

Law Commission

Consultation Paper No 205

**THE ELECTRONIC COMMUNICATIONS
CODE**

A Consultation Paper

THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Rt Hon Lord Justice Munby (*Chairman*), Professor Elizabeth Cooke, Mr David Hertzell, Professor David Ormerod and Frances Patterson QC. The Chief Executive is Elaine Lorimer.

Topic of this consultation: This Consultation Paper deals with the Electronic Communications Code (Schedule 2 to the Telecommunications Act 1984). The Code sets out the regime that governs the rights of electronic communications operators to install and maintain infrastructure on public and private land.

We discuss the current law and set out a number of provisional proposals and options for reform on which we invite consultees' views.

Scope of this consultation: The purpose of this consultation is to generate responses to our provisional proposals and questions with a view to making recommendations for reform. Our provisional proposals and consultation questions are listed in Part 10.

Geographical scope: The Electronic Communications Code applies to the whole of the United Kingdom. This Consultation Paper focuses on the law of England and Wales. We are conducting this project in consultation with the Scottish Law Commission and the Northern Ireland Law Commission, who are advising us about issues of law specific to their jurisdictions. Our final Report will alert Government to any issues specific to Northern Ireland and Scotland that are brought to our attention.

Impact assessment: In answering the questions in this Consultation Paper, consultees are asked also to comment on the likely costs and benefits of any changes provisionally proposed. This information will be provided to the Department for Culture, Media and Sport to assist in the preparation of an impact assessment for any reform of the Electronic Communications Code.

Previous engagement: We have been assisted by a wide range of meetings with stakeholders representing a number of different interests. On 29 March 2012 we hosted an all-stakeholder seminar, which was attended by over 70 individuals, to give interested parties the chance to raise concerns both with us and with one another.

Duration of the consultation: We invite responses from 28 June 2012 to 28 October 2012.

How to respond

Send your responses either –

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

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

Tel: 020 3334 0200 / Fax: 020 3334 0201

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

After the consultation: In the light of the responses we receive, we will decide our final recommendations and present them to Parliament. We hope to publish our Report in spring 2013. It will be for Parliament to decide whether to make any changes to the law.

Code of Practice: We are a signatory to the Government's Code of Practice on Consultation and carry out our consultations in accordance with the Code criteria (set out on the next page).

Freedom of information: It is important that you refer to our Freedom of Information Statement on the next page.

Availability of this consultation paper: You can view or download this Consultation Paper free of charge on our website at:

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

CODE OF PRACTICE ON CONSULTATION

THE SEVEN CONSULTATION CRITERIA

Criterion 1: When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2: Duration of consultation exercise

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible

Criterion 3: Clarity and scope of impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4: Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5: The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6: Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7: Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

CONSULTATION CO-ORDINATOR

The Law Commission's Consultation Co-ordinator is Phil Hodgson.

- You are invited to send comments to the Consultation Co-ordinator about the extent to which the criteria have been observed and any ways of improving the consultation process.
- **Contact:** Phil Hodgson, Consultation Co-ordinator, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ – Email: phil.hodgson@lawcommission.gsi.gov.uk

Full details of the Government's Code of Practice on Consultation are available on the BIS website at <http://www.bis.gov.uk/policies/better-regulation/consultation-guidance>.

Freedom of Information statement

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

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

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

THE LAW COMMISSION

THE ELECTRONIC COMMUNