, s 34 (regarding any works likely, while being carried out or afterwards, to result in obstruction or danger to navigation) and the Food and Environment Protection Act 1985, Part II (concerning deposits in the sea). It also replaced the requirement to obtain the Secretary of State's consent for works in tidal waters and lands under the 2003 Code, para 11(3) to (11) (repealed).

(1) the territorial sea, the area of the exclusive economic zone,[75] and the area of sea within the limits of the UK sector of the continental shelf, and the sea bed and subsoil within those areas;

(2) any area submerged at mean high water spring tide; and

(3) the waters of every estuary, river or channel, so far as the tide flows at mean high water spring tide.[76]

7.97 The 2009 Act has established the Marine Management Organisation to discharge licensing and enforcement functions for the waters adjacent to England and all UK offshore waters. A licence is needed for activities such as depositing substances or objects in the sea, construction, alteration or improvement of works (in or over the sea or on or under the sea bed) and dredging the sea bed.[77]

7.98 The Marine Management Organisation is also charged with developing marine plans for various marine planning regimes established by the 2009 Act, which also provides for the adoption of a marine policy statement by the Secretary of State and the devolved administrations.[78]

7.99 Thus, in tidal waters and lands which are subject to a Crown interest, a Code Operator requires both the consent of the relevant Crown body and a licence from the Marine Management Organisation in order to carry out works. Where there is no Crown interest, no consent from the landowner is needed, although the Marine Management Organisation will not grant a licence for the exercise of a right under paragraph 11 of the 2003 Code unless adequate compensation arrangements have been made.[79]

7.100 The Crown Estate Act 1961 is relevant where consent is required from the Crown Estate. Where the Crown Estate Commissioners dispose of any interest in land, such as a lease or licence for a Code Operator to lay cabling in the sea bed, they are required to do so:

> for the best consideration in money or money's worth which in their opinion can reasonably be obtained, having regard to all the circumstances of the case but excluding any element of monopoly value attributable to the extent of the Crown's ownership of comparable land.[80]

[75] This area can stretch to 200 nautical miles from the baselines established under the UN Convention on the Law of the Sea. See the Marine Management Organisation's diagram showing the geographical extent of the Marine and Coastal Access Act 2009, available at http://www.marinemanagement.org.uk/licensing/marine/geographical.htm (last visited 20 February 2013).

[76] Marine and Coastal Access Act 2009, s 42(1) and (3). See also subsections (2) (no contravention of international obligations) and (4) (when waters which are closed off permanently or intermittently are to be treated as part of the sea).

[77] Marine and Coastal Access Act 2009, s 66(1).

[78] Above, Part 3. See Department for Environment, Food and Rural Affairs, *UK Marine Policy Statement* (March 2011).

[79] Marine and Coastal Access Act 2009, s 80.

[80] Crown Estate Act 1961, s 3; see the Consultation Paper, para 4.16.

Consultation

7.101 In the Consultation Paper, we asked consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests. We also asked for their views on three questions: whether this special regime should continue, or whether the General Regime should apply; what the terms of any special regime should be; and whether tidal waters and lands subject to a Crown interest should be treated differently from other tidal waters and lands.[81]

7.102 First, we consider the existence of the special regime for tidal waters and lands in which there is no Crown interest.

Tidal waters and lands within paragraph 11(1) of the 2003 Code

7.103 The majority of consultees who responded to the question in the Consultation Paper argued that there should not be a special regime for tidal waters and lands. It was noted that this would simplify the Code and bring more land within the consistent framework of the General Regime.

7.104 Some consultees noted that bringing tidal waters and lands within the General Regime would mean that private landowners would receive consideration for the granting of rights to operators under the Code. In addition, a balancing exercise would be carried out before the imposition of those rights, if the landowner was unwilling to agree.

7.105 Others considered that a special regime should be retained, in particular due to the different regulatory environment which applies to tidal waters and lands. Falcon Chambers and the Bar Council suggested that a balancing approach similar to that in the General Regime should be applied, but that it should be amended to take account of the greater public interest in installing cables carrying international traffic, and of other interests and activities relevant to the use of these areas.

7.106 Finally, there was minority support for the current special regime; Geo Networks Ltd described it as "adequate and suitable". The Crown Estate suggested that:

> It would be dangerous (given the potential significance of areas of tidal waters and lands) to vest any particular significant power of consent in the hands of a private land owner … . The current Code position (where private landowners have no ability to obstruct cable landings) produces the best solution that the circumstances will allow, with strategic land usage falling back to the determination of the [Marine Consents Unit or Marine Management Organisation] in its more general regulatory role.

7.107 In considering whether tidal waters and lands should be brought within the General Regime, we are conscious of the importance of Code Operators' access to such lands. The Crown Estate has advised that the number of points which are suitable for cables to make landfall are limited, particularly given the competing

[81] Consultation Paper, paras 4.20 and 4.21.

interests in the use of the sea bed. This means that a Code Operator may have a limited, or no, choice of routes inland.

7.108 We are also conscious that our consultation question was asked against the background of a provisional proposal that consideration for the grant of all Code Rights should be calculated on a compulsory purchase basis. The context in which we now examine the issue has changed. We do not consider that we have sufficient evidence that the special regime currently causes difficulties in practice to make a recommendation which would substantially increase the price payable for the grant of rights over tidal waters and lands.

7.109 Consultees commented that interests in the use of marine land must be balanced. We agree that this is particularly important in the context of coastal and tidal environments, which represent a shared resource: not only are there many other cables seeking to make landfall to serve inland needs – carrying electricity from offshore generation, gas and so forth – but other competing activities must be considered. These include industry, port and harbour operations, navigation and leisure activities.[82]

7.110 However, this balancing exercise – determining how use of this shared resource should be balanced between Code Operators and other potential users – is best undertaken in the context of the marine licensing procedure, by the Marine Management Organisation. We do not think that it is appropriate for the grant of rights also to be subject to the discretion of the tribunal applying the test for the imposition of Code Rights.

THE ALTERATION AND REMOVAL OF APPARATUS INSTALLED ON TIDAL WATERS AND LANDS

7.111 We have considered, above, the impact of paragraph 20 of the 2003 Code on apparatus installed pursuant to rights which the Code automatically gives to Code Operators.[83]

7.112 In relation to tidal waters and lands, we think that there is a stronger argument to allow owners who have not had the opportunity to object to the placement of apparatus to argue that it should be removed or otherwise altered. While the use of tidal waters and lands is public, the landowner may still have valid reasons to consider that his interest in or use of the land has been unfairly prejudiced.

7.113 In Chapter 8 of this Report we discuss and make recommendations about a right to object to apparatus, limited to specified situations.[84] Objections within a year of the installation would be determined on grounds similar to those in paragraph 17 of the 2003 Code, and thereafter would reflect the provisions of paragraph 20.[85] We consider that it would be appropriate for those with interests in tidal waters and lands on which apparatus has been placed pursuant to the automatic rights

[82] Department for Environment, Food and Rural Affairs, *Our seas – a shared resource, high level marine objectives* (20 April 2009), available at http://archive.defra.gov.uk/environment/marine/documents/ourseas-2009update.pdf (last visited 20 February 2013).

[83] See paras 7.54 to 7.62 and 7.84 to 7.85 above.

[84] See para 8.25 and following below.

[85] See our recommendation at para 8.39 below.

under the special regime to have such a right to object, which continues and, in the first year after installation, enlarges the current rights available to them under paragraph 20 of the 2003 Code. We are therefore recommending that this right to object should be available to landowners of tidal waters and lands.[86]

Tidal waters and lands which are subject to a Crown interest

7.114 In the Consultation Paper we expressed the view that by the terms of the 2003 Code, a Crown body can deny a Code Operator the grant of any rights to carry out works in tidal water or land subject to a Crown interest.[87] This analysis was accepted by almost all those responding to the Consultation Paper, but a few queried its accuracy. Falcon Chambers suggested that the procedure under paragraph 5 of the 2003 Code could be invoked against a Crown body which withheld consent under paragraph 11. We agree that the wording of the 2003 Code as to the circumstances in which rights over tidal waters and lands may be conferred is difficult to follow. However, it seems to us that paragraph 11(2) would have been worded differently if it had been intended that Code Operators should be able to acquire rights over Crown tidal waters and lands through paragraph 5.

7.115 Charles Russell LLP put forward the view that paragraph 11(2) does not restrict the existence of rights under paragraph 11, but only the manner in which those rights are exercised. We find this argument difficult; it inserts a qualification that is not apparent from the wording of paragraph 11(2), and it is in any case of little benefit to a Code Operator to hold a right which cannot be exercised without the requisite agreement.

7.116 The majority of consultees considered that all tidal waters and lands should be treated in the same way, and that Crown bodies should not have the absolute right to refuse consent to the installation of apparatus. These consultees argued that there is no reason to differentiate between different areas of land depending on the landowner; RICS, for example, described the current position as "inconsistent and inequitable".

7.117 Two specific concerns were raised about the current law. First, the lack of legislative procedure for the grant of rights from Crown bodies: Geo Networks Ltd stated that:

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

7.118 Cable & Wireless Worldwide Group considered that "at the very least the Crown should not be able to unreasonably withhold or delay their consent".

[86] See para 8.37 below. Such provisions are not required for Crown bodies with interests in tidal waters and lands; they are free to make their own arrangements as to the terms and conditions on which consent is given to installation, including "lift and shift" or other alteration provisions. See paras 7.124 and 7.130 below.

[87] Consultation Paper, para 4.16. Even if the Code Operator has obtained a licence for the works under the Marine and Coastal Access Act 2009. See *Geo Networks Ltd v The Bridgewater Canal Company Ltd* [2010] EWHC 548 (Ch), [2010] 1 WLR 2576 at [16] by Lewison J; *Geo Networks Ltd v The Bridgewater Canal Company Ltd* [2010] EWCA Civ 1348, [2011] 1 WLR 1487 at [8] by Sir Andrew Morritt C.

7.119 Secondly, consultees raised concerns about the creation of ransom strips subject to licence fees charged by Crown bodies. Cable & Wireless Worldwide Group referred to:

> difficulties in agreeing terms that include rental payments in such instances, as the tidal waters, foreshores and estuaries tend to be ransom strips because of their nature in connecting parcels of land under which the [items of electronic communications apparatus] are readily installed and because there is no certainty that consent will be given.

This consultee considered that "rents demanded for crossing short distances of Crown land are disproportionately excessive", arguing that rental demands do not reflect differences in the distance to be covered. Again, the lack of a dispute resolution mechanism for consideration via the Code was noted. The UK Competitive Telecommunications Association (UKCTA) also recounted problems encountered by members: "Given that the Crown has a monopoly on such land, [Code Operators] have in the past had to agree to terms to which they would not otherwise have agreed."

7.120 Hibernia Atlantic considered that Code Operators "face real material commercial issues where the Crown withholds agreement or imposes terms which are commercially unviable for any operator".

7.121 On the other hand, several consultees – such as BT and Surf Telecoms – stated that they had not experienced problems in relation to tidal waters and lands, or that agreement could be reached.[88] Falcon Chambers felt that "the Crown Estate can be trusted to behave responsibly in relation to requests concerning its foreshore". Carter Jonas LLP noted that the Crown Estate have permitted several installations on the Crown's marine estate (as well as on the rural and urban estates), and that the consideration charged is required to exclude any monopoly value under the Crown Estate Act 1961.[89] They supported the current distinction on the basis that "Crown interests should have Crown immunity", as well as to ensure:

> that cable crossings are not forced through potentially interfering with other oil, gas and cables or to the detriment of a potential offshore windfarm.

7.122 The Crown Estate responded to the consultation and set out the issues it takes into account when considering an application to install apparatus on its property, for example, on the sea bed. In particular, the response emphasised the supervisory role the Crown Estate considers that it discharges in balancing the range of interests in tidal waters and lands, and its expertise in ensuring appropriate placement of apparatus, management of the available landfall points and control of works. Emphasis was placed on section 3 of the Crown Estate Act

[88] Peel Holdings Land and Property (UK) Ltd also noted that a client holding a Crown interest has experienced "problems with operators of international undersea cables engaging on renewals and reviews".

[89] See para 7.100 above. This consultee suggested that "Crown immunity" should be extended to all land subject to Crown interests. We consider that this would be an unnecessary restriction compared to the current law.

1961, preventing the Crown Estate from putting Code Operators in a ransom situation.

7.123 We have considered very carefully the objections of consultees to the current distinction between tidal waters and lands in which a Crown interest subsists, and those in which there is no Crown interest. We acknowledge the strength of their arguments that, in principle, landowners should be treated equally; and we appreciate that the current system has left some Code Operators dissatisfied with the arrangements made in order to bring vital cables onshore.

7.124 We consider, however, that it would not be appropriate, in the context of this project, to make a recommendation to remove the special protection for the areas which are subject to Crown interests. To make special provision for electronic communications apparatus could unfairly prioritise Code Operators' interests above those of other operators and undertakers who also seek rights in Crown tidal waters and lands. The concerns raised by consultees would in our view be better addressed by a more general review of the law relating to Crown lands.

7.125 Such a review could consider in more detail whether a more straightforward, single procedure for consent to works in the marine environment could be developed. The Crown Estate, which manages the majority of the land affected by paragraph 11(2), has told us that it is currently discharging a supervisory role within an area which demands the knowledge and expertise which it has accumulated. Many consultees argued that the Crown Estate's supervisory role has been superseded by the functions of the Marine Management Organisation.[90] We see the force of these arguments; it may be advantageous for a review to consider how best to avoid duplication between these bodies, while still taking advantage of the accumulated knowledge and expertise of the Crown Estate.

7.126 Accordingly, while we make no recommendation to remove the special protection that attaches to Crown tidal waters and lands, we draw to Government's attention the need for a wider review of the role of the Crown in the stewardship of marine areas, and in particular to pursue more efficient procedures for obtaining consents in this area.

7.127 We agree with consultees who thought that the revised Code should limit the amounts which can be charged by Crown bodies for giving consent to the exercise of rights under paragraph 11(1).

7.128 We have already recommended that the amount payable for Code Rights under the General Regime should be the market value of those rights, assuming that there is more than one suitable property available to the Code Operator. This will prevent a pricing that takes advantage of any monopoly position of the seller; other suitable properties must be assumed to exist in the ownership of other willing sellers or lessors. We think it is right that this provision should be applied consistently in relation to the granting of rights under the General Regime, and by Crown bodies in relation to tidal waters and lands.

[90] See further House of Commons Treasury Committee, "The management of the Crown Estate: Eighth Report of Session 2009 – 10" (vol 1) 22 March 2010, at paras 90 to 94, available at http://www.publications.parliament.uk/pa/cm200910/cmselect/cmtreasy/325/325i.pdf (last visited 20 February 2013).

Recommendations

7.129 **We recommend that the effect of paragraph 11(1) of the 2003 Code should be replicated in the revised Code.**

7.130 **We recommend that the effect of paragraph 11(2) of the 2003 Code should be replicated in the revised Code, subject to provision that the terms as to the consideration element of the payment for the giving of the agreement to the exercise of the right on that land shall be void insofar as they provide for consideration which exceeds the market value of those rights, using the definitions in the "Red Book" (*RICS Valuation – Professional Standards*) modified so as to embody the assumption that there is more than one suitable property available to the Code Operator.**

RELEVANT CONDUITS

7.131 Code Operators' rights are restricted in relation to specified conduits. Under paragraph 15 of the 2003 Code, Code Operators cannot do anything inside a relevant conduit without the agreement of the authority controlling it, even if they would otherwise be authorised to do so by the other provisions of the 2003 Code (in particular, paragraph 9, concerning street works).[91]

7.132 Section 98(6) of the Telecommunications Act 1984 defines "relevant conduits" as follows:

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

7.133 Section 98 of the 1984 Act provides that the functions of an authority with control of a relevant conduit include powers concerning installation and the keeping of electronic communications apparatus in relevant conduits, notwithstanding any statutory limitations on the use of a conduit. This is without prejudice to the rights of any person in the land on, under or over which the conduit is located, but an authority with control of a public sewer may authorise apparatus to be installed and kept wholly within that sewer and this is not a contravention of any obligations imposed on the authority.[92]

[91] See para 7.72 and following above. A street works licence will often be required under Part 3 of the New Roads and Street Works Act 1991.

[92] Telecommunications Act 1984, s 98(2) to (4).

Consultation

7.134 We noted the potential risk and public disruption flowing from interference with these conduits, and provisionally proposed that the restriction currently contained in paragraph 15 of the Code should be retained in the revised Code.[93]

7.135 Consultees generally agreed with this provisional proposal.[94] The provisions of paragraph 15 were termed a "sensible precaution" by the UK Competitive Telecommunications Association; consultees also commented on the public importance of avoiding disruption to utility services which pass through conduits, such as water, sewerage and electricity.

7.136 Water UK responded to the consultation to provide information on particular issues regarding the water and sewer networks. The response noted that the potable water network is almost always unsuitable for use for electronic communications apparatus (for example, due to risk to public health and the rigorous cleaning procedures used). Sewers are more often suitable, but must be of a certain size to accommodate apparatus without operational problems such as blockage or snagging.

7.137 Consultees recognised that at present, those with control of relevant conduits have freedom as to whether and on what terms they deal with Code Operators for the installation of electronic communications apparatus. This was welcomed by many consultees, such as the Central Association of Agricultural Valuers (CAAV) and the Country Land & Business Association.

7.138 However, other consultees considered that authorities controlling relevant conduits should not have the absolute right to veto their use for electronic communications apparatus. Cable & Wireless Worldwide Group suggested that consent "should not be unreasonably withheld or delayed bearing in mind future requirements of the authority for the use of the conduit and/or safety requirements".

7.139 We are not convinced that it is appropriate to modify the absolute right of those who have control of the conduits to which paragraph 15 applies to refuse consent to the placement of apparatus there. A range of conduits would be affected by such a provision, raising a variety of special considerations. We think that it is important, given the importance of avoiding disruption to the services for which they are primarily intended, that the authorities controlling those conduits also have control over the placement of additional apparatus there, and the terms and conditions on which this occurs.[95] Consultation responses have not evidenced that there have been difficulties in reaching agreement in specific cases.

[93] Consultation Paper, para 4.34.

[94] The provisional proposal was taken by some consultees as suggesting reform to require Code Operators to use existing conduits in some circumstances. This was not our intention.

[95] We also note the concerns raised by some consultees that placing apparatus in the conduit might be outside the conduit provider's own rights: see Telecommunications Act 1984, s 98, noted at para 7.133 above.

Recommendation

7.140 **We recommend that the effect of paragraph 15 of the 2003 Code should be replicated in the revised Code.**

UNDERTAKERS' WORKS

7.141 The final special regime confers additional rights for Code Operators in connection with undertakers' works. Paragraph 23 of the 2003 Code applies where a Code Operator's apparatus needs to be removed or altered, temporarily or permanently, in order for a "relevant undertaker" to carry out works on its own infrastructure. The term "relevant undertaker" includes not only other Code Operators, but also those statutorily authorised to carry on "any railway, tramway, road transport, water transport, canal, inland navigation, dock, harbour, pier or lighthouse undertaking".[96]

7.142 The undertaker must give at least 10 days' notice to the Code Operator of an alteration to which paragraph 23(1) applies.[97] The operator then has the right, by counter-notice, either to undertake the works itself or to require the undertaker to do so under the Code Operator's supervision and to its satisfaction. If such a counter-notice is given, the undertaker can only go ahead with the works independently if the operator does not make the alteration within a reasonable time, or "unreasonably fails to provide the required supervision".[98]

7.143 It is a criminal offence, punishable by a fine, for an undertaker to execute works without giving notice, or unreasonably to fail to comply with any reasonable requirement of the operator under paragraph 23.[99]

7.144 Code Operators are entitled, in any court of competent jurisdiction, to be awarded compensation under paragraph 23(5) and (6) of the 2003 Code for any loss or damage caused by effecting alterations which are necessary due to a relevant undertaker's works and for any expenses incurred in supervising or carrying out the alteration works.

Consultation

7.145 We provisionally proposed that the substance of paragraph 23 of the 2003 Code governing undertakers' works should be replicated in the revised Code,[100] and invited consultees' comments on the provision. The majority of consultees agreed

[96] 2003 Code, para 23(10). There is also provision for the definition to be applied to others, and this has been done in several Acts: for example, Water Industry Act 1991, sch 13, para 4. For the purposes of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003, "relevant undertakers" are defined as in the 2003 Code, para 23(10), with the addition of undertakers engaged in the supply of gas, electricity, water, heat or the disposal of sewage: reg 2(2). Regulation 3(1) requires Code Operators to "consult … relevant undertakers with a view to avoiding the disruption of the services provided by those undertakers".

[97] 2003 Code, para 23(2). This requirement does not apply in relation to any emergency works of which the undertaker gives the Code Operator notice as soon as practicable after commencing the works: para 23(3).

[98] 2003 Code, para 23(4) to (7).

[99] 2003 Code, para 23(8).

[100] Consultation Paper, para 4.40.

with the provisional proposal; these included Code Operators such as BT, who reported that:

> We have had no difficulties with this provision to date but it remains an important regime.

7.146 Network Rail and Dŵr Cymru Welsh Water, in particular, supported the application of paragraph 23. Network Rail described it as:

> essential … [Network Rail] must be able to carry out repairs, maintenance, upgrading and improvements to the railway as these are required.

7.147 In the Consultation Paper, we invited consultees to state whether there are any additional undertakers who should be included in the provision.[101] Only one addition was suggested: developers who are constructing access roads by agreement with the Highways Authority.[102] We do not think that this merits the special treatment of paragraph 23, since such a road is a private development even if the arrangement is for it to be adopted. However, we think that the provision of paragraph 23 for further undertakers to be added by statute includes useful flexibility, and that it should be retained.

7.148 We also asked whether paragraph 23 strikes an appropriate balance between the needs of undertakers. Charles Russell LLP's response suggested that paragraph 23 could be made more practical, such as by lengthening the notice period of 10 days so as to "allow time for workable alternatives to be put in place". South West Water Ltd, on the other hand, suggested that paragraph 23 embodies an unfairness to the undertaker who wishes to make the alteration, since it requires those alteration works to be carried out "to the satisfaction of the operator".[103] It was argued that if the undertaker requires the change, and has to pay for it, then the undertaker's standards should apply.

7.149 We note that provisions substantially similar to those in paragraph 23 appear in other areas of the law where a balance needs to be struck between undertakers' interests.[104] We therefore do not think that it would be appropriate for us, as part of this project, to recommend reforms to paragraph 23 alone. However, comparison with the provisions relating to works carried out by electricity licence holders suggests that a notice period of one month would be more appropriate than the 10 days in the 2003 Code.[105]

7.150 In the Consultation Paper, we also commented that there is no mechanism under paragraph 23 for a Code Operator to argue that the works to its apparatus should not be undertaken, for example if this would put the Code Operator in breach of

[101] Consultation Paper, paras 4.38 and 4.39.

[102] Ian S Thornton-Kemsley.

[103] Whether under sub-paragraph (4)(b) (works carried out under supervision of operator) or (7) (where no counter-notice is given by the operator, or the operator fails to make the alteration or to provide supervision as stated in the counter-notice).

[104] Electricity Act 1989, sch 4, para 3; Road Traffic (Driver Licensing and Information Systems) Act 1989, sch 5.

[105] Electricity Act 1989, sch 4, para 3(3).

its agreement with a Site Provider.[106] This point was noted by two consultees, but it was not suggested that the point has given rise to difficulties in practice. In the absence of further information as to how often such issues might arise, or how they are dealt with at present, we make no recommendation for change.

Recommendation

7.151 **We recommend that the effect of paragraph 23 of the 2003 Code should be replicated in the revised Code.**

[106] Consultation Paper, para 4.38.

CHAPTER 8
FURTHER RIGHTS AND OBLIGATIONS

INTRODUCTION

8.1 This Chapter addresses a number of rights and obligations contained in the 2003 Code which stand outside the core list of Code Rights and the regulated relationships. These can, in particular, affect relationships between Code Operators and third parties with whom they have no direct contractual relationship. We consider:

(1) the right to install overhead lines;

(2) rights to object to apparatus;

(3) the obligation to affix notices to overhead apparatus;

(4) the right to lop trees; and

(5) Code Rights against third parties.

8.2 This Chapter also considers responses to our consultation questions about the 2003 Regulations, in particular the obligation under regulation 16 to maintain sufficient funds to cover costs and expenses incurred in the installation of apparatus.

THE RIGHT TO INSTALL OVERHEAD LINES

8.3 Where a Code Operator has apparatus installed on or over land, paragraph 10 of the 2003 Code gives it the power to install lines that pass over other land in the vicinity provided that any line is:

(1) connected to the apparatus; and

(2) no less than 3 metres above the ground, nor within 2 metres of any building.

8.4 The exercise of this right cannot interfere with access to the land over which it passes[1] and is subject to other elements of the Code (so, for example, it would not give a right to cross a railway).[2] In the event that land is injuriously affected as a result of the right being exercised, then paragraph 16 of the 2003 Code provides for compensation.[3]

[1] Paragraph 10 is subject to paragraph 3: 2003 Code, para 10(1).

[2] 2003 Code, para 10(1) and, for example, paras 12 to 14 (the linear obstacles regime is considered at paras 7.12 to 7.71 above).

[3] See para 5.13 above.

8.5 Under the 2003 Code the right to install overhead lines can be exercised without giving notice to any owner or occupier of land crossed by the lines.[4] However, landowners and occupiers can give notice objecting to such lines (and other apparatus 3 metres or more above the ground), within three months of the installation, and can apply to court to have the objection upheld.[5]

8.6 The Department for Culture, Media and Sport has conducted a consultation about the possible relaxation of regulation 4(1) of the 2003 Regulations which requires Code Operators generally to install lines underground.[6] The consultation closed on 21 February 2012 and the outcome is pending. If the proposed relaxation takes place, then the power to fly overhead lines may be used more often.

8.7 We asked consultees to tell us their experiences and views about overhead lines or other apparatus, and specifically about:

(1) 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;[7] and

(2) the right to object to overhead apparatus.[8]

The right to install overhead lines without consent

8.8 There was support for this right though responses suggested that it is used to varying degrees: British Telecommunications plc (BT) described it as "vital" whereas Surf Telecoms said that they rarely used the right, save where the landowner could not be traced. South West Water Ltd was of the opinion that the right was now unnecessary as we move towards wireless networks.

8.9 Some consultees thought that there should be a consultation process before overhead lines were installed or even that the Code Operator should be made to seek the consent of the landowner beforehand. The Central Association of Agricultural Valuers (CAAV) and Peel Holdings Land and Property (UK) Ltd said that:

[4] An express grant of planning permission will usually be unnecessary because Code Operators benefit from permitted development rights, so there may have been no opportunity for a landowner or occupier to object to a grant of planning permission. The relevant general permitted development orders grant permission for works to be lawfully undertaken (subject to various exceptions, including where the apparatus exceeds certain prescribed heights which are, in some cases, significantly in excess of three metres). See the Town and Country Planning (General Permitted Development) Order 1995, SI 1995 No 418, sch 2, part 24 (in respect of England) and the Town and Country Planning (General Permitted Development) (Wales) Order 2002, SI 2002 No 1878 (W187).

[5] 2003 Code, para 17. This right also extends to the owners and occupiers of nearby land, in certain circumstances; we discuss this, together with the provisions of para 20 of the 2003 Code which may also be applicable for landowners of the land crossed by the line, or adjacent land, at para 8.17 and following below.

[6] See Department for Culture, Media and Sport, *Consultation: Relaxing the restrictions on the deployment of overhead telecommunications lines* (November 2011), available at http://www.culture.gov.uk/consultations/8652.aspx (last visited 20 February 2013).

[7] Consultation Paper, para 3.67.

[8] Consultation Paper, para 3.68.

> 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.

8.10 However, there was no evidence of problems caused by the right. We do not recommend an additional requirement of consultation; but our recommendations about the right to object, below,[9] will go some way to meeting any concerns about the installation of overhead apparatus.

The right to install lines at a minimum of 3 metres above the ground

8.11 A number of consultees thought the 3 metre limit was too low and could lead to interference with farming practices given the increased size of modern farming machinery. The National Farmers Union (NFU) gave examples of such machinery:

> It is not uncommon for modern machinery, in particular combines, telehandlers, tipping trailers and irrigation equipment to reach heights of more than 3m. So, lines installed across agricultural land at a height of 3 metres could cause significant difficulties for farmers.

8.12 The CAAV explained:

> 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.

8.13 It was suggested by Peel Holdings Land and Property (UK) Ltd and the CAAV that a more practical rule would be to follow the template of Regulation 3(2) of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 and require that the height above ground must 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). Alternatively, Batcheller Monkhouse proposed that the limit should be raised to 5 metres.

8.14 However, paragraph 10(2)(b) of the 2003 Code provides:

> (2) Nothing in sub-paragraph (1) above shall authorise the installation or keeping on or over any land of–
>
> …
>
> (b) any line which by reason of its position interferes with the carrying on of any business carried on on that land.

8.15 We do not therefore propose any change in the 3 metre limit.

[9] See paras 8.37 to 8.38 below.

8.16 **We recommend that the revised Code should preserve Code Operators' rights, in paragraph 10 of the 2003 Code, to install and keep installed lines passing over third party land which are connected to apparatus.**

RIGHTS TO OBJECT TO APPARATUS

The right to object to apparatus in the 2003 Code

8.17 Paragraph 17 of the 2003 Code provides that landowners may object to apparatus "the whole or part of which is at a height of 3 metres or more above the ground". This includes, but is not limited to, overhead lines at that height (whether or not installed pursuant to the right at paragraph 10 of the 2003 Code). This right of objection may be exercised within three months of completion of the installation. It is available to an occupier or landowner on whose land the apparatus is installed, or to a neighbour the enjoyment of whose land is capable of being prejudiced due to the proximity of the apparatus.

8.18 After two months have elapsed from the giving of notice, but before four months have passed, the occupier or landowner can apply to the court for the objection to be upheld.[10] The court must uphold the objection if the apparatus appears materially to prejudice the applicant's enjoyment of or interest in the land, unless it is satisfied that removal will diminish the quality of service or increase the cost of the communications service, or will involve separate additional expenditure, or give another person a case to object that is as good as the applicant's.[11]

8.19 The court must not make an order if the applicant is in fact bound by Code Rights and in the light of that it is unreasonable for the objection to be made;[12] and it cannot do so unless it is satisfied that the Code Operator has sufficient rights to undertake the alteration, or that it would acquire them if it applied for them to be imposed. This is necessary because the alteration requested may, for example, mean that the Code Operator has to move apparatus to another landowner's land.[13]

8.20 The tailormade right of objection under paragraph 17 stands in addition to a general right to require alteration (but under more stringent conditions) in paragraph 20 of the 2003 Code.[14]

8.21 The majority of consultees thought that the right to object under paragraph 17 should remain, though Shere Group Ltd considered that it should be restricted to occasions where the apparatus had not already been through a planning permission process. A large number of consultees thought that rights to object should be extended. One concern held by Mobile Phone Mast Development Ltd and Dŵr Cymru Welsh Water was that if overhead lines had already been

[10] 2003 Code, para 17(5).

[11] 2003 Code, para 17(6).

[12] 2003 Code, para 17(7). It is possible, though unlikely, that a court could grant an order where a person is bound by Code Rights.

[13] 2003 Code, para 17(10). The court can exercise the powers of compulsion given in para 5 of the 2003 Code; it may also give directions requiring others to be given notice of the application (para 17(11)).

[14] See paras 6.7 to 6.13 above.

installed, the tribunal deciding whether to grant the objection would be more likely to allow them to remain. However, we think that the approach of the 2003 Code is justified in the interests of enabling Code Operators to install apparatus without delay, where they have the right under the Code to do so. Paragraph 17 currently provides that, when the court considers whether the alteration would involve "substantial additional expenditure", it must in effect disregard the expense of the alteration itself.[15] This prevents a Code Operator from arguing that the expense of alteration in itself should block the objection.

8.22 Paragraph 17 provides that a landowner may object to overhead lines (or other apparatus the whole or part of which is installed at a height of 3 metres or more from the ground) within three months of the completion of their installation. The date from which the time limit for objection begins was discussed in *Jones v T-Mobile (UK) Ltd*[16] where it was held that the notice period began from the date the installation was completed, not from the date it was put to use or from the date a notice was affixed to it.[17]

8.23 The Bar Council and RLS Law were concerned that the initial 3-month time limit in which the objection should be raised was too short and that members of the public would not know of their right to object, especially if they were not in occupation. The Bar Council thought that if the time limit was extended it would help landowners and would be unlikely to prejudice Code Operators:

> … if the apparatus is already in place, then there is likely to be little, if any, additional prejudice to the operator from allowing an extended period for objections.

8.24 Falcon Chambers proposed that the time limit be abolished and replaced with a rule that would allow the landowner to remove the apparatus if necessary:

> 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.

The right to object to apparatus in the revised Code

8.25 The right in the 2003 Code to object to overhead apparatus needs to be considered in the light of two other issues addressed in this Report.

8.26 The first is our recommendation that the revised Code should not provide an equivalent to paragraph 20 of the 2003 Code for those who are bound by Code Rights.[18] This is because Site Providers who grant Code Rights or have them imposed upon them will have the opportunity to negotiate the terms on which the

[15] 2003 Code, para 17(6)(b).

[16] [2003] EWCA Civ 1162, [2003] 3 EGLR 55.

[17] See para 8.41 and following below.

[18] See para 6.71 above.

apparatus is installed; their successors in title take subject to those rights just as they do to any other rights granted by a landowner whose interest they purchase or who grants them a lease.[19]

8.27 The second is the question of apparatus installed on, under or over tidal water or lands in accordance with the special regime currently at paragraph 11(1) of the 2003 Code.[20] This is another context in which apparatus can be installed on private land without the owner's consent and without the need to go through a tribunal procedure to establish the right to impose Code Rights. Paragraph 20 of the 2003 Code is currently available to those owners, so that in some circumstances they can require the alteration or removal of the apparatus.

8.28 For the reasons discussed in Chapter 6, the general rights given by paragraph 20 of the 2003 Code in relation to the alteration or removal of apparatus should not be replicated. But we take the view that there is a need for the revised Code to retain an equivalent to paragraph 20, and an equivalent to the more generous but time-limited rights to object in paragraph 17, for three classes of objector:

(1) landowners over whose land overhead lines have been installed pursuant to the Code Operator's automatic right to do so;[21]

(2) landowners and occupiers who are prejudiced by the installation of apparatus more than three metres above ground on neighbouring land and who are not bound by Code Rights in respect of it; and

(3) landowners of tidal water or lands, other than the Crown bodies, in respect of apparatus installed there.[22]

8.29 In all these cases, the landowner has no choice about the installation of the apparatus, does not have the opportunity to negotiate terms, but cannot require removal. The reasons why an equivalent to paragraph 20 is not needed in the revised Code do not apply in these situations, and we need to replicate both paragraph 20 and paragraph 17 – the latter being a more generous right but strictly time-limited.[23]

The period and grounds for objection

8.30 We agree with consultees that the current 3-month period for objections under paragraph 17 of the 2003 Code is too short. In considering how to amend this, we have taken into account both the landowner's interest in being able to object to apparatus which is installed without the need to acquire Code Rights in respect of it, and the Code Operator's interest in using the rights conferred by the Code and maintaining the continuity of its network.

[19] See para 6.68 above.

[20] Discussed in Chapter 7, para 7.91 and following above.

[21] See our recommendation at para 8.16 above.

[22] Because the relevant Crown body does have the opportunity to negotiate terms in deciding whether to give consent to the installation.

[23] Extending a right to object to neighbours, case (2) above, where overhead apparatus has been installed, represents an exception to our policy on paragraph 20 (see para 6.65 and following above), because we think that overhead apparatus may be particularly obtrusive.

8.31 We have concluded that the categories of objector identified at paragraph 8.28 above should have the right to object to the relevant apparatus, on grounds similar to those in paragraph 17 of the 2003 Code, within a year of the installation.[24] When the year has expired, the right to object will be restricted so that it is only exercisable on terms similar to those in paragraph 20 of the 2003 Code. In particular, the objector will need to show that the change is needed to enable improvement of his or her land, and will usually bear the costs of making it.

8.32 In the light of the recommendation we make in Chapter 9 about the forum for dispute resolution,[25] we recommend that objections to apparatus under the revised Code should be adjudicated by the Lands Chamber of the Upper Tribunal. Where the tribunal orders the alteration or removal of the apparatus in a way that will require the Code Operator to acquire new Code Rights, the tribunal should – as under paragraphs 17 and 20 in the 2003 Code – have the ability where appropriate to impose new Code Rights on a Site Provider in accordance with the test we have discussed at Chapter 4.[26] As at present, in such a case the application will need to be brought to the notice of other interested persons as necessary, and the tribunal will give directions accordingly.

8.33 Regarding objections within one year of installation, we have explained above the grounds on which the court is directed to uphold the applicant's objection under paragraph 17(6) of the 2003 Code.[27] Under paragraph 17(8), the court is directed in addition:

> to have regard to all the circumstances and to the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services.

8.34 We have not recommended that the "Access Principle" should feature in the revised Code. However, sub-paragraph (6)(a) directs consideration of whether the alteration of the apparatus would:

> substantially increase the cost or diminish the quality of the service provided by the operator's network to persons who have, or may in future have, access to it … .

We do not consider, therefore, that it is necessary to direct separate consideration of the public interest in access to a choice of high quality electronic communications services.[28]

8.35 After the year has elapsed, it will be possible to use a modified version of paragraph 20 of the 2003 Code to object to apparatus:

[24] We are recommending that the provisions regarding replacement apparatus in paragraph 17(3) of the 2003 Code should be retained.

[25] See para 9.47 below.

[26] See our recommendation at para 4.43 above and the preceding discussion.

[27] See para 8.18 above.

[28] See our recommendation at para 4.43 above.

(1) an objection can be made if the alteration or removal of the apparatus is needed to enable the objector to carry out a proposed improvement of the land in which he or she has an interest, including development and change of use;

(2) the tribunal may only make an order if the alteration or removal will not substantially interfere with any service which is or is likely to be provided using the operator's network;

(3) the tribunal must have regard to all the circumstances in considering whether to make the order.

8.36 We consider that all such objections should follow a similar notice and application procedure, and that this should broadly follow the pattern in paragraph 17 of the 2003 Code.

Recommendations

8.37 **We recommend that the revised Code should include a right to object:**

(1) **to lines kept installed on or over land; and**

(2) **to apparatus kept installed on, under or over tidal water or lands;**

exercisable by landowners of the land on, under or over which the apparatus is installed unless the occupier or landowner is bound by Code Rights in respect of the apparatus installed or, in relation to (2) above, is a Crown body with an interest in the tidal water or land in question.

8.38 **We recommend that the revised Code should include a right to object to apparatus the whole or part of which is at a height of 3 metres or more above the ground, exercisable by occupiers and landowners of neighbouring land the enjoyment of which may be prejudiced due to the proximity of the apparatus, unless the occupier or landowner is bound by Code Rights in respect of that apparatus.**

8.39 **We recommend that the provisions of the revised Code regarding the right to object:**

(1) **where the objection is brought within one year of the completion of the installation of the apparatus, should reflect those in paragraph 17(3), (4), (6) and (8) to (10) of the 2003 Code; and**

(2) **where the objection is brought more than one year after the completion of the installation of the apparatus, should reflect those in paragraph 20(4) to (10) of the 2003 Code;**

except that in either case the tribunal should not be required to consider the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services.

8.40 **We recommend that the right to object should be exercised by notice to the Code Operator, and that applications for the objection to be upheld should be made to the Lands Chamber of the Upper Tribunal.**

THE OBLIGATION TO AFFIX NOTICES ON OVERHEAD APPARATUS

8.41 Where a Code Operator installs equipment that is over 3 metres high, paragraph 18 of the 2003 Code requires it to secure a notice to every major item of apparatus installed or, if no major item is installed, to the nearest major item to which the apparatus is directly or indirectly connected. The notice must be secured within three days of completion of the installation and must be affixed in a position where it is reasonably legible; giving the name and address of the Code Operator.[29] Failure to comply with this requirement is a criminal offence.[30]

8.42 In *Jones v T–Mobile (UK) Ltd,* Kennedy LJ considered the meaning of "legible" and concluded:

> The requirement of legibility means that the notice must be at such a height on the apparatus, not masked by part of the apparatus or other obstruction, and of such size that it can be read with reasonable comfort.[31]

8.43 Kennedy LJ went on to observe that there is nothing in the 2003 Code to suggest that the notice must be affixed to public land, and that if the notice was on private land the interested landowner could ask permission to enter the land or could find out by reference to planning permission.[32]

8.44 Ian S Thornton-Kemsley, Peel Holdings Land and Property (UK) Ltd and the CAAV argued that any notice must be genuinely accessible for those who may wish to rely on it. NFU were of the opinion that if there is no access to the site then the notice should be placed in a public location.

8.45 We recognise the possibility that those who wish to identify the Code Operator who has installed apparatus may encounter practical difficulties in accessing notices affixed under paragraph 18. However, we are concerned that imposing further requirements on Code Operators in this respect could be disproportionate to the risk of such difficulties occurring in practice, particularly where there is no obvious alternative location for the notice.

8.46 We also asked consultees to give us their views about the obligation to affix notices to overhead apparatus, including whether failure to do so should remain a criminal offence.[33]

[29] The purpose of this provision appears to be to indicate to whom any objection can be made: *Jones v T-Mobile (UK) Ltd* [2003] EWCA Civ 1162, [2003] 3 EGLR 55 at [13] by Kennedy LJ.

[30] 2003 Code, para 18(3).

[31] *Jones v T-Mobile (UK) Ltd* [2003] EWCA Civ 1162, [2003] 3 EGLR 55 at [14].

[32] Above at [14].

[33] Consultation Paper, para 3.69.

8.47 Many consultees thought that criminalisation went too far, but most wanted to keep a strict rule on putting up notices. Cable & Wireless Worldwide Group, Surf Telecoms and Falcon Chambers were concerned that a criminal response was not proportionate as it might not be practicable to fulfil the obligation: for example, because the sign could be removed by a third party or if there was no access to the site and so the sign would not be seen by the public. However, we note that paragraph 18(4) provides the following defence:

> In any proceedings for an offence under this paragraph it shall be a defence for the person charged to prove that he took all reasonable steps and exercised all due diligence to avoid committing the offence.

8.48 Some consultees were of the opinion that civil remedies were more suitable. The NFU, Peel Holdings Land and Property (UK) Ltd and the CAAV suggested that denying Code Rights to operators who did not fulfil their obligations would be a better deterrent.

8.49 We agree that it is important for those responsible for apparatus to be identifiable. However, there is much to be said for the view that this is a civil matter which should be subject to civil sanctions. One option would be to provide for enforcement by Ofcom with financial sanctions. However, our consultation did not yield adequate material for us to make a detailed recommendation on this point; we are therefore making a recommendation that the enforcement of the obligation to affix notices to overhead lines be reconsidered in the context of the 2003 Regulations, which are likely to require amendment following a number of our recommendations but, in some cases, not until some further consultation has taken place.

8.50 **We recommend that the revised Code should replicate the effect of paragraph 18 of the 2003 Code as to the obligation to affix notices to overhead apparatus.**

8.51 **We recommend that consideration should be given to the introduction of civil sanctions for failing to affix a notice to overhead apparatus, as part of the consideration of the amendment of the 2003 Regulations.**

8.52 If such civil sanctions are introduced, they will not formally supersede the criminal offence in the revised Code. However, their availability will enable the obligation to be enforced without resorting to criminal prosecution where that would not be appropriate, and we envisage that consequently criminal proceedings would be necessary in only a very few cases.

TREE LOPPING

8.53 Under paragraph 19 of the 2003 Code, Code Operators have the right to give notice to the occupier of land on which a tree grows requiring it to be “lopped” (that is, cut back), at the Code Operator’s cost, if it overhangs a street and obstructs or interferes with the Code Operator’s apparatus (or will do so).

8.54 The landowner may object, using a notice procedure, and in that event the Code Operator can ask the court to confirm the notice. If there is no objection, or if a court confirms the notice, the Code Operator can have the tree lopped "in a husband-like manner"[34] and causing the minimum damage to the tree.[35]

8.55 These rights extend to trees that are protected by a tree preservation order; there is an exception in the tree preservation regime for "statutory undertakers" which in this context specifically includes Code Operators.[36] The exception also applies to trees in conservation areas.[37]

8.56 We asked consultees whether Code Operators' rights under this paragraph should extend to vegetation as well as to trees; to trees or vegetation wherever they are (in other words, not limited to apparatus on a street); and to cases of interference with wireless signals rather than with tangible apparatus.[38]

Vegetation that overhangs a highway

8.57 Many consultees thought that the right to lop trees should be extended to vegetation because the distinction between the two was too fine. Some consultees also pointed out that vegetation may cause specific problems such as interfering with cabling.

8.58 There was some concern that a general right to lop vegetation could cause problems where the vegetation is needed by the landowner: for example, so that they may continue to receive subsidies under the Single Farm Payment scheme or other environmental scheme payments or, as South West Water Ltd pointed out, for sewage treatment works. However, provided that the right to lop extends only to trees and vegetation overhanging the highway, such concerns could be dealt with individually by the terms and conditions of the agreement between the Code Operator and the Site Provider.

8.59 Some consultees thought that the right to lop trees and vegetation should be extended to include those not overhanging the street.[39] Again, we take the view that the proper way to address this problem is by agreement with the relevant landowner. Where the Code Operator has exclusive possession of land the encroachment of vegetation will not be a problem; where the Operator has the right to lay a cable, for example, the terms and conditions on which Code Rights

[34] We anticipate that the drafters of the revised Code will wish to avoid this expression.

[35] 2003 Code, para 19(4).

[36] See the Town and Country Planning (Tree Preservation) (England) Regulations 2012, SI 2012 No 605, regs 14(1)(a)(iii) and 14(3)(e). For Wales, see the Town and Country Planning (Trees) Regulations 1999, SI 1999 No 1892, sch 1(5)(1)(a) and 1(5)(2). Under s 210 of the Town and Country Planning Act 1990 it is a criminal offence to breach a tree preservation order, but only if the breach is "in contravention of tree preservation regulations", which would not apply to a Code Operator due to the provisions just mentioned.

[37] See the Town and Country Planning (Tree Preservation) (England) Regulations 2012, SI 2012 No 605, reg 15(1)(a)(i). For Wales, see the Town and Country Planning (Trees) Regulations 1999, SI 1999 No 1892, reg 10(1)(a).

[38] Consultation Paper, para 3.74.

[39] Including BT, Cable & Wireless Worldwide Group and the Mobile Operators Association.

are exercised should be framed with a view to potential problems with vegetation, particularly in a rural setting.

8.60 We take the view, therefore, that the Code Operator's right to cut back trees should extend to vegetation generally, but should continue to be restricted to that which overhangs a highway.

8.61 Some consultees thought that the right to lop should only be available if the tree or vegetation is causing genuine interference (Carter Jonas LLP, Mobile Phone Mast Development Ltd and Dŵr Cymru Welsh Water). By contrast, Arqiva argued that:

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

8.62 We consider that preventative measures should be permitted, so that a Code Operator is not forced to wait for the tree, or other vegetation, to cause disruption to apparatus.

8.63 **We recommend that the revised Code should make provision giving Code Operators the right to require the cutting back of any tree or other vegetation that overhangs a highway where it interferes with, or will or may interfere with, a Code Operator's apparatus, and otherwise corresponding with the provisions of paragraph 19 of the 2003 Code.**

8.64 If there is an objection to the lopping of a tree, the matter may be referred to the Lands Chamber of the Upper Tribunal in accordance with the recommendation we make in Chapter 9 of this Report.[40]

Cutting back vegetation to prevent interference with a wireless signal

8.65 Some consultees argued that there should be a right to cut back trees or other vegetation which were interfering with wireless signals. They considered that, if the revised Code was aiming to be technology neutral, then a distinction between interference with wireless signals and tangible apparatus could not be upheld.

8.66 We are concerned, however, that a right which depends on interference with the invisible paths of wireless signals could be too broad, and that we do not have sufficient evidence that problems currently arise which cannot be resolved without resorting to the Code. Consultation responses did not amount to sufficient support for the possibility of extending the right to lop vegetation in this way, and so we have not made any recommendation for reform on this point.

[40] See para 9.47 below.

CODE RIGHTS AND THIRD PARTIES

8.67 We asked consultees whether they were aware of difficulties experienced in accessing electronic communications because of the inability to get access to a third party's land, whether for occupiers of multi-dwelling units or otherwise.[41]

8.68 Many of the consultees who responded to this question were of the opinion that no difficulties were caused by the inability to gain access via a third party's land, or did not know of such difficulties.

8.69 Batcheller Monkhouse reported that they had never come across this as a problem and said that it was normal for properties which are sold away to reserve appropriate rights for services, which would normally include telecoms apparatus. Telecoms Property Consultancy Ltd (TPCL) and Shoosmiths LLP added that, in general, landlords actively want to allow Code Operators on to their land to provide services to their tenants and thereby increase the desirability of their property.

8.70 By contrast, some consultees had experienced problems with access to sites via third party land. BT described it as a "central area of difficulty" and provided anecdotal evidence of cases in which delays in reaching negotiations with third party landowners created problems for supplying Ethernet circuits to a business with thousands of high-street premises. They also said that in attempts to roll out Next Generation Access (NGA) broadband they experienced problems with multi-dwelling units and multi-occupancy units (for example, commercial office blocks), with 40% of the landlords they contacted being unwilling to engage in negotiations.

8.71 It was reported that problems with third party landowner engagement or compliance slow the process down. Geo Networks Ltd had not experienced difficulties in gaining access to third party land as such, but stated that they had found that certain third party landowners impose restrictive access terms such as limiting access for upgrading or alteration or limiting access to a single tenant.

8.72 To provide Code Operators with automatic rights to access or cross third-party land, in the context of multi-dwelling units, would be a significant and serious step to take, and we are not convinced that consultation has provided sufficient evidence for it.

Compelling Code Operators to gain rights over third parties' land

8.73 Paragraph 8 of the 2003 Code provides for potential subscribers to serve a notice on Code Operators to compel them to use the powers under the Code compulsorily to acquire an interest in another's land. The Code Operator can avoid doing so by applying to the county court to have the notice set aside on the ground that, even if it obtained the necessary right, the operator would not afford the person access to its network and could not be required to do so. If the Code Operator takes no action, the potential subscriber can give notice to the relevant landowner and, if necessary, take proceedings under the Code on the Code Operator's behalf.

[41] Consultation Paper, para 3.100.

8.74 We asked consultees whether they were aware of circumstances where paragraph 8 was used.[42] Responses were clear that this power is rarely, if ever, used. No consultees reported experience of it being used and only two consultees noted that they have known it to be threatened.

8.75 We also asked consultees whether they saw a need for the revised Code to enable landowners and occupiers to compel Code Operators to use their powers to gain Code Rights against third parties in this way.[43] The majority of consultees thought that the revised Code should not provide for such a right or thought that it was not necessary. Some consultees argued that paragraph 8 of the 2003 Code is never used and so there is no need to provide such a right in the revised Code.

8.76 TPCL and the British Property Federation were of the opinion that, on the basis that the market will dictate who receives the service, there was no need for landowners to be able to compel operators.

8.77 Other consultees were concerned that such a right might be exercised when it was not reasonable and thought that it should be up to Code Operators to decide when to use their powers. For example, the landowner might choose a Code Operator and compel it to acquire rights against a third party, irrespective of whether that was the most appropriate Code Operator to do so. Furthermore, Code Operators might not have the provisions in place to install the apparatus, and could be forced to go to court to acquire the right only for the potential subscriber to decide not in fact to subscribe.

8.78 On the other hand, BT thought that the existing provisions should remain and that the Government or Ofcom should take steps to make people aware of the rights they have under the Code. It was suggested that a way forward would be to empower potential subscribers to address third parties directly to secure permission, and that the process could be quicker and cheaper as often the potential subscriber and third party may already be in some form of legal relationship, such as landlord and tenant.

8.79 In light of the above responses we consider that the revised Code should not replicate the provisions of paragraph 8. Paragraph 8 appears to be rarely, if ever used; landlords, tenants and Code Operators can continue to come to agreements in the same way as they do currently.

8.80 **We recommend that the revised Code should not include a provision equivalent to paragraph 8 of the 2003 Code.**

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

8.81 Unlike the provisions of the Code, the 2003 Regulations do not relate to the legal rights and obligations between Code Operators and private landowners. Instead,

[42] Consultation Paper, para 3.102.

[43] Consultation Paper, para 3.101.

the 2003 Regulations deal with certain conditions and restrictions to which a Code Operator is made subject when Ofcom applies the Code to the operator.[44]

8.82 In the Consultation Paper we provided an overview of the provisions in the Regulations under the headings "Planning, conservation and protected areas", "Sharing and co-operation with others", "Installation requirements" and "Maintenance, records and inspection".[45] We asked consultees for their views on the 2003 Regulations generally,[46] and specifically about regulation 16 which we discuss below.

8.83 The responses we received often focused on specific parts of the 2003 Regulations rather than general themes; many provisions of the regulations attracted no comment. Furthermore, many of the comments received have been discussed in other parts of this Report (for example, regarding the sharing of apparatus) or relate to the interaction of the regulations with planning legislation and so are outside the scope of this Report.

8.84 The following discussion focuses on issues specific to the 2003 Regulations on which consultees commented, ending with the provisions of regulation 16. We make recommendations only where we recommend change to the 2003 Regulations; where we make no comment we take the view that no amendment should be made.[47]

Regulation 8: protected areas

8.85 Regulation 8 imposes requirements to give notice where a Code Operator intends to install apparatus in specific protected areas. The notice must be given to the appropriate planning authority or designated public body. For instance, for an installation in a national nature reserve in England, notice must be given to Natural England.[48]

Protected areas and environmental impact

8.86 Regulation 8(1)(b) provides that when a Code Operator intends to install electronic communications apparatus in a national nature reserve, site of special

[44] In the consultation opened by the Department for Culture, Media and Sport on 29 January 2013 on their proposal to allow broadband cabinets and overhead lines to be installed without the need for prior approval from local planning authorities, it is stated that the proposed changes would not revoke the statutory consultation requirements placed on operators by the 2003 Regulations: Department for Culture, Media and Sport, *Consultation: Proposed changes to siting requirements for broadband cabinets and overhead lines to facilitate the deployment of superfast broadband networks* (January 2013) p 6, available at http://dcms.gov.uk/images/consultations/CONDOC_fixed_bb.pdf (last visited 20 February 2013).

[45] Consultation Paper, paras 9.15 to 9.38.

[46] Consultation Paper, para 9.39.

[47] Unlike the 2003 Code, the 2003 Regulations do not need to be re-drafted from scratch and so we need only make recommendations where change is required.

[48] The requirement does not apply to all apparatus installed in protected areas: service lines affixed to and lying on the outside of a building or other permanent structure and replacement poles and lines are excluded, provided that they do not increase the environmental impact of the apparatus located in the area.

scientific interest, area of special scientific interest or marine nature reserve the operator must give written notice to:

(i) English Nature, in England;

(ii) Scottish Natural Heritage, in Scotland;

(iii) the Countryside Council for Wales, in Wales; or

(iv) the planning authority, in Northern Ireland (in the case of a national nature reserve, area of special scientific interest or marine nature reserve).

8.87 The National Trust suggested that regulation 8(1)(b) be extended to include Grade I registered historic parks and gardens and World Heritage Sites.

8.88 Furthermore, regulation 8(5) provides that the environmental impact of apparatus is to be assessed having regard, in particular, to its visual impact on the landscape, its effect on plant and animal life, and its impact on the visual amenity of properties.

8.89 The National Trust considered that this should be extended to include:

(1) impact (directly or by the effect on their setting) on the significance of heritage assets;

(2) impact on natural resources (including but not limited to soils, carbon and water); and

(3) impact on vulnerable undiscovered archaeology and unscheduled archaeology of national significance.

8.90 Whilst we see the potential benefit in the above suggestions, we are not minded to impose further restrictions on Code Operators in this regard. Therefore we do not recommend any change to regulation 8(1)(b) and (5).

Giving notice

8.91 Regulation 8(1)(d) provides that:

> When a code operator intends to install electronic communications apparatus in ... any land which the National Trust or the National Trust for Scotland has notified the code operator that it owns, or holds any interest in, he must give written notice to its relevant regional office.

8.92 Therefore if a Code Operator intends to install apparatus on National Trust land, notice must be given to the relevant regional office of the National Trust. However, this is only the case if the National Trust has previously informed the Code Operator of their ownership of an interest in the land.

8.93 The National Trust considered that the onus should not be on it to notify Code Operators of the land in which it owns or holds an interest, arguing that the increased number of Code Operators makes this “unreasonable and impractical”.

The Trust reasoned that, as it is the Code Operator that wished to benefit from the Code Rights over the land, the onus should be on the Code Operator to ascertain whether the land on which it wished to install apparatus is National Trust land.

8.94 We agree. It also seems anomalous that there is an onus on the National Trust, and the National Trust for Scotland, to notify Code Operators about their ownership of land, when this is not seen as a necessity for English Nature and Scottish Natural Heritage.

8.95 **We recommend that regulation 8(1)(d) of the 2003 Regulations be amended so as to remove the requirement upon the National Trust or the National Trust for Scotland to notify Code Operators of land that it owns, or has an interest in before the requirements of regulation 8 are triggered.**

Regulation 3: general conditions

8.96 Regulation 3(1) imposes obligations to consult with others. In relation to works which involve the breaking up of certain highways and roads, the relevant highway authority or roads authority must be consulted, to ensure that the works "do not undermine or unduly disturb" the authority's work. It also requires a Code Operator to consult the appropriate planning authority for the installation of electronic communications apparatus, including installation in a local nature reserve.[49] "Relevant undertakers", such as those with statutory authority to carry on a railway or canal, or gas or electricity suppliers, must also be consulted to avoid disruption to their services.[50]

8.97 Strutt & Parker LLP suggested that regulation 3(1) be widened to involve consultation with the local community. We do not, however, consider that such an additional requirement would be appropriate.

8.98 Mobile Phone Mast Development Ltd and Dŵr Cymru Welsh Water considered that it should impose an obligation to consult with relevant undertakers (including water and sewerage undertakers), with the aim of avoiding disruption. However, this requirement appears already to be covered. The definition of relevant undertakers includes (amongst others) those engaged in the supply of water or the disposal of sewage.

8.99 Regulation 3(4) relates to sharing, and states that a Code Operator "where practicable, shall share the use of electronic communications apparatus".

8.100 Strutt & Parker LLP were of the opinion that Code Operators do not always follow regulation 3(4) and Carter Jonas LLP thought that Code Operators should be encouraged as much as possible to share. They also suggested that encouraging Code Operators to share should extend to the installation of cables, and that Code Operators should leave extra capacity to allow for sharing. Geo Networks Ltd suggested that the wording of regulation 3(4) should be strengthened to ensure that landowners would not be able to prevent sharing.

[49] Designated under the National Parks and Access to the Countryside Act 1949, s 21(1).

[50] "Relevant undertakers" are defined as in the 2003 Code, para 23(1), with the addition of undertakers engaged in the supply of gas, electricity, water, heat or the disposal of sewage: 2003 Regulations, reg 2(2).

8.101 In Chapter 3 of this Report, we have made a recommendation to give Code Operators a limited right to share apparatus, which will override purported limitations in the arrangement with the Site Provider.[51] We do not consider that it would be appropriate as part of this project for us to make a recommendation regarding the extent to which and the circumstances in which Code Operators should be obliged to share apparatus. A number of issues are relevant: for example, the possibility that sharing will unfairly burden the original Code Operator, or be inefficient for the new Code Operator, compared to the installation of new apparatus.[52]

8.102 RICS thought that regulations 3(1) and 3(3) to (5) were unnecessary as they were duplications of obligations found elsewhere:

> Regulation 3(1) duplicates requirements to consult with the Highways Authority, to deploy apparatus under the [New Roads and Street Works Act 1991]. 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.

8.103 However, under the New Roads and Street Works Act 1991, Code Operators are obliged only to "notify" a highway authority and there is no requirement to "consult" it before breaking up the road. So regulation 3(1) goes further than that legislation and does not merely duplicate it.[53]

8.104 Similarly, RICS considered that regulations 3(3), 3(4) and 3(5) duplicate requirements under the General Permitted Development Order (GPDO), forming enforceable planning conditions. RICS were of the opinion that this duplication left these parts of the Regulations redundant as a Local Planning Association, who would enforce the requirements under the GPDO, was more likely to become aware of any breaches than Ofcom.

8.105 The GPDO does not directly duplicate these provisions. Though parts 24 and 25 of the GPDO also contain provisions controlling the siting and visual impact of apparatus, there is no explicit mention of sharing or installing minimal apparatus. There are conditions which could be read as those requirements, for example, removing antennae which are not needed, but there is no duplication.

8.106 We conclude therefore that regulation 3 serves an independent function and does not need to be repealed.

[51] See para 3.51 above.

[52] See para 3.39 and following above, where we discuss further practical difficulties which could arise from the right to share apparatus.

[53] In some instances the Code Operator will need to the permission of the highways authority before carrying out works. The Traffic Management Act 2004 introduced permit schemes which go further than regulation 3(1) as Code Operators must apply for a permit to undertake the work. However, the permit scheme only applies where the relevant authority has applied to be a 'permit authority' and for some or all of their roads to be covered by the scheme. In all other cases the New Roads and Street Works Act 1991 will apply. More information on permit schemes can be found on the Government website: https://www.gov.uk/government/organisations/department-for-transport/series/traffic-management-act-tma-part-3-permit-schemes (last visited 20 February 2013).

Regulation 4: lines

8.107 Regulation 4(1) contains a general requirement for Code Operators to install all lines underground. Lines flown from poles in an area where service lines are already flown from poles are excepted, as are lines attached to or supported by certain electricity poles and pylons or installed to provide a temporary network. There is also an exception for certain lines fixed to the outside of buildings or flown between the eaves of nearby buildings, and for certain feeder cables. That exception does not apply to lines affixed to certain listed buildings or located in conservation areas. Finally, if "it is not in all the circumstances reasonably practicable to install the line underground", the Code Operator need not do so.

8.108 Strutt & Parker LLP thought that this regulation should be preserved except where this would be undesirable for the landowner. They also considered that the general requirement to install lines underground should be "subject to planning at all times".

8.109 We noted above that the outcome of the Department for Culture, Media and Sport's consultation on this regulation is currently awaited and so it would be inappropriate for us to recommend any change to this regulation.

Regulation 5: installation of electronic communication apparatus

8.110 Regulation 5 requires a Code Operator to give written notice to the planning authority where it intends to install apparatus (other than lines) in an area where it has not previously installed apparatus; or to install a cabinet, box, pillar, pedestal or similar apparatus for which planning permission is not required. There are exceptions concerning apparatus installed inside a building (or other permanent structure), temporary networks and apparatus attached to or supported by certain electricity poles or pylons. One month's notice, specifying details of the proposed installation, must be given.

8.111 RICS focused on the interaction between the 2003 Regulations and General Permitted Development Orders. They noted that, absent regulation 5, Code Operators could deploy apparatus without reference to any planning authority.

8.112 RICS noted the utility of this provision: that Local Planning Authorities have information about development within their areas, that they can properly inform anyone enquiring about or challenging the legality of the development, and that they can correct a Code Operator who is proceeding on the mistaken understanding that the development is permitted by a General Permitted Development Order. However, RICS argued that the requirement to give notice may not need to be universal and that there is little point in requiring notice in the cases where planning permission is needed anyway. In these cases the planning application itself will suffice as notice.

8.113 Regulation 5(3) was not considered to be so useful. Under regulation 5(3) the planning authority may, within one month, give the Code Operator written notice of conditions with which it wishes the Code Operator to comply in respect of the installation. However, the Code Operator "is not obliged to comply with those conditions to the extent that they are unreasonable in all the circumstances". RICS pointed out that:

> 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.

8.114 The Bar Council was of the opinion that this provision gave excessively broad powers to Code Operators.

8.115 Arqiva took the view that the whole of regulation 5 together with regulations 6 (conservation areas), 7 (listed buildings and ancient monuments) and 8 (protected areas) were duplications of the planning system and should be removed as they impose an unnecessary administrative burden. They said that these regulations duplicate the licences granted under section 7 of the Telecommunications Act 1984.

8.116 We note the differences of opinion among consultees here and make no recommendation; the interaction between Regulation 5 and the planning system is unclear and it would be unwise to recommend any change without further evidence.

REGULATION 16: FUNDS FOR MEETING LIABILITIES

8.117 Regulation 16 of the 2003 Regulations requires a Code Operator to:

> … ensure that sufficient funds are available to meet the specified liabilities which [arise or may arise in certain periods] from the exercise of [the right to undertake works in publicly maintained streets and roads].[54]

8.118 The specified liabilities are set out in regulation 16(10), which we summarise as follows:

(1) certain liabilities in respect of costs and expenses that arise under the New Roads and Street Works Act 1991;

(2) any costs or expenses reasonably incurred by an appropriate or responsible authority in making good any damage caused by the installation or removal of electronic communications apparatus; and

(3) any costs or expenses reasonably incurred by an appropriate or responsible authority that arise after certain events have occurred[55] in removing electronic communications apparatus from the street.[56]

[54] 2003 Regulations, reg 16(1).

[55] The events are serious for Code Operators, and include circumstances where a Code Operator ceases to provide an electronic communications network and where a Code Operator is deemed unable to pay its debts (the process of determining this is set out in reg 16(11)) or enters into administration, receivership or liquidation.

[56] The circumstances in which this liability arises are more complicated than we set out here: see reg 16(10)(c)(ii) and (iii).

8.119 In order to confirm that it is complying with the obligation to maintain sufficient funds, a Code Operator must provide an annual certificate to Ofcom. The certificate must set out certain prescribed information.[57]

8.120 Where Ofcom is not satisfied that a Code Operator has discharged the duty set out in paragraph 8.117 above, it can direct that operator to take such steps as Ofcom considers "appropriate for the purpose of securing that sufficient funds are available to meet the … liabilities"; and can publish details of any such direction.[58] In the Consultation Paper we noted one instance where Ofcom took enforcement action for non-compliance with this duty.[59]

8.121 Ofcom stated that they were not aware of any instances where the funds set aside pursuant to regulation 16 had ever been called upon, and this was echoed by several other consultees. BT understood that "this may have arisen in the case of one operator". Some consultees noted that if one operator leaves a site then it is likely that another operator will take its place, and therefore considered that the regulation was not proportionate to the risk of liabilities arising.[60]

8.122 Though many consultees thought that regulation 16 was needed, some considered that the duty placed an unnecessary burden on Code Operators. BT described it as:

> … a prudent precaution. We remain content with the current arrangement provided finance can be secured at reasonable expense.

The latter part of this response echoes the sentiments of other consultees who saw the benefit of having funds for meeting liabilities but thought that the current requirements were too onerous, and in particular that ring-fencing the money needed was not the best method for doing so.

8.123 Ofcom commented that:

> We can see the rationale for affected public bodies (including highway authorities and local authorities) having some ability to be compensated in the event of the failure of a communications provider, if they are to incur expense to deal with any street works or telecoms equipment that is above ground. …
>
> … Our view is that proportionality should be a key consideration. Therefore if it is still deemed that some form of funds for liabilities are still required, then an assessment should be made on the most

[57] The information differs depending upon what type of entity the Code Operator is and relates to signature, a statement that the duty has been fulfilled (including the amount of funds provided for), and a copy of any insurance or other instrument that is going to be used to provide the funds.

[58] 2003 Regulations, reg 16(7)(a) and (b).

[59] See Office of Communications, Enforcement and penalty notifications under sections 111 and 112 of the Communications Act 2003: Notice and explanatory statement (20 February 2007), available at http://stakeholders.ofcom.org.uk/binaries/telecoms/cop/enforcement.pdf (last visited 20 February 2013).

[60] The Mobile Operators Association, Cable & Wireless Worldwide Group and RICS.

> appropriate system based on the level of risk for public bodies. Any changes to regulation 16 should also consider the impact on smaller operators. The current system places a disproportionate requirement on smaller companies who may find it more difficult to comply with the current requirements.

8.124 RICS argued that the Regulations should contain a provision to reduce the risk of a Code Operator leaving a significant burden on public funds. They considered that some form of funding, held independently from the Code Operator, would be a reasonable and sensible solution. To reduce the administrative burden they suggested that the amount to be held should be calculated along the following lines:

> A standard figure might be estimated for the removal of an assumed "standard" form for each type of apparatus deployed using powers under the [New Roads and Street Works Act 1991]. 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.

8.125 Other consultees suggested alternatives. Cell:CM Chartered Surveyors suggested a bond payable to the local authority and Carter Jonas LLP a bond or some form of insurance policy similar to that of a contractor who undertakes highway works. Geo Networks Ltd thought that there should be some alternative insurance obligation on Code Operators, but was not aware of suitable insurance products. Ofcom also expressed doubt as to the availability of financial products:

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

8.126 The issues reported to us concerning regulation 16 are wide-ranging: whether a regime to cover potential liabilities arising from the exercise of the right to undertake street works is needed at all, how the risks of the exercise of that right should be assessed, and how Code Operators should be required to make financial provision for those risks.

8.127 In view of the support shown by consultees for some protection for authorities affected by the exercise of the right to undertake street works, we do not think that we would be justified in making a recommendation to remove regulation 16. Consultees also argued that consideration should be given to amending the provisions of regulation 16 so that it responds more proportionately to the risks occasioned by the exercise of that right. We have sympathy for these arguments, and for the concerns raised about non-compliance. However, because of the limited information available to us, it is difficult to make recommendations for reform to regulation 16 as part of this project.

8.128 It seems to us that the greater difficulties are practical, and that they arise not directly from regulation 16 itself, but from the lack of availability of commercially viable instruments which enable Code Operators to fulfil the obligation under regulation 16 other than by the deposit of funds. Regulation 16(6) envisages several ways in which this regulation can be fulfilled: by insurance, bond, guarantee or indeed by "[any] other instrument which will provide the [specified] funds". Ofcom have consulted on and developed a specimen bond for illustrative purposes, and have also made available non-binding guidelines for Code Operators in assessing the cover they require.[61] Within the context of this project and the information available to us from consultation, it is not appropriate for us to make recommendations designed to support the availability of such instruments.

[61] For more information on the Funds for Liability Consultation 2009 and the new specimen bond published in 2010 see the Ofcom website at: http://stakeholders.ofcom.org.uk/telecoms/policy/electronic-comm-code/funds-for-liabilities (last visited 20 February 2013).

CHAPTER 9
DISPUTE RESOLUTION AND PROCEDURAL ISSUES

INTRODUCTION

9.1 It was clear from many of our discussions with stakeholders before publication of the Consultation Paper that one of the principal sources of discomfort with the 2003 Code is its failure to provide for swift and effective dispute resolution. For many consultees a very important expectation of the revised Code is a solution to this problem; dispute resolution, therefore, is the primary focus of this Chapter.

9.2 We explained in Chapter 1 that we have concluded that the appropriate forum for the majority of disputes arising under the revised Code will be the Lands Chamber of the Upper Tribunal ("the Lands Chamber").[1] In this Chapter we discuss that recommendation. We also explore the possibility of enabling Code Operators to have early access to land, where most but not all terms are agreed with the landowner, on a basis that is fair to both parties.

9.3 A significant factor in disputes under the Code is costs; in this Chapter we discuss responses to the question we asked in the Consultation Paper about the award of costs, and talk about other procedural mechanisms for minimising delay.

9.4 We then turn to the question of whether any remedies are needed for the enforcement of Code Rights, before moving on to some procedural issues: the need for standardised forms of notice under the revised Code, and the possibility of standard form agreements for use where the parties wish to do so. Finally we make a recommendation about the formulation of a code of practice for Code Operators; this arises from a number of suggestions made to us by consultees which we feel are not suitable for inclusion in the revised Code itself, but which could usefully be captured in a code of practice created under the auspices of Ofcom. We have included our recommendations about standard terms and a code of practice in this Chapter alongside dispute resolution, not only so as to group together these recommendations to Ofcom but also because these non-contentious measures are intended as a means to prevent future disputes.

9.5 The discussion is presented under the following headings:

(1) The forum for Code disputes

(2) Enabling early access

(3) Costs

(4) Other procedural mechanisms for minimising delay

(5) The enforcement of Code Rights

[1] See para 1.42 above.

(6) Notice procedures

(7) Standard forms of agreement

(8) A code of practice for Code Operators.

THE FORUM FOR CODE DISPUTES

Code disputes and the importance of an effective procedure

9.6 Not all disputes with Code Operators arise from the Code; actions in nuisance, for example, relating to apparatus installed under Code Rights are not Code disputes. Nor is the enforcement of a leasehold covenant where the parties are Site Provider and Code Operator – an example might be an allegation that the Code Operator has upgraded its apparatus in breach of a leasehold covenant. Although the parties' lease is a regulated relationship under the Code, and will be continued beyond its term by virtue of the provisions of the revised Code,[2] the dispute remains a straightforward action between landlord and tenant governed by the general law.

9.7 By "Code disputes" we mean disputes that could not have arisen but for the application of the Code to the parties, and for which the revised Code must make special provision. The most important of these will be disputes about the creation of Code Rights and – at the other end of the lifespan of a regulated relationship – about the removal of apparatus. But there will also be disputes about the extent of rights conferred by the revised Code, for example about rights to upgrade and share,[3] and about the special regimes.

9.8 The existence or absence of a cost-effective mechanism for the resolution of Code disputes can have a significant impact on the way in which parties conduct themselves in negotiations. Agreements are struck in the shadow of the Code. Code Operators who have no confidence in the possibility of acquiring Code Rights swiftly through the court system may find that the only way to meet their business objectives is to agree more than the market price, or terms that are less advantageous than might be awarded if the right were acquired compulsorily. As Telecoms Property Consultancy Ltd (TPCL) noted in the context of cables and ducts:

> Site providers that are in a monopolistic position by owning the only piece of land over which cables and ducts can be laid are in a strong position to demand above market rent, particularly where that landlord derives no benefit from the use of his land or property. This can be a landlord's position despite the case law that has consistently rejected ransom payments and revenue sharing. In order for landlords to maintain a fair and reasonable view on the true market rent there has to be a good prospect that that operator can resort to a third party and within a short timescale and at appropriate cost.

[2] See our recommendation at para 6.96 above.

[3] See our recommendation at para 3.51 above.

9.9 Landowners too need to know that they have access to swift adjudication when the Code Operator steps outside the Code Rights, or when they are entitled to vacant possession of the land.

9.10 We also acknowledge the United Kingdom's obligations under Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the "Framework Directive"). Article 11 of the Directive requires a Member State to ensure that simple, efficient, transparent and publicly available procedures are applied to the resolution of a dispute over compulsory access to land by a Code Operator. A decision must be reached without delay and within six months of the date of the Code Operator's application.

9.11 This article has been implemented in the United Kingdom by regulation 3(2) of the Electronic Communications and Wireless Telegraphy Regulations 2011,[4] which requires that:

> … except in cases of expropriation, the competent authority must make its decision within 6 months of receiving the completed application.

9.12 In framing our recommendations we have in mind the need to address these issues and devise an efficient dispute resolution procedure.

9.13 In the following text we discuss the problems associated with the various forums provided for dispute resolution under the 2003 Code and in particular with the county court, the views of consultees about alternative forums, and our conclusions relating to the Lands Chamber.

Dispute resolution under the 2003 Code

9.14 At present, a range of bodies have jurisdiction in Code disputes. Disputes resolved by the county court include the following.

(1) Where a Code Operator wishes to install apparatus on a person's land, but that person does not agree to the installation, the county court has the power under paragraph 5 to dispense with the need for the agreement, and make a financial award, following an application by the Code Operator.

(2) Where a Code Operator already has apparatus installed on land in respect of which proceedings under paragraph 5 are pending, the county court has the power under paragraph 6 to confer on the Code Operator temporary rights so as to ensure that its network is maintained pending determination of the proceedings.

(3) Where a Code Operator's apparatus is already installed on a person's land, that person may apply to the county court for an order under paragraph 20 of the 2003 Code to require the operator to alter or remove the apparatus.

[4] SI 2011 No 1210.

9.15 The Lands Chamber is the forum for the following issues.

(1) Where, on a right being conferred or varied in accordance with paragraph 2 of the 2003 Code, there is a diminution in value of a relevant interest in the land due to the security provisions of the 2003 Code, the Code Operator is obliged to pay compensation under paragraph 4(4). The amount of compensation falls to be assessed by the Lands Chamber.

(2) Where a right conferred under the Code causes injurious affection to neighbouring land within the meaning of section 10 of the Compulsory Purchase Act 1965, the Code Operator must pay compensation under paragraph 16 of the 2003 Code. The amount of compensation is determined by the Lands Chamber.

9.16 Finally, the Code also provides for some disputes to be resolved by arbitration.

(1) Disputes relating to the installation of apparatus, or emergency works to apparatus, crossing a linear obstacle are to be referred to arbitration under paragraphs 12 and 13 of the 2003 Code.

(2) In addition, where a landowner's agreement is dispensed with by the county court making an order under paragraph 5 of the 2003 Code, the court is also obliged to make a financial award under paragraph 7. However, paragraph 7(4) allows the court to refer any questions arising as a consequence of making that award to an arbitrator.

9.17 The provision for several different forums is problematic in itself, because it is confusing and may lead to the necessity for multiple proceedings where a complex dispute engages a number of different issues that fall to be decided in different ways.

9.18 The 2003 Code provides for most Code disputes to be heard by the county court. The message we heard from stakeholders prior to the publication of the Consultation Paper was that the county court was ill-equipped to deal with Code disputes, resulting in slow and expensive proceedings. We provisionally proposed that the revised Code should no longer specify the county court as the forum for most disputes.[5] Almost all of the responses we received to our proposal echoed this view. Both Code Operators and Site Providers expressed dissatisfaction with the county court; its shortcomings were seen as expense, delay, and lack of expertise.

Expense

9.19 A number of consultees said that they had found the cost of county court litigation to be out of proportion to the value of the matter to be resolved. TPCL instanced a landlord and tenant dispute over a difference in rent of £2,430 for a mast site in which the combined costs of the claimant and the defendant totalled £53,000.[6] The Central Association of Agricultural Valuers (CAAV) and Peel Holdings Land and Property (UK) Ltd also provided us with the following information:

[5] Consultation Paper, para 7.26.

[6] *Vodafone Ltd v John Bryan Roberts* (2011) [ref:OAF01290].

> The scale of litigation is also illustration by the application for a costs capping order in *Petursson v Hutchison 3G* in which Hutchison 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.

Delay

9.20 Geo Networks Ltd explained:

> Operators rolling out electronic communications networks are usually working to challenging delivery timescales. Taking a dispute through the county court system is a lengthy process and there are no certainties as to when a final judgment will be reached. The delays entailed would in many cases lead to business opportunities being lost, or to contractual liabilities. … The *Mercury* case took more than a year from interlocutory order to the final judgment (with several months of negotiations preceding the court case).
>
> Landlords know that the current timescales are prohibitive and are able to exploit the commercial pressure facing Code Operators to extract commercial terms and conditions that conflict with the Code.

Lack of expertise

9.21 Perhaps the biggest concern shown by consultees related to the perceived lack of judicial expertise in dealing with the Code, especially issues of valuation. Increased expense and delay can to some extent be seen as corollaries of this. As the Mobile Operators Association noted:

> 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.

9.22 This problem is likely to perpetuate itself. The county court will not accumulate the desired knowledge of the Code unless it has a substantial body of precedent on which to draw, and it will not be able to do so unless more parties submit their disputes to it. Although British Telecommunications plc (BT) was content for the county court to retain its status as the main forum for most Code disputes, it acknowledged that:

> As we understand that Code Operators do not frequently litigate, it is inevitable that the county courts tend to have limited experience of the provisions of the Code and perhaps appreciation of the commercial dynamics of the industry.

The views of consultees about alternative forums

9.23 We asked for consultees' views as to the best forum for the resolution of Code disputes.[7] Essentially the choice for an alternative to the county court is between some form of arbitration or expert determination outside the courts system, and adjudication within the tribunal system.

Arbitration

9.24 Arbitration is a primarily voluntary form of dispute resolution. The parties can agree to submit their dispute to one or more arbitrators who make a binding decision. An agreement to arbitrate may be made before the dispute arises – through the insertion of an appropriately-worded clause into the parties' contract – or once it has arisen. Arbitration is a process that stands outside the court system, and generally involves the private determination of the dispute by an expert.

9.25 The law can prescribe the use of arbitration. The 2003 Code requires certain disputes surrounding the crossing of a linear obstacle to be submitted to arbitration.[8] Could this be extended, so that arbitration covers all or most Code disputes?

9.26 We note that it is currently possible for the parties to agree to submit any Code dispute to arbitration. Some consultees, such as Ian S Thornton-Kemsley, suggested that the revised Code should imply such a clause into new agreements:

> I … consider that the Code should make default provision for arbitration as a standard term on any agreement to which the Code applies. … Such forums may allow greater expedition in determining cases. This is particularly important for operators anxious to meet commercial imperatives.

9.27 A number of consultees supported the use of arbitration for valuation disputes, or even for all Code disputes. For example, Arc Partners (UK) Ltd commented:

> We believe that arbitration (in accordance with the Arbitration Act 1996) should be available as dispute resolution, particularly over rent review disputes or disputes over the terms of a renewal.

9.28 Peel Holdings Land and Property (UK) Ltd and CAAV were also in favour of deciding Code disputes through arbitration:

> 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.

[7] Consultation Paper, para 7.27.

[8] 2003 Code, paras 12(8) and 13; see para 7.14 above.

9.29 Cell:cm Chartered Surveyors noted that the use of arbitration has many benefits:

> The Code already allows for Arbitration to resolve disputes in relation to linear obstacles. Arbitration is an internationally recognised method of resolving disputes. The Arbitration Act 1996 allows for disputes to be settled promptly, fairly and without undue expense. The six month timetable in Para 7.4 of the consultation document is only likely to be met by reference to Arbitration.

9.30 Arbitration, as noted above, generally involves determination by an expert on a technical subject. Closely related to arbitration are two procedures involving technical experts, that appealed to some consultees: the party wall procedure and the "necessary wayleaves" procedure.

9.31 The party wall dispute resolution procedure is contained in section 10 of the Party Wall etc Act 1996[9] and involves a two-stage process. The first stage involves the appointment of surveyors; the parties can jointly appoint a party wall surveyor, or each can appoint his or her own party wall surveyor, who will then together select a third surveyor. The second stage of the process leads to an award. The jointly instructed surveyor or the third surveyor (whichever is the case) is empowered by the legislation to make an award in relation to any of the disputes which fall within the scope of his or her authority under the 1996 Act. Appeal from the surveyor's award lies to the county court.

9.32 Another consultee suggested a procedure similar to that currently used for the grant of necessary wayleaves under the Electricity Act 1989. Such wayleaves are granted by the Secretary of State; hearings take place in accordance with the Electricity (Compulsory Wayleaves) (Hearings Procedure) Rules 1967 and are usually conducted by an independent engineering inspector.

9.33 Where both parties to a dispute agree to its being referred to arbitration, the procedure may be quicker than the court system and it will generally have the advantage of privacy.[10] However, consultees noted a number of drawbacks that could arise if Code disputes generally were to be determined by arbitration, and which we think could apply equally to any other method of determination by a technical expert.

9.34 One is that at the heart of disputes about the imposition of Code Rights is a legal test which involves balancing the public interest with those of an individual. A surveyor or valuer, whilst an expert in his or her own field, is unlikely to have the experience and expertise to undertake this.

9.35 Another problem is the complexity of Code disputes and the fact that conferring Code Rights may involve setting up a long-term arrangement. The British Property Federation and TPCL said that:

[9] For which there is no equivalent in Scotland or Northern Ireland.

[10] Although the corollary of this is that arbitration awards are not publicly available and so cannot be a source of valuation comparables; nor can they amount to legal precedents.

> Party Wall disputes do not involve consideration and are one off settlements rather than an on-going lessor and lessee arrangement. It is difficult to see how this can be adapted for use in telecoms agreements which can be significantly more complex.[11]

9.36 Concerns were also expressed that the procedure could be tainted by bias, whether conscious or unconscious, on the part of the arbitrator. Mr Tony Harris noted that valuers typically act exclusively for either Code Operators or Site Providers, but not both; and it is notable that RICS produced for us a split consultation response, giving the opposed views of its "landowner members" on the one hand and its "Code Operator members" on the other.

9.37 In the light of these concerns we do not think it practicable for the majority of Code disputes to be determined by arbitration. Nor are we attracted to the idea that valuation issues alone should be arbitrated. That may be a sensible procedure if undertaken by agreement, but where there is no agreement about arbitration a dispute about the imposition of Code Rights, or about the variation of the terms and conditions on which they are held, should be determined in a single forum. It is unlikely to be convenient or cost-effective for the parties to have to be heard before two different adjudicators.

9.38 However, we have heard no concerns relating to the existing use of arbitration to determine disputes about the installation of apparatus in pursuance of the right in paragraph 12 of the 2003 Code to cross a linear obstacle, discussed in Chapter 7.[12]

The tribunal system

9.39 Within the tribunal system both the Lands Chamber and the Property Chamber of the First-tier Tribunal, which is to come into existence shortly, are obvious candidates to have jurisdiction in Code disputes. Indeed, the Lands Chamber already has jurisdiction over certain Code disputes, namely the determination of the amount of compensation payable under paragraphs 4(4) and 16(1) of the Code. Tribunal proceedings are of course public; tribunal judges are accustomed to making decisions of law and to balancing the public and private interest; most importantly, the Lands Chamber has far greater valuation expertise than has the county court.[13]

9.40 In the Consultation Paper, we discussed the possibility of the revised Code prescribing the Lands Chamber as the forum for all or most Code disputes.[14] Should the Lands Chamber be responsible for dealing with all Code disputes, or just those surrounding the conferral of compulsory rights, with issues about payment for those rights to be determined by other means? Most of the consultees who responded to our consultation question on suitable forums for

[11] RICS also raised this concern.

[12] See para 7.66 and our recommendation at para 7.70 above.

[13] Although the President of the Lands Chamber has always been a judge with expertise in property law, most of its full-time members were until recently surveyors. However, all judges, including High Court judges, are also now judges of the Upper Tribunal: Tribunals, Courts and Enforcement Act 2007, s 6.

[14] Consultation Paper, paras 7.18 to 7.25.

dispute resolution under the revised Code[15] showed at least some clear support for the Lands Chamber (or the Lands Tribunal for Scotland) becoming the main forum for litigation.

9.41 Peel Holdings Land and Property (UK) Ltd and the CAAV described the Lands Chamber as "an existing forum with substantial property and valuation skills", and as "[carrying] the confidence of the property world".

9.42 Many emphasised, however, that recourse to the Lands Chamber should be regarded as a measure of last resort, and that the parties should be encouraged to use alternative dispute resolution in the first instance. According to the British Property Federation:

> Every opportunity should be taken … to use alternative dispute procedures before matters are escalated to Lands Chamber level.

9.43 The Property Chamber of the First-tier Tribunal is due to come into existence next year. Some consultees were supportive of a partial transfer of jurisdiction to the Property Chamber. Shoosmiths LLP recommended that if competence is to be divided between the Property Chamber and the Lands Chamber, the former should only be empowered to deal with the most basic of disputes and, in any event, the Lands Chamber should deal with the majority of cases to begin with "as the early decisions will form important precedents that will be invaluable to those seeking to resolve matters through negotiation".

Conclusions and recommendation

9.44 In the light of consultation responses, we regard the Lands Chamber as the obviously suitable forum for Code disputes, with the exception of issues relating to linear obstacles, as discussed in Chapter 7.[16]

9.45 Before publication of the Consultation Paper we corresponded with the then President of the Lands Chamber, George Bartlett QC,[17] who made the following comments about the relationship between the two chambers:

> A new First-tier Tribunal chamber, the Property Chamber comes into existence next year. It will incorporate residential property tribunals, Agricultural Land Tribunals and the Adjudicator to the Land Registry, and will have both legal and surveyor membership. Appeal will lie to the Lands Chamber, and there will be scope for moving first-instance cases between the Upper Tribunal and the First-tier Tribunal. Thus after the Valuation Tribunal for England is incorporated into the Property Chamber in 2014 I would expect that some of our compensation cases, initially the smaller ones, could be transferred down, provided that we are satisfied that the expertise is there. The Property Chamber could well be the appropriate recipient of smaller disputes under the Electronic Communications Code. This could be achieved by conferring all the jurisdictions on the Upper Tribunal with

[15] Consultation Paper, para 7.27.

[16] See para 7.66 and our recommendation at para 7.70 above.

[17] Consultation Paper, paras 7.20 to 7.21.

> power to transfer down individual cases or categories of case; or by conferring some (or perhaps all) of them on the First-tier Tribunal with power to transfer individual cases up to the Upper Tribunal.

9.46 We regard the Lands Chamber as the obviously better solution in view of its established jurisdiction and expertise. Rule 5(3)(k) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010[18] provides that the Lands Chamber may "transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings and … (ii) the Tribunal considers that the other court or tribunal is a more appropriate forum for the determination of the case". That power would also enable the Lands Chamber to transfer proceedings to the county court, which might be useful in some cases involving leases, particularly where related premises were also the subject of litigation under the Landlord and Tenant Act 1954.

9.47 **We recommend that the revised Code should make provision for the Lands Chamber of the Upper Tribunal to adjudicate Code disputes, subject to our recommendation at paragraph 7.70 above that objections as to proposed works to cross a linear obstacle are to be referred to arbitration.**

ENABLING EARLY ACCESS

9.48 Paragraph 5 of the 2003 Code enables Code Rights to be conferred despite the opposition of the landowner, and we anticipate that the revised Code will do the same in accordance with our recommendations in Chapter 4. The Code Rights that are sought may range from the right to install apparatus on land on a long-term or permanent basis, to a temporary right to obstruct a landowner's access. In technical terms, what is wanted may be a lease, an easement, a wayleave or a simple temporary licence. The provisions for dispute resolution in paragraph 5 of the 2003 Code are geared to the situation where the landowner does not wish to confer Code Rights, and enable the county court to dispense with the landowner's agreement to the conferral of the rights.

9.49 We have recommended that such disputes be adjudicated by the Lands Chamber. We anticipate that the Lands Chamber's expertise, as well as the potential for the distribution of the case-load between the First-tier and Upper Tribunals, will result in a considerable improvement in the speed and efficiency of proceedings.

9.50 However, we think that we can go further. In many cases a landowner will not be wholly opposed to the installation of electronic communications apparatus. Installation in itself may be uncontentious, and may be welcomed as a source of revenue (and of a mobile phone or broadband service). The sticking point is more usually the terms on which Code Rights will be conferred, and most often the price. TPCL said:

> By far the majority of disputes are over the market rent. Landowners that are in a monopolistic position by owning the only piece of land over which cables and ducts can be laid are in a strong position to demand above market rent, particularly where that landlord derives

[18] SI 2010 No 2600 (L 15).

> no benefit from the use of his land or property. This can be a landlord's position despite the case law that has consistently rejected ransom payments and revenue.

9.51 A failure to agree a price for the installation may result from a genuine disagreement about valuation, and, given the need to involve experts, this may be a complicated and time-consuming issue to resolve. Some landowners would be content to allow early access if they could do so safely, as it would allow them to secure the benefits of the installation (consideration and, in some cases, also enhanced communications service). This is, however, problematic under the 2003 Code, because once apparatus is installed under the 2003 Code it benefits from the protection of paragraph 21, leaving the landowner locked into the security provisions of the Code and the Code Operator with little incentive to make progress towards agreeing consideration. Accordingly, the landowner cannot safely allow early access until it is satisfied that all the terms and conditions of the parties' legal relationship are in place.

9.52 In many cases negotiation on price is complicated by a mismatch between the objective of promoting the consensual granting of Code Rights and the inefficiency of the mechanism for conferring rights when agreement cannot be reached. We have heard concerns that the 2003 Code presents landowners with an incentive to refuse to agree a price; effectively they can ransom Code Operators who need to secure access within a specified timeframe. If both parties are aware that the Code Operator commercially cannot wait for a full paragraph 5 hearing to establish whether Code Rights will be imposed, then negotiation is compromised. That is the case even if the landowner does not in fact oppose the installation of a Code Operator's apparatus – or knows that it would not be realistic to resist the compulsory imposition of the rights which the Code Operator requires. This is not an abuse of rights by the landowner; it is a natural consequence of the legitimate desire to maximise the value of rights. The 2003 Code makes a refusal to agree price the most effective way to achieve that.

9.53 So there are a number of contexts within which a Code Operator will not be able to gain access to land where the only sticking point is price. BT confirmed in its consultation response that the county court will not currently grant temporary rights in these circumstances.

9.54 In the Consultation Paper we provisionally proposed that it should be possible for Code Rights to be conferred at an early stage in proceedings pending the resolution of disputes over payment.[19] We suggested that where the only issue in dispute between the parties is payment, the conferral of Code Rights in the interim period between the commencement of proceedings and trial would address concerns about the landowner's ability to hold out on price by refusing to grant access.

9.55 Some consultees strongly supported this proposal. Cable & Wireless Worldwide Group asserted that it would inject much-needed impetus into negotiations that had broken down because of obstinate behaviour on the part of the Site Provider:

[19] Consultation Paper, para 7.31.

> We agree with the provisional proposal and for an expedited procedure to apply to commence proceedings pursuant to paragraph 5 to reach this early stage. We consider that a revised code will not be effective in providing a balanced approach to compensation for the rights sought by the operator unless there is the ability in the code to allow for rights to be granted in a sensible time period that allows for service to be provided to prevent time becoming a means by which grantors can extract ransom.

9.56 The Mobile Operators Association and Surf Telecoms shared the view that the early grant of Code Rights would generally enable the faster provision of electronic communications services to consumers.

9.57 TPCL, while supportive, emphasised that the early grant of Code Rights should not be possible where there is disagreement as to any term of occupation besides price:

> If terms cannot be agreed, permitting the occupation of the site without an agreement leaves too many uncertainties on the terms of occupation and the rights of either party will be unclear, especially on indemnity and insurance issues as well as a host of other terms. … I would suggest that this should only be possible in circumstances where the terms of occupation are fully agreed save for market rental value (ie post negotiation or mediation) at which point the Lands Chamber could agree to the operator taking occupation whilst an Arbitrator or Independent Expert determines the market rental value.[20]

9.58 Many Site Providers disagreed with our provisional proposal. Some believed that interim applications for Code Rights would become the norm, and that any incentive for the Code Operator to finalise the terms of its agreement with the Site Provider would be lost. As the British Property Federation put it:

> Once firmly ensconced on a site and generating revenue for their business [Code Operators] would have little interest in a speedy resolution of outstanding issues.

9.59 The National Farmers Union (NFU) agreed, adding:

> The negotiating position of landowners would also be unfairly prejudiced as the apparatus would already be in situ, and they would have to go through formal processes and procedures in order to get the apparatus removed if the situation is not ultimately resolved.

9.60 Consultation therefore confirmed the view that providing Code Operators with early access would bring benefits, but could also carry risks. We are confident that, even with early access rights, Code Operators would continue to operate on the basis that negotiation is preferable to litigation, and that applications for rights to be granted compulsorily would be the last port of call for securing Code Rights. But we agree that any system that granted Code Operators early access with

[20] The British Property Federation also raised this concern.

Code Rights, protected by the security provisions of the revised Code, would leave operators with little incentive to go on to finalise agreements. Consultation has also confirmed our view that it would be impracticable to allow early access where the terms of access, other than price, were not established.

9.61 We have concluded that the revised Code should allow early access for Code Operators, but only on an interim basis. We recommend that this should be achieved by enabling Code Operators, when making an application for Code Rights under the revised Code, to apply to the Lands Chamber for an interim order for access pending the resolution of disputes over payment. Such orders would only be granted on terms that give the landowner the right to vacant possession if a final order in favour of the Code Operator is not made before the expiry of the interim order.

9.62 In cases where Code Operators and landowners are both content with early access, the grant of interim access would proceed by way of a consent order, which might include agreed terms as to interim payment.

9.63 In other cases there would have to be a contested interim hearing. We suggest that the Code Operator would have to satisfy the Lands Chamber that there was a good arguable case[21] that the test for the imposition of Code Rights would be satisfied at trial before the interim order could be made. If successful, the Code Operator would be granted interim access to the land on terms specified by the tribunal. The interim order might include terms as to interim payment by consent, pending final determination of the consideration; and the tribunal might order interim compensation where it was possible to do so without hearing extensive evidence. But the objective of the interim order would be to enable access pending determination of valuation issues, and so the final hearing would resolve the question of consideration (and payment would then be backdated with interest to the date of the interim order).

9.64 Whether or not an interim hearing is contested, it is important to ensure that the rights granted to the Code Operator under the interim order do not place the landowner at an irremediable disadvantage by giving to the Code Operator the full protection of Code Rights. This can be achieved by requiring that interim orders must include provision to the effect that, if a final order in favour of the Code Operator is not made before expiry of the interim order, the Code Rights will come to an end and the landowner will be immediately entitled to enforce removal of the apparatus. That application would be listed for hearing and would proceed unless the parties had reached agreement on outstanding issues in the meantime. Thus if consideration is not determined following an interim order made by consent, or if the Code Operator obtains an interim order but is

[21] The standard of a good arguable case would require the Code Operator to show that it had much the better of the argument on the material available: *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547, 555, by Waller LJ (not doubted on appeal: [2002] 1 AC 1). The use of that standard is well-established in cases where the applicant is seeking an order that will have significant consequences for the respondent, such as an application for permission to serve proceedings outside the jurisdiction and an application for a freezing injunction.

unsuccessful at the full hearing of its application,[22] the landowner is able to remove the apparatus and have the land reinstated.[23]

9.65 How would this speed up the process? It might be objected that a landowner who wanted to ransom could still do so simply by threatening to contest the hearing, or by claiming to disagree with other terms of access, and not simply consideration. Clearly, interim applications would be more attractive to Code Operators in some circumstances than others. However, the availability of the interim procedure would speed up access to the tribunal; a hearing dealing only with access and terms other than consideration is more straightforward than a full hearing and may be able to be dealt with on the papers. Access to a quicker and cheaper interim determination would therefore decrease the risk of ransom. The availability of an interim hearing would also make ransom a more risky tactic; a landowner who refused to consent to early access where the test was clearly satisfied and the Code Operator was offering reasonable terms would be at risk of an adverse costs order in the event that the Code Operator was granted an interim order.[24]

9.66 The availability of interim access would therefore encourage negotiated settlement, in line with the overall objectives of the Code and existing market practice. It would realign the balance in negotiation without unfairly prejudicing the interests of landowners. The dual protection for landowners – that early access rights would not be Code Rights conferring security on apparatus, and that any interim order would only stand pending a full hearing at which an unsuccessful Code Operator would be ordered to remove its apparatus – operates as a check on Code Operators who might see the interim procedure as a means of by-passing negotiation.

9.67 **We recommend that the revised Code should enable the Lands Chamber of the Upper Tribunal to make an order conferring Code Rights on an interim basis, either by consent, or where the Code Operator has made out a good arguable case that the test for the imposition of Code Rights is satisfied. Such orders may include terms as to compensation and as to interim consideration; they must provide that if the test for the imposition of Code Rights is not satisfied at a final hearing (or the Code Operator discontinues the proceedings) the landowner will have an immediate right to enforce removal of any electronic communications apparatus placed on the land pursuant to the interim order.**

COSTS

9.68 The costs of Code disputes can be substantial and are a matter of concern to many stakeholders. In the county court costs generally follow the event, but the courts and tribunals have a wide discretion as to costs. In the Consultation Paper

[22] That is, in the rare event that the tribunal decided at the final hearing that the test for the imposition of Code Rights was not satisfied despite the Code Operator having made out an arguable case on its application for an interim order.

[23] See our recommendation at para 6.128 above.

[24] The order as to costs would usually be costs in the case; in other words, the costs of the application will be paid by the side which loses at the final hearing.

we sought consultees' views as to how costs should be dealt with in disputes under the 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 Site Provider's conduct has unnecessarily increased the costs incurred; or

(2) that costs should be paid by the losing party.[25]

9.69 We also asked consultees whether different rules for costs are needed depending upon the type of dispute.[26]

9.70 Few consultees believed that the presumption that costs should follow the event should apply in all cases. Evergreen Property Consulting Ltd argued that this presumption "poses an unacceptable litigation risk to low-net-worth-landowners". There was support for the general rule that reasonable costs should be paid by the Code Operator in cases where it is seeking to acquire Code Rights by compulsion. The most common argument in support of this view was that it would do justice to a Site Provider who is being forced against his or her will to accommodate the Code Operator's apparatus. According to Ian S Thornton-Kemsley:

> It is our experience that most Code disputes arise because of the mindset of operators not landowners. It is usual that where someone is seeking an agreement uninvited by the other party, then the one wanting the agreement will generally pay the reasonable costs of that other party. That is also, presumably on similar grounds, the general presumption for compulsory purchase where claimants whose land is compulsorily acquired are entitled to their costs.

9.71 The analogy with compulsory purchase is a difficult one to draw. It is true that on a claim for compensation for compulsory acquisition of land, the costs incurred by a claimant in establishing the amount of the compensation are seen as part of the expense imposed on the claimant by the acquisition, and so are generally recoverable from the purchasing authority. But a landowner and a Code Operator may be in dispute not about compensation but about the test for the imposition of Code Rights, or about the terms and conditions on which they are to be conferred. Later, they may be in dispute about the removal of electronic communications apparatus or about a change in the terms and conditions on which Code Rights are held.

9.72 We bear in mind that the objectives of a regime for the award of costs are twofold:

(1) to encourage the early and efficient resolution of disputes; and

(2) fairly to apportion costs between the parties in the event that they are unable to agree on who should pay what.

[25] Consultation Paper, para 7.37.

[26] Consultation Paper, para 7.38.

9.73 So we think that there is a case for costs following the event in a context where matters can and should be settled by agreement, or by alternative forms of dispute resolution, if possible.

9.74 Some consultees felt that a rule that costs should be paid by the losing party may be beset with difficulty, as the losing party may not always be easy to identify. As Dev Desai explained:

> 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.

9.75 We disagree that the losing party will be difficult to identify, but we acknowledge the complexity of Code disputes and anticipate that there will be cases where the Lands Chamber awards costs on one issue to one party, and on another to the other – apportioning the costs between the two parties.

9.76 Accordingly, we take the view that it should be the starting point that the costs of Code disputes follow the event. But this is only a starting point; it may be partially or totally displaced. And it may operate in favour of the Code Operator in respect of one part of the proceedings (notably satisfaction of the test for the imposition of Code Rights), but in favour of the Site Provider in another (notably entitlement to consideration and compensation).

Costs in the Lands Chamber

9.77 How then does the treatment of costs in the Lands Chamber sit with our views on costs? The costs regime in the Lands Chamber provides generally for costs to be paid by the losing party, but is also sensitive to the conduct of the parties both before and during proceedings, and recognises that a Code Operator may protect its position in a dispute over valuation by making an offer without prejudice save as to costs.

9.78 Section 29 of the Tribunal, Courts and Enforcement Act 2007 provides that:

> (1) The costs of and incidental to–
>
> (a) all proceedings in the First-tier Tribunal; and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

9.79 The exercise of this power is governed by rule 10 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, which provides that the Tribunal may make a summary or detailed assessment of costs on its own initiative. The Practice Directions of the Lands Chamber provide additional flexibility.[27] Paragraph 2.2 of the Practice Directions provides that:

> In exercising its power to order that any or all of the costs of any proceedings incurred by one party be paid by another party or by their legal or other representative the Tribunal may consider whether a party has unreasonably refused to consider ADR when deciding what costs order to make, even when the refusing party is otherwise successful.

9.80 The general rule for costs, as set out in paragraph 12.3(1), is that the successful party ought to receive its costs. However, the Tribunal retains a discretion to depart from this rule in appropriate cases. In exercising this discretion, the Tribunal will have regard to:

> … all the circumstances, including the conduct of the parties; whether a party has succeeded on part of their case, even if they have not been wholly successful; and admissible offers to settle. The conduct of a party will include conduct during and before the proceedings; whether a party has acted reasonably in pursuing or contesting an issue; the manner in which a party has conducted their case; whether or not they have exaggerated their claim; and the matters stated in paragraphs 2.2, 8.3(2) [written questions to experts], 8.4 [discussions between experts] and 10 [site inspections] above.[28]

9.81 A further important element in the Tribunal's costs regime is that in any proceedings before the Tribunal any party may make an offer to any other party to settle all or part of the proceedings or a particular issue on terms specified in the offer. Neither the offer nor the fact that it has been made may be referred to at the hearing if it is marked with "without prejudice save as to costs" or similar wording.[29]

9.82 Such offers have an important role to play in encouraging the early settlement of disputes over consideration under the revised Code.

9.83 Where proceedings are determined in accordance with the simplified procedure or the written representations procedure,[30] costs will only be awarded if there has been an unreasonable failure on the part of the claimant to accept an offer to settle, or if either party has behaved otherwise unreasonably, or the circumstances are in some other respect exceptional. These rules are part of a

[27] Practice Directions of the Lands Chamber of the Upper Tribunal (29 November 2010). They were made and issued by the Senior President of Tribunals in exercise of powers conferred by the Tribunals, Courts and Enforcement Act 2007 and with the agreement of the Lord Chancellor as required under s 23(4) of the 2007 Act.

[28] Practice Directions of the Lands Chamber of the Upper Tribunal, para 12.2.

[29] Practice Directions of the Lands Chamber of the Upper Tribunal, para 12.7(1). Para 12(7)(2) gives further requirements as to the content of the offer.

[30] See para 9.92 below.

strategy of encouraging the parties not to incur or put each other to excessive expense in relatively straightforward cases.

Costs capping

9.84 TPCL and the British Property Federation argued that costs should be capped in order to prevent Code Operators from lavishing resources on a case in order to create a precedent. They suggested that in disputes over valuation, costs should be limited to a multiple of the rent awarded by the court or tribunal.

9.85 We are not minded to pursue this suggestion. Whether or not it is right for Code Operators to seek to clarify the law in this way, it would be difficult arbitrarily to fix on a multiple, and it is not clear how costs could be capped in disputes that have nothing to do with valuation – which realistically are at least as likely to generate useful precedent.

9.86 The wide discretion of the tribunal enables it to make appropriate awards in cases where costs have far exceeded what the tribunal considers would have been reasonable.

OTHER PROCEDURAL MECHANISMS FOR MINIMISING DELAY

9.87 We asked consultees to let us have their views on other procedural mechanisms that might minimise delay in Code disputes. The views we received touched on both litigation procedure and notices; issues relating to notices are dealt with below,[31] and we comment here on suggestions made about litigation procedure.

9.88 Most consultees agreed that the current procedures for resolving Code disputes could be improved. Many thought that a change of forum and clearer notice procedures (which we discuss elsewhere) would go most of the way to achieving this, but a few other suggestions were made.

9.89 Surf Telecoms recommended that rules akin to the pre-action protocols that regulate certain types of proceedings in the civil courts should be introduced, with appropriate sanctions for non-compliance. This would encourage the parties to "negotiate and resolve their disputes reasonably, to adopt a 'cards on the table' approach, and to encourage the early exchange of information".

9.90 We consider that the existing case management powers of the Lands Chamber deal with this concern. Rule 5 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 confers a wide power on the tribunal to regulate its own procedure. Specifically, the tribunal may permit or require one party to provide documents, information, evidence or submissions to another party;[32] deal with an issue in the proceedings as a separate or preliminary issue;[33] hold a hearing to

[31] See para 9.105 and following below.

[32] Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, r 5(3)(d).

[33] Above, r 5(3)(e). The tribunal may order any preliminary issue in the proceedings to be disposed of at a preliminary hearing where such issue is properly severable from other issues in the proceedings and where its determination might effectively dispose of the whole case or reduce the issues in the case, thereby saving costs and avoiding delay: Practice Directions of the Lands Chamber of the Upper Tribunal, para 7.

consider any matter, including a case management issue;[34] and stay proceedings.[35]

9.91 Moreover, as we saw above, the award of costs can be influenced by the conduct of the parties,[36] and may be a powerful incentive to encourage co-operation and efficient resolution. We think that the desire to limit costs (and to avoid having to pay those of the other party) is sufficiently influential to capture the concerns of consultees.

9.92 The Mobile Operators Association suggested that a fast-track procedure could be introduced for simple and low-value disputes. This is an option which is already open to the Lands Chamber. One of four different types of procedure – the standard procedure, the simplified procedure, the special procedure and the written representation procedure – can be selected depending on the nature and complexity of the dispute.[37]

9.93 These four types of procedure are sufficiently flexible to cover both simple and difficult disputes under the revised Code.[38]

THE ENFORCEMENT OF CODE RIGHTS

9.94 The 2003 Code does not provide mechanisms for enforcing Code Rights. The remedies available for breach of a Code Right are those under the general law. The most common remedies will be damages or an injunction;[39] where Code Rights are conferred by the grant of a lease then the whole of the extensive law relating to the enforcement of leasehold covenants will be available to the parties.

9.95 We asked consultees:

(1) to what extent unlawful interference with electronic communications apparatus or rights causes problems;

[34] Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, r 5(3)(f).

[35] Above, r 5(3)(j). The parties may apply at any time for a short stay in the proceedings to attempt to resolve their differences, in whole or in part, outside the tribunal process, for which no fee is payable. If the parties require a second or longer stay, the fee for an interlocutory application must be paid and the parties must satisfy the tribunal that an additional or longer stay would be appropriate: Practice Directions of the Lands Chamber of the Upper Tribunal, para 2.1.

[36] See paras 9.79 to 9.81 above.

[37] Lands Chamber Practice Directions, para 3. The simplified procedure is an expedited procedure intended for disputes in which no substantial issue of law or of valuation practice or conflict of fact is likely to arise: para 3.3. Only rarely, if ever, will the simplified procedure be suitable for disputes over access or payment under the revised Code. The special procedure is reserved for cases which require the management of a senior member of the tribunal in view of their complexity, value or wider importance: para 3.4. We imagine that some disputes under the revised Code will fit this description. The written representation procedure will be used where, having regard to the issues in the case and the desirability of minimising costs, the tribunal is of the view that oral evidence and argument can properly be dispensed with: para 3.5. The standard procedure applies in all cases not assigned to one of the other procedures: para 3.2.

[38] We noted above that there are some costs implications in the choice of procedure.

[39] An injunction is an order forcing a person not to do something, and a mandatory injunction is an order forcing a person to do something. See the Consultation Paper, para 3.103 and following.

(2) to what extent any such problems are caused by a Code Operator having to enforce rights through the courts or by the remedies awarded by the courts; and

(3) whether any further criminal or civil provisions were needed to enable Code Operators to enforce their rights.[40]

9.96 We also asked whether landowners or occupiers needed any additional provision to enable them to enforce obligations owed by Code Operators.[41]

9.97 In general it was thought that the remedies available under the general law were sufficient. The Bar Council noted that:

> The court has wide and effective powers which we would expect to be sufficient. The power of courts to impose injunctions is swift, effective, and readily available.

9.98 The opinion of consultees was split with regard to the problems caused by interference with a Code Operator's apparatus. Some consultees had no experience or knowledge of any interference with apparatus while others thought that it was a problem that can affect network coverage.[42]

9.99 BT considered there to be a problem with metal theft, but in general physical interference with apparatus appears to be rare. Clarke Willmott LLP were not aware of any instances of physical interference. Most consultees who mentioned interference spoke of landowners cutting the power supply to apparatus, and the main reason given for interference was the breakdown in relations between the Code Operator and Site Provider. Many consultees said that this often occurred at times when Code Operators were reluctant to negotiate. TPCL stated that:

> The only occasions in which a landlord might consider in breach of a contractual arrangement are denying access to a site or turning off a power supply, however, this is usually where the Code operator remains in occupation beyond the term of their expired agreement and refuses to negotiate for a new agreement or demands terms that the landlord considers unreasonable. Such action can bring a Code operator back to the negotiating table.

9.100 We have made recommendations in Chapter 6 which we expect will go some way to prevent the breakdown of operator-landowner relations during such negotiations and so limit the cases of interference with apparatus.[43] Whilst Code Rights are to continue beyond their contractual expiry date, thus regularising the position of Code Operators at the end of a term, we have made provision for

[40] Consultation Paper, para 3.106.

[41] Consultation Paper, para 3.107.

[42] Strutt & Parker LLP stated: "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."

[43] See para 6.102 and following above.

landowners to be able to remove the apparatus where redevelopment is in prospect, or where a Code Operator has not observed the terms and conditions on which Code Rights are held. Most importantly we have provided for a procedure that places the onus on Code Operators to take action if, when a landowner requires removal, they wish to keep the apparatus in place.

9.101 Some consultees suggested that interference with apparatus should be criminalised both to speed up proceedings and to act as a deterrent. The Mobile Operators Association said that:

> 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.

9.102 However, most consultees argued that imposing criminal sanctions would be going too far. The Bar Council and Falcon Chambers both thought that there was nothing to justify the imposition of a criminal sanction in these cases. Furthermore, consultees considered that there was insufficient evidence to suggest that interference was a problem great enough to introduce criminal sanctions. The Country Land & Business Association (CLA) thought that criminal sanctions should not be introduced without "substantial evidence" to support such a change and the British Property Federation noted that:

> No evidence is presented about the scale of the problem that operators encounter. We doubt whether any changes in enforcement provisions would be appropriate. Creating a criminal offence should be very much a last resort and would need to be justified by evidence of a major and widespread problem.

9.103 We agree, and we make no recommendation for the introduction of a criminal offence. We suggest that the current remedies are sufficient and should remain as they stand.

9.104 One consultee recommended that penalty charges should be imposed for failure to comply with deadlines under the revised Code. We take the view that the procedural requirements already prescribed in the Lands Chamber procedure rules will go some way towards providing an incentive to comply with deadlines. More importantly, our recommendations in Chapter 6 about the procedure where a landowner wants to remove apparatus create incentives for the Code Operator to act promptly; the threat of removal is likely to be more effective than any other penalty.[44]

NOTICE PROCEDURES

9.105 We move now to three final topics in this Chapter where, in addition to making recommendations about the revised Code, we also make recommendations addressed to Ofcom; they relate to notices, standard form agreements, and a code of practice.

[44] See para 6.102 and following above.

9.106 The 2003 Code provides for the use of notices in a number of instances: where Code Rights are required,[45] for example, or where a landowner wants to remove apparatus.[46] Paragraph 24 of the 2003 Code requires Code Operators to use forms of notice approved by Ofcom.

9.107 In our discussions of the substance of the revised Code we have concentrated on substantive issues, but of course the revised Code will have to provide for notices to be given in a number of instances.[47] In the Consultation Paper we provisionally proposed that the revised Code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service.[48] We also asked consultees whether improvements could be made to the forms of notices that Code Operators are required to use.[49]

9.108 Consultees almost unanimously agreed that the revised Code should prescribe consistent notice procedures and rules for service, though it was also apparent that consistency meant different things to different consultees.

9.109 To some consultees, consistency demanded the introduction of a uniform period for the service of notices and counter-notices under the revised Code. Mobile Phone Mast Development Ltd and Dŵr Cymru Welsh Water suggested that the notice period under the revised Code should be extended to a minimum of 6 weeks.

9.110 Other consultees believed that to achieve consistency, both Code Operators and Site Providers should be required to use prescribed forms of notice.

9.111 As to the notice templates that are currently produced by Ofcom, we were given the impression that these are fairly widely used, but that they could be improved in certain respects. According to Geo Networks Ltd:

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

9.112 Cable & Wireless Worldwide Group said that:

> If [Ofcom is] to continue [to draft these notices] there should be a consultation process on the wording of notices and the means by which the notices can be amended (a right of appeal) where they are found not to work in practice.

[45] 2003 Code, para 5(1).

[46] 2003 Code, para 21(2).

[47] In one case we have given some detail about lengths of notice, namely the procedure to be followed where the landowner wishes to remove apparatus, because notice requirements and periods are crucial to providing a procedure that works: see para 6.98 and following above. We also commented in Chapter 4 on the period within which a Code Operator may commence proceedings to apply for Code Rights to be imposed: see para 4.55 and following above.

[48] Consultation Paper, para 7.52.

[49] Consultation Paper, para 7.53.

9.113 Consultees were divided on the issue of whether the use of standard form notices should be mandatory or voluntary. Peel Holdings argued that to require landowners to use standard forms of notice would be unfair to the some 60% of landowners who are currently unrepresented by agents. Falcon Chambers took the view that:

> 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 1933.

9.114 In contrast, UK Competitive Telecommunications Association (UKCTA) favoured prescribed forms of notice for landowners:

> Under the current code there are no clear and unambiguous rules which apply to landowners' notices. As a result, [Code Operators] 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, [Code Operators] 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 [Code Operator]. If the landowner did not intend to serve a formal notice then the [Code Operator'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 productive.

9.115 However, Falcon Chambers were sceptical of this argument:

> 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 are equally clear.

9.116 It was suggested by South West Water Ltd, Charles Russell LLP, RICS and Batcheller Monkhouse that mandatory forms of notice under the revised Code could model those prescribed for business lease renewal disputes by the Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004.

Conclusions and recommendations

9.117 We agree with consultees that the notice periods under the revised Code should be as consistent as possible, but there are instances where a particular notice period is part of the design of a procedure. The notice period within which a landowner should decide whether or not to grant the rights requested by a Code Operator should be shorter than the period to be given to a Code Operator who is required to vacate a site. So we make no specific recommendation about notice periods under the revised Code, but look to the drafter to provide periods which

are as consistent as possible in line with consultees' preference for standardisation.

9.118 As to the use of prescribed forms of notice, our conclusions differ between Site Providers and Code Operators.

9.119 In general, we are not anxious to impose prescribed forms upon Site Providers. However, in Chapter 6 we recommend that the revised Code should provide for prescribed forms of notice for use by Site Providers who wish to terminate or renew an agreement or a lease, to require the removal of apparatus, or to obtain information about apparatus in contemplation of its removal.[50] We do so with a view to avoiding confusion as to whether a notice has in fact been served in these circumstances;[51] there is an obvious analogy here with the use of prescribed forms of notice for the termination and renewal of business tenancies under the Landlord and Tenant Act 1954.

9.120 Subject to that, we consider that landowners should not be required to use prescribed forms of notice.[52] But we expect that they would find it useful if Ofcom provided templates for their use as well as for Code Operators. However, we do agree that it should be compulsory for Code Operators to use forms prescribed by Ofcom, in line with the views of a number of consultees.

9.121 In formulating both sets of templates Ofcom will need the views and contributions of both landowners and Code Operators, and so we are making a recommendation about consultation.

9.122 **We recommend that the revised Code should require Ofcom to produce forms for use by landowners and Site Providers in complying with the notice provisions of the revised Code, but that the use of those forms be optional (subject to the recommendations that we make about prescribed notices at paragraphs 6.103, 6.117 and 6.139 above).**

9.123 **We recommend that the revised Code should require Ofcom to produce forms for use by Code Operators, and that their use should be compulsory; notices in a different form should be invalid.**

9.124 **We recommend that Ofcom consult about the content and style of the forms for use by landowners and Site Providers and of those to be prescribed for Code Operators.**

STANDARD FORM AGREEMENTS

9.125 In the Consultation Paper we discussed the possibility of mandatory or optional standard form agreements, or standard terms, between Code Operators and landowners.[53] We were clear that mandatory standard form agreements were not

[50] See paras 6.103, 6.117 and 6.139 above.

[51] See para 6.101 above.

[52] Under the revised Code, notice will need to be served on the Code Operator to require the alteration of apparatus crossing a linear obstacle (see our recommendation at para 7.71 above) and in relation to objections to apparatus (see our recommendations at paras 8.37 to 8.40 above).

[53] Consultation Paper, paras 7.55 to 7.59.

practicable as they could not cover the wide range of circumstances involved in Code agreements – from the technology to be installed to the physical characteristics of the site. But we explained that a voluntary form could give a starting point for negotiations and could be amended as necessary to meet particular circumstances. We asked consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether the revised Code might contain provisions to facilitate the standardisation of terms.[54]

9.126 Many consultees agreed that an optional standard form of agreement would be useful in principle. No consultee advocated the imposition of a mandatory form of agreement on the parties. However, a number of consultees questioned the extent to which standard terms would be used in practice. TPCL said:

> Situations and operators' requirements are different at every site. Similarly every landlord has different priorities over different sites that vary from time to time. On the basis that Operators change their agreement terms every 6 months a standard form would be out-of-date very quickly and will not be able to move with changes in technology. The parties already agree precedent documents where possible and use multi-site agreements to try to standardise terms across a portfolio of properties.

9.127 Cable & Wireless Worldwide Group anticipated that it would be extremely difficult to draft a model agreement that catered for different types of apparatus:

> This would generally be a starting point only, as the type of agreement varies according to the sophistication of the site and the land. As we have previously noted, there is a huge difference between the purposes and types of electronic communications apparatus for which rights are conferred; ranging from a simple wayleave to cross land with ductwork and cables to network sites.

9.128 Carter Jonas LLP suggested that the introduction of default heads of terms, rather than a comprehensive model agreement, would appeal to a wider range of parties.

9.129 Just as there is no typical piece of apparatus, there is also no typical Site Provider, as RICS observed:

> 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.

9.130 We appreciate that experienced Site Providers may be reluctant to depart from their own terms, or terms drafted by another which they have been accustomed to using. For example, precedent forms have been developed by the CLA and

[54] Consultation Paper, para 7.60.

NFU in relation to specified wayleaves for the installation of rural broadband.[55] But the provision of precedent agreements by Ofcom can only be an additional source of help, particularly for landowners who may otherwise feel at a disadvantage in the negotiation of terms. At a most basic level a standard form agreement can ensure that important terms are not forgotten.

9.131 We remain supportive of the introduction of one or more standard form agreements for use by the parties at their option. Input from landowner and Code Operator stakeholders will be essential to provide drafting for discussion and ensure that a balanced and trusted set of terms results.

9.132 **We recommend that Ofcom consult on one or more standard forms of agreement between landowners and Code Operators, for optional use.**

CODE OF PRACTICE

9.133 A number of consultees made comments to the effect that Ofcom should take on a larger role in the regulation of Code Operators. Of particular note was the suggestion that Code Operators should adhere to a code of practice. In making that suggestion Mobile Phone Mast Development Ltd felt that Ofcom could:

> … operate a complaints procedure similar to that provided by Ofwat in the water and sewerage industry or OFGEM in the energy industry. This should give Ofcom the power to receive and investigate complaints and to punish breaches of the Codes/any exceeding of Code powers/any unreasonable conduct by a complaints procedure.

9.134 Mindful of the move towards de-regulation, and of the resource implications of closer supervision, we are not making any recommendation that Ofcom's supervisory role should increase. But we agree that many of the concerns that we have heard from consultees could be met by Ofcom negotiating and agreeing with Code Operators a code of practice.

9.135 A code of practice could address several aspects of relationships with landowners. One important issue is the provision of information. We asked consultees whether they considered that more information was needed for landowners and, if so what was required and how it should be provided.[56] A number of consultees suggested that information be provided to landowners at an early stage, when Code Rights are first requested, to explain the effect that the revised Code will have upon any agreement reached with a Code Operator. NFU were of the opinion that:

> … more information is needed for landowners and it would be helpful if this was set out in an information pack when the Code Operator first makes contact with the landowner.

[55] See http://www.cla.org.uk/News_and_Press/Latest_Releases/Broadband/wayleave_payments (last visited 20 February 2013). These organisations have also previously worked with, for example, Openreach to produce a memorandum of understanding and agreed form of wayleave agreement.

[56] Consultation Paper, para 7.54.

> The information pack should explain the key provisions of the code, and explain the procedures that apply. In particular, landowners should be informed of the provisions which apply at the end of the agreement, and the procedures in place for securing the removal or alteration of apparatus.

9.136 Cell:cm Chartered Surveyors suggested that the notice should also contain the Code Operator's proposed terms and an undertaking to pay the Site Provider's costs.

9.137 A code of practice could also address issues that cannot be managed by compulsion through the revised Code because they are too sensitive to individual circumstances; in particular, insurance by Code Operators and the management of access, and the level of obligations that Code Operators should be prepared to take on as terms and conditions on which Code Rights are held.[57]

9.138 In addition, it could cover the way in which Code Operators respond to the needs of neighbouring landowners. We have recommended that the revised Code should not include rights for owners of adjacent land to have equipment installed pursuant to Code Rights moved or altered.[58] Another issue is apparatus installed under the special regimes, particularly on the street pursuant to paragraph 9 of the 2003 Code. We noted in the Consultation Paper the potential for problems to arise when apparatus interferes with the development plans of a neighbouring landowner, for example, where a roadside cabinet is situated where a landowner wishes to install, or change the position of, a driveway. We have made no recommendation to include provisions in the revised Code for these particular cases.[59] In these circumstances we would expect the Code Operator to act reasonably by agreeing, if technically possible and subject to the costs of doing so being met by the landowner, to move the infrastructure. We think that a code of practice could make clear that this is what is expected.

9.139 Many of these issues are already well-managed by Code Operators, who would be well-placed to develop a draft code of practice drawing on their experience, and we envisage that landowner organisations will also wish to contribute to drafting. We see the virtue of a code of practice that would set out the expectations for good practice within the industry and would provide therefore a measure of reassurance to landowners.

9.140 **We recommend that Ofcom consult on, and agree with Code Operators, a code of practice covering issues such as the provision of information to landowners, conduct in negotiations with landowners, the content of agreements granting Code Rights, and relationships with those whose property adjoins land where apparatus is sited (including highways).**

[57] See para 3.70 and following above.

[58] See para 6.72 above.

[59] See para 7.85 above.

CHAPTER 10
SUMMARY OF RECOMMENDATIONS

CHAPTER 2: THE CODE RIGHTS AND THE REGULATED RELATIONSHIPS

10.1 We recommend that section 106 of the Communications Act 2003 be amended so that the revised Code may be applied to a person who provides infrastructure on the same basis as it may be applied to providers of systems of conduits.

[paragraph 2.29]

10.2 We recommend that the revised Code should set out a list of Code Rights which, when validly conferred on a Code Operator (in writing, even if the law does not otherwise require that), or imposed by the tribunal, will be protected by the provisions of the revised Code.

[paragraph 2.76]

10.3 We recommend that rights granted to anyone other than a Code Operator should not become Code Rights – and therefore should not be protected by the provisions of the revised Code – even if the holder of the right later becomes a Code Operator.

[paragraph 2.77]

10.4 We recommend that the Code Rights should be:

(1) to keep electronic communications apparatus installed on, under or over land;

(2) to inspect, maintain, upgrade or operate electronic communications apparatus on land;

(3) to execute any works on land for or in connection with the installation or maintenance of electronic communications apparatus;

(4) to enter land in order to inspect, maintain or upgrade any apparatus kept installed on that land or elsewhere;

(5) to connect to a power supply; and

(6) to obstruct access to land (whether or not the land to which access is obstructed is the land on which electronic communications apparatus is installed)

for the purposes of the operation of one or more electronic communications networks, or of providing a conduit system or infrastructure for electronic communications apparatus.

[paragraph 2.78]

10.5 We recommend that the revised Code should define "electronic communications apparatus" as:

(1) any apparatus (which includes "any equipment, machinery or device and any wire or cable and the casing or coating for any wire or cable") which is designed or adapted:

(a) for use in connection with the provision of an electronic communications network; or

(b) for a use which consists of or includes the sending or receiving of communications or other signals that are transmitted by means of an electronic communications network;

(2) any line, meaning "any wire, cable, tube, pipe or similar thing (including its casing or coating) which is designed or adapted for use in connection with the provision of any electronic communications network or electronic communications service";

(3) any conduit (including a tunnel, subway, tube or pipe), structure, building, pole or other thing in, on, by or from which any electronic communications apparatus is or may be installed, supported, carried or suspended; and

(4) any security installations or shrouding for electronic communications apparatus.

[paragraph 2.79]

10.6 We recommend that the revised Code should provide that property rights in electronic communications apparatus installed by a Code Operator do not change by reason of their being attached to land.

[paragraph 2.80]

10.7 We recommend that the conferral of Code Rights should not be a relevant disposal for the purposes of Part I of the Landlord and Tenant Act 1987.

[paragraph 2.81]

10.8 We recommend that where Code Rights are conferred by a lease, the revised Code should make no special provision as to who should be bound by the lease and its provisions, and should not amend or disapply the normal rules of land registration.

[paragraph 2.129]

10.9 We recommend that where Code Rights are conferred otherwise than in a lease, the revised Code should provide for them to bind successors in title to the Site Provider who granted them, and those with an interest subsequently derived from the title of the Site Provider, as if they were property rights.

[paragraph 2.130]

10.10 We recommend that the effect of paragraph 2(5) of the 2003 Code should be replicated in the revised Code.

[paragraph 2.131]

10.11 We recommend that the revised Code should provide for an amendment to the Land Registration Act 2002 to the effect that Code Rights that amount to an interest in land, conferred otherwise than in a lease, will be overriding interests so that they are enforceable against purchasers of registered land despite not being registered.

[paragraph 2.132]

CHAPTER 3: ANCILLARY RIGHTS AND OBLIGATIONS

10.12 We recommend that the revised Code should provide that in relation to an agreement or lease that confers Code Rights and is entered into after the implementation of the revised Code, a Code Operator shall be entitled to assign all the benefit of the agreement, or the lease as the case may be.

[paragraph 3.24]

10.13 We recommend that the revised Code should provide that any term in an agreement or lease between a Site Provider and a Code Operator that prevents, restricts, or requires payment for the assignment to another Code Operator of all the Code Rights conferred by the agreement shall be void, except for a term in a lease that requires the tenant to enter into an authorised guarantee agreement within the meaning of section 16 of the Landlord and Tenant (Covenants) Act 1995.

[paragraph 3.25]

10.14 We recommend that the revised Code should provide that where a Code Operator assigns an agreement conferring Code Rights, other than a lease, to another Code Operator, the assignor shall have no liability for breaches of obligations under the agreement which occur after the agreement has been assigned, subject to the following recommendation.

[paragraph 3.26]

10.15 We recommend that the revised Code should provide that on the assignment of the benefit of an agreement or the lease pursuant to the recommendations made above:

(1) either the assignor or the assignee shall give notice to the Site Provider of the identity, and address for service, of the assignee; and

(2) the assignor shall not be released from its obligations under the agreement or lease until this notice has been given (notwithstanding the provisions of section 5 of the Landlord and Tenant (Covenants) Act 1995).

[paragraph 3.27]

10.16 We recommend that the revised Code should provide that in relation to an agreement or lease commencing after the implementation of the revised Code:

(1) a Code Operator shall be permitted to upgrade or share electronic communications equipment within a physical structure of which the Code Operator has exclusive possession provided that the sharing or upgrading:

(a) cannot be seen from outside that structure, and

(b) imposes no burden on the Site Provider; and

(2) a term in an agreement, or in a lease between a Code Operator and a Site Provider shall be void if it prevents, or imposes an obligation to pay for, such upgrading or sharing of electronic communications equipment.

[paragraph 3.51]

10.17 We recommend that the revised Code should include provisions with the same effect as paragraph 29 of the 2003 Code.

[paragraph 3.54]

CHAPTER 4: THE TEST FOR THE IMPOSITION OF CODE RIGHTS

10.18 We recommend that the revised Code should enable the tribunal to grant one or more Code Rights to a Code Operator, or to make an order that one or more Code Rights shall bind a landowner, if:

(1) the prejudice to the landowner can be compensated in money; and

(2) the public benefit that is likely to be derived from the making of the order outweighs the prejudice to the landowner, bearing in mind the public interest in access to a choice of high quality electronic communications services;

provided that none of the grounds for bringing Code Rights, or the lease conferring them, to an end which are specified in the recommendation at paragraph 10.35 below are made out by the landowner.

[paragraph 4.43]

10.19 We recommend that the revised Code should contain provisions corresponding to those contained in paragraphs 5(4), 5(5) and 5(7) of the 2003 Code as to the terms and conditions on which Code Rights are imposed and as to the effect of the imposition of those rights.

[paragraph 4.53]

10.20 We recommend that the revised Code should require the tribunal to consider in every instance the duration of the Code Rights to be imposed and whether terms and conditions should be imposed, in the interests of the Site Provider, as to early termination of the Code Rights or as to any right to require the Code Operator to reposition, or temporarily to remove, electronic communications equipment in any circumstances.

[paragraph 4.54]

10.21 We recommend that under the revised Code a Code Operator should be free to initiate proceedings for the imposition of Code Rights as soon as its notice requiring the grant of Code Rights has been rejected by the landowner.

[paragraph 4.58]

CHAPTER 5: PAYMENT FOR RIGHTS UNDER THE GENERAL REGIME

10.22 We recommend that the measure of consideration payable under the revised Code to those against whom an order is made for the imposition of Code Rights should be the market value of those rights, using the definitions in the "Red Book" (*RICS Valuation – Professional Standards*), modified so as to embody the assumptions:

(1) that there is more than one suitable property available to the Code Operator; and

(2) that the Code Operator does not have the entitlement to upgrade or share apparatus, or to assign the Code Rights, conferred by the revised Code in accordance with our recommendations at paragraphs 10.12 and 10.16 above.

[paragraph 5.83]

10.23 We recommend that the revised Code should provide that compensation be payable by Code Operators to the following:

(1) persons against whom Code Rights are created;

(2) persons who are bound by Code Rights;

(3) persons who suffer depreciation in the value of an interest in neighbouring land;

(4) persons who are required to lop trees and vegetation overhanging a street pursuant to a notice served by a Code Operator; and

(5) persons who are entitled to require the removal of a Code Operator's apparatus, in respect of the period until the apparatus is removed or becomes the subject of Code Rights, and the expenses of removal, where appropriate.

[paragraph 5.106]

10.24 We recommend that the revised Code should provide that Code Operators shall pay the valuation and legal costs of those claiming compensation, and should incorporate the provisions in rules (2) to (4) of section 5 of the Land Compensation Act 1961 and of section 10(1) to (3) of the Land Compensation Act 1973, as the 2003 Code does.

[paragraph 5.107]

CHAPTER 6: MOVING AND REMOVING ELECTRONIC COMMUNICATIONS APPARATUS

10.25 We recommend that the revised Code should not give to Site Providers any additional rights (beyond those expressly agreed or conferred on them as part of the terms and conditions upon which Code Rights are granted or imposed) to have electronic communications apparatus repositioned or removed.

[paragraph 6.71]

10.26 We recommend that the revised Code should not, except as specified in our recommendations at paragraphs 10.59 to 10.62 below, reproduce the protection given to owners of adjacent land contained in paragraph 20 of the 2003 Code.

[paragraph 6.72]

10.27 We recommend that a lease granted primarily for the purpose of conferring Code Rights upon a Code Operator should not fall within the scope of Part 2 of the Landlord and Tenant Act 1954.

[paragraph 6.83]

10.28 We recommend that where Code Rights have been conferred by a lease whose primary purpose is not the grant of Code Rights, the lease should fall within the scope of Part 2 of the Landlord and Tenant Act 1954 and the provisions of the revised Code for the continuity of Code Rights should not apply to the Code Rights within the lease.

[paragraph 6.85]

10.29 We recommend that the revised Code should not restrict the ability of the planning authorities to require removal of electronic communications apparatus installed in breach of planning legislation.

[paragraph 6.89]

10.30 We recommend that the revised Code should provide that Code Rights, and leases conferred primarily for the purpose of granting Code Rights, shall not come to an end unless terminated in accordance with the provisions of the revised Code.

[paragraph 6.96]

10.31 We recommend that a Site Provider – to be defined in the revised Code as a landowner who has granted Code Rights, or had them imposed upon him or her by the tribunal, or is otherwise bound by Code Rights – should be enabled by the revised Code to bring Code Rights to an end (or to bring to an end a lease conferred primarily for the purpose of granting Code Rights) by serving a notice upon the Code Operator.

[paragraph 6.102]

10.32 We recommend that that notice:

(1) must be in a prescribed form;

(2) must give at least 18 months' notice of the ending of the Code Rights (or of the lease, as the case may be);

(3) must expire on a date on which the Code Rights (or the lease, as the case may be) could have been brought to an end, or on or after the date on which the Code Rights (or the lease, as the case may be) would have come to an end by the passage of time, had the Code Rights or the lease not been continued in accordance with the recommendation we made at paragraph 10.30 above; and

(4) must state that one or more of the grounds for termination, set out in our recommendation at paragraph 10.35 below, applies.

[paragraph 6.103]

10.33 We recommend that the Code Rights, or the lease as the case may be, shall come to an end in accordance with the notice given by the Site Provider, unless:

(1) within three months of receipt of the Site Provider's notice the Code Operator serves a counter-notice, in a prescribed form, stating either that it does not want its Code Rights (or the lease, as the case may be) to come to an end, or that it wants new Code Rights on new terms and conditions; and

(2) within three months of the service of that counter-notice initiates proceedings in the Lands Chamber of the Upper Tribunal to claim that the Code Rights (or the lease) should continue, or should continue on different terms and conditions, or to claim new Code Rights (or a new lease).

[paragraph 6.104]

10.34 We recommend that the revised Code should incorporate provision for the tribunal to determine an interim rent, by analogy with the provisions of section 24 of the Landlord and Tenant Act 1954.

[paragraph 6.108]

10.35 We recommend that the tribunal shall make an order bringing to an end the Code Rights, or the lease conferring them as the case may be, if one or more of the following grounds is made out by the Site Provider:

(1) that the Code Rights ought to be brought to an end in view of substantial breaches by the Code Operator of its obligations under the terms and conditions (or the lease, as the case may be) pursuant to which it has Code Rights;

(2) that the Code Rights ought to be brought to an end because of persistent delay in payment by the Code Operator under the terms and conditions (or the lease, as the case may be) pursuant to which it has Code Rights;

(3) that the Site Provider intends to redevelop all or part of the land on which the apparatus is sited, or neighbouring land, and could not reasonably do so unless the Code Rights are brought to an end;

(4) that the Code Operator is not entitled to the Code Rights because the test for the imposition of Code Rights (our recommendation at paragraph 10.18 above) is not satisfied.

[paragraph 6.110]

10.36 We recommend that where the claimant fails to establish one of the grounds recommended above, the Code Rights (or the lease) will continue, but the tribunal may make an order conferring fresh Code Rights, amending the terms and conditions on which Code Rights are held, or for the termination of the current lease and the grant of a new lease to the Code Operator, having regard to all the circumstances of the case and in particular to:

(1) the business and technical requirements of the Code Operator;

(2) the use that the Site Provider is making of his or her land;

(3) any statutory duties of the Site Provider; and

(4) the level of consideration currently payable under the revised Code for the Code Rights that the Code Operator has or wishes to acquire.

[paragraph 6.113]

10.37 We recommend that the revised Code should provide that the terms of a lease granted by order of the tribunal shall be such as may be agreed between the Site Provider and the Code Operator or as, in default of such agreement, may be determined by the tribunal; and in determining those terms the tribunal shall have regard to the terms of the current lease or other agreement and to all relevant circumstances.

[paragraph 6.114]

10.38 We recommend that Site Providers and Code Operators should be enabled by the revised Code to require either:

(1) that the terms and conditions on which Code Rights are held (or the terms of a lease by which they are conferred, as the case may be) are to be amended, or

(2) that the agreement or lease is to come to an end and a new one be granted,

by serving a notice upon the other party.

[paragraph 6.116]

10.39 We recommend that that notice:

(1) must be in a prescribed form;

(2) must give at least six months' notice of the change of terms;

(3) must expire on a date at which the Code Rights (or the lease, as the case may be) could have been brought to an end, or on or after the date at which the Code Rights (or the lease, as the case may be) would have come to an end by the passage of time, had the Code Rights or the lease not been continued in accordance with the recommendation we made at paragraph 10.30 above; and

(4) must set out the amendments required, or the details of the new lease or agreement required.

[paragraph 6.117]

10.40 We recommend that the revised Code should provide that if the parties have not reached agreement within six months of the service of the notice, either party shall be able to apply to the Lands Chamber of the Upper Tribunal for an order effecting the amendment requested or requiring the grant of the new agreement or lease, as the case may be.

[paragraph 6.118]

10.41 We recommend that on hearing that claim, the tribunal may make an order conferring fresh Code Rights, amending the terms and conditions on which Code Rights are held, or for the termination of the current lease and the grant of a new lease to the Code Operator, having regard to all the circumstances of the case and in particular to:

(1) the business and technical requirements of the Code Operator;

(2) the use that the Site Provider is making of his or her land;

(3) any statutory duties of the Site Provider; and

(4) the level of consideration currently payable under the revised Code for the Code Rights that the Code Operator has or wishes to acquire.

[paragraph 6.119]

10.42 We recommend that where a landowner is not bound by Code Rights the revised Code should not restrict the landowner's ability to require the removal of electronic communications apparatus from land, save as provided in our recommendations at paragraphs 10.48, 10.49, 10.52, 10.53, 10.54 and 10.58 below.

[paragraph 6.127]

10.43 We recommend that the revised Code should include provisions that correspond to those of paragraph 4(2) in the 2003 Code, giving landowners who are not bound by Code Rights the right to require the Code Operator to reinstate the land to its original condition.

[paragraph 6.128]

10.44 We recommend that the revised Code should provide that where electronic communications apparatus has been installed on land pursuant to Code Rights but is no longer in use, and there is no realistic prospect of its being used, either for the purposes of an electronic communications network or as conduits or infrastructure for a network, the Site Provider shall be able to require its removal as if he or she were not bound by Code Rights.

[paragraph 6.129]

10.45 We recommend that the revised Code should enable a landowner to apply to the tribunal for:

(1) an order entitling him or her to recover from the Code Operator the costs of removing electronic communications apparatus;

(2) an order entitling him or her to sell any apparatus removed and to retain the whole or a part of the proceeds of sale on account of the costs of removing it;

in cases where the Code Operator has not complied with a request (made by notice in a prescribed form) to remove the apparatus.

[paragraph 6.133]

10.46 We recommend the revised Code should provide that where a Code Operator has applied for Code Rights in respect of apparatus that is already situated on land, that operator should also be able to apply for such temporary rights as are reasonably necessary for securing that, pending the determination of the application for Code Rights, the service provided by the operator's network is maintained and the apparatus properly adjusted and kept in repair.

[paragraph 6.134]

10.47 We recommend that the revised Code should provide that where a Code Operator is asked by a landowner on whose land electronic communications apparatus is sited to disclose whether or not the apparatus is there pursuant to Code Rights, and the Code Operator does not reply within two months of service of that request in a prescribed form, then:

(1) the landowner shall be entitled to proceed as if the Code Operator did not have Code Rights, but

(2) if it is later established that the Code Operator has Code Rights and the landowner proceeds to give notice and require removal, the Code Operator shall pay the landowner's costs incurred in the procedure for requiring removal in any event.

[paragraph 6.139]

CHAPTER 7: THE SPECIAL REGIMES

10.48 We recommend that the effect of paragraph 12 of the 2003 Code should be replicated in the revised Code.

[paragraph 7.68]

10.49 We recommend that where those provisions cease to apply to land by virtue of a change in its use, the rights granted by them shall continue to apply to a Code Operator in respect of apparatus already installed there, until they are brought to an end by a notice served on the Code Operator by the landowner or person with control of the land giving at least 12 months' notice of the ending of the rights.

[paragraph 7.69]

10.50 We recommend that the revised Code should provide for objections as to works which a Code Operator proposes to execute to cross a linear obstacle to be referred to arbitration, and that the provisions of paragraph 13 of the 2003 Code should accordingly be replicated in the revised Code.

[paragraph 7.70]

10.51 We recommend that the effect of paragraph 14 of the 2003 Code should be replicated in the revised Code, except that where the tribunal is considering whether to grant an order for the alteration of apparatus kept installed on, under or over a linear obstacle, the tribunal should be required to have regard to all the circumstances and to the public interest in access to a choice of high quality electronic communications services.

[paragraph 7.71]

10.52 We recommend that the effect of paragraph 9 of the 2003 Code should be replicated in the revised Code, subject to the limitations in the existing provision.

[paragraph 7.88]

10.53 We recommend that where land ceases to be a street which is a maintainable highway for the purposes of the revised Code, the rights granted by the revised Code should continue to apply to a Code Operator in respect of apparatus already installed there, until they are brought to an end by a notice served on the Code Operator by the landowner or person with control of the land giving at least 12 months' notice of the ending of the rights.

[paragraph 7.89]

10.54 We recommend that the effect of paragraph 11(1) of the 2003 Code should be replicated in the revised Code.

[paragraph 7.129]

10.55 We recommend that the effect of paragraph 11(2) of the 2003 Code should be replicated in the revised Code, subject to provision that the terms as to the consideration element of the payment for the giving of the agreement to the exercise of the right on that land shall be void insofar as they provide for consideration which exceeds the market value of those rights, using the definitions in the "Red Book" (*RICS Valuation – Professional Standards*) modified so as to embody the assumption that there is more than one suitable property available to the Code Operator.

[paragraph 7.130]

10.56 We recommend that the effect of paragraph 15 of the 2003 Code should be replicated in the revised Code.

[paragraph 7.140]

10.57 We recommend that the effect of paragraph 23 of the 2003 Code should be replicated in the revised Code.

[paragraph 7.151]

CHAPTER 8: FURTHER RIGHTS AND OBLIGATIONS

10.58 We recommend that the revised Code should preserve Code Operators' rights, in paragraph 10 of the 2003 Code, to install and keep installed lines passing over third party land which are connected to apparatus.

[paragraph 8.16]

10.59 We recommend that the revised Code should include a right to object:

(1) to lines kept installed on or over land; and

(2) to apparatus kept installed on, under or over tidal water or lands;

exercisable by landowners of the land on, under or over which the apparatus is installed unless the occupier or landowner is bound by Code Rights in respect of

the apparatus installed or, in relation to (2) above, is a Crown body with an interest in the tidal water or land in question.

[paragraph 8.37]

10.60 We recommend that the revised Code should include a right to object to apparatus the whole or part of which is at a height of 3 metres or more above the ground, exercisable by occupiers and landowners of neighbouring land the enjoyment of which may be prejudiced due to the proximity of the apparatus, unless the occupier or landowner is bound by Code Rights in respect of that apparatus.

[paragraph 8.38]

10.61 We recommend that the provisions of the revised Code regarding the right to object:

(1) where the objection is brought within one year of the completion of the installation of the apparatus, should reflect those in paragraph 17(3), (4), (6) and (8) to (10) of the 2003 Code; and

(2) where the objection is brought more than one year after the completion of the installation of the apparatus, should reflect those in paragraph 20(4) to (10) of the 2003 Code;

except that in either case the tribunal should not be required to consider the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services.

[paragraph 8.39]

10.62 We recommend that the right to object should be exercised by notice to the Code Operator, and that applications for the objection to be upheld should be made to the Lands Chamber of the Upper Tribunal.

[paragraph 8.40]

10.63 We recommend that the revised Code should replicate the effect of paragraph 18 of the 2003 Code as to the obligation to affix notices to overhead apparatus.

[paragraph 8.50]

10.64 We recommend that consideration should be given to the introduction of civil sanctions for failing to affix a notice to overhead apparatus, as part of the consideration of the amendment of the 2003 Regulations.

[paragraph 8.51]

10.65 We recommend that the revised Code should make provision giving Code Operators the right to require the cutting back of any tree or other vegetation that overhangs a highway where it interferes with, or will or may interfere with, a Code Operator's apparatus, and otherwise corresponding with the provisions of paragraph 19 of the 2003 Code.

[paragraph 8.63]

10.66 We recommend that the revised Code should not include a provision equivalent to paragraph 8 of the 2003 Code.

[paragraph 8.80]

10.67 We recommend that regulation 8(1)(d) of the 2003 Regulations be amended so as to remove the requirement upon the National Trust or the National Trust for Scotland to notify Code Operators of land that it owns, or has an interest in before the requirements of regulation 8 are triggered.

[paragraph 8.95]

CHAPTER 9: DISPUTE RESOLUTION AND PROCEDURAL ISSUES

10.68 We recommend that the revised Code should make provision for the Lands Chamber of the Upper Tribunal to adjudicate Code disputes, subject to our recommendation at paragraph 10.50 above that objections as to proposed works to cross a linear obstacle are to be referred to arbitration.

[paragraph 9.47]

10.69 We recommend that the revised Code should enable the Lands Chamber of the Upper Tribunal to make an order conferring Code Rights on an interim basis, either by consent, or where the Code Operator has made out a good arguable case that the test for the imposition of Code Rights is satisfied. Such orders may include terms as to compensation and as to interim consideration; they must provide that if the test for the imposition of Code Rights is not satisfied at a final hearing (or the Code Operator discontinues the proceedings) the landowner will have an immediate right to enforce removal of any electronic communications apparatus placed on the land pursuant to the interim order.

[paragraph 9.67]

10.70 We recommend that the revised Code should require Ofcom to produce forms for use by landowners and Site Providers in complying with the notice provisions of the revised Code, but that the use of those forms be optional (subject to the recommendations that we make about prescribed notices at paragraphs 10.32, 10.39 and 10.47 above).

[paragraph 9.122]

10.71 We recommend that the revised Code should require Ofcom to produce forms for use by Code Operators, and that their use should be compulsory; notices in a different form should be invalid.

[paragraph 9.123]

10.72 We recommend that Ofcom consult about the content and style of the forms for use by landowners and Site Providers and of those to be prescribed for Code Operators.

[paragraph 9.124]

10.73 We recommend that Ofcom consult on one or more standard forms of agreement between landowners and Code Operators, for optional use.

[paragraph 9.132]

10.74 We recommend that Ofcom consult on, and agree with Code Operators, a code of practice covering issues such as the provision of information to landowners, conduct in negotiations with landowners, the content of agreements granting Code Rights, and relationships with those whose property adjoins land where apparatus is sited (including highways).

[paragraph 9.140]

(*Signed)* DAVID LLOYD JONES, *Chairman*
ELIZABETH COOKE
DAVID HERTZELL
DAVID ORMEROD
FRANCES PATTERSON

ELAINE LORIMER, *Chief Executive*
18 February 2013

APPENDIX A
RESPONSES TO THE CONSULTATION PAPER

ORGANISATIONS

Abacona Investments Ltd

Aberdeen Asset Managers Ltd (AAM)

Affinity Sutton Group

Agricultural Law Association (ALA)

Arc Partners (UK) Ltd

Arqiva

Babcock International Group plc

Batcheller Monkhouse; response endorsed by 63 clients, some of whom also responded individually

The Benefice of St James Garlickhythe

The Berkeley Group plc

Bizspace Ltd

The British Library

British Property Federation

British Telecommunications plc

Bruntwood Ltd

Cable & Wireless Worldwide Group (on behalf of Cable & Wireless UK, Energis Communications Ltd, Thus Group Holdings Ltd, Your Communications Ltd)

Canal & River Trust (CRT)

Capital & Regional Property Management Ltd

Carter Jonas LLP

Cell:cm Chartered Surveyors

The Central Association of Agricultural Valuers (CAAV)

Central Scotland Police

Charities' Property Association and the Churches' Legislation Advisory Service

Charles Russell LLP (reflecting discussions at seminar on 1 October 2012)

Chelmer Housing Partnership (CHP)

Church of Scotland General Trustees

City of London Law Society

Clarke Willmott LLP

Country Land & Business Association (CLA)

The Crown Estate

DAC Beachcroft LLP

Deards Ltd

The Digital World Centre Ltd

Donnington Investments Ltd

Dŵr Cymru Welsh Water

Ellandi LLP

Evergreen Property Consulting Ltd

Faculty of Advocates

Falcon Chambers

The General Council of the Bar of England and Wales (the Bar Council)

Geo Networks Ltd

Glasgow Housing Association

Guy's & St Thomas' Charity and Desmond Hampton

Harvey White Properties Ltd

Heatherwood and Wexham Park Hospitals NHS Foundation Trust

Hibernia Atlantic

Highcross Strategic Advisers

Hogan Lovells International LLP

Imperial College Healthcare NHS Trust

Itchen Sixth Form College

Kingsley Smith Solicitors LLP

Land Registry

The Law Society of England and Wales (The Law Society)

Leeds City Council

Legal & General Investment Management

Leicestershire Police Authority

Level 3 Communications (UK) Ltd

London Borough of Hackney

LSE Estates Division

Manawey Developments Ltd

Mobile Operators Association (MOA)

Mobile Phone Mast Development Ltd (MPMD)

Nabarro LLP

National Farmers Union

The National Trust

Network Rail

Newcastle City Council

Newnham College London

NewRiver Retail (UK) Ltd

Northern Trust Company Ltd (NTCL)

Nottinghamshire Police Authority

The Office of Communications (Ofcom)

Peel Holdings Land and Property (UK) Ltd group of companies and their subsidiary companies (including The Bridgewater Canal Company Ltd)

The Phone Mast Company Ltd

Pippingford Estate Company Ltd

Port of London Authority

The Portman Estate

Property Litigation Association

The Queen Elizabeth II Conference Centre

Rainham Steel Investments Ltd

RH & RW Clutton LLP on behalf of approximately 100 landowning clients

Rix & Kay Solicitors LLP

RLS Law

Royal Institution of Chartered Surveyors (RICS) (including RICS Telecom Forum Board)

Scottish Land & Estates

Shepherd and Wedderburn LLP

Shere Group Ltd

Shoosmiths LLP

Shulmans LLP

South West Water Ltd

St Margarets Court (Rottingdean) Ltd

Strutt & Parker LLP

Surf Telecoms

TDC Aberdeen Ltd

Telecoms Property Consultancy Ltd (TPCL)

UBS Global Asset Management (UK) Ltd

UK & European Investments Ltd

UK Competitive Telecommunications Association (UKCTA)

UK Land Estates (Services) Ltd

Water UK

Westfield Shoppingtowns Ltd

Wireless Infrastructure Group (WIG)

WM Housing Group

WO & PO Jolly Holdings Ltd

INDIVIDUALS

Charles Anderson

Henry Aubrey-Fletcher

W R Avens

Fiona Beale

Peter Browning

Dev Desai

Alicia Foo and Nicholas Vuckovic

Tony Harris

Roger Foxwell

David King

Peter and Patricia Kingston

Susan Marriott

Ted Mercer

Odell Milne

Charles Pitcher

Sir Charles Ponsonby

Rafe Staples; also on behalf of Funeven Ltd and East India Dock Ltd

Councillor Vincent Stops (Hackney London Borough Council)

Philip Straker

Nicholas Taggart

Caroline Tayler

Mike Tristram

Ian S Thornton-Kemsley

John G Woolman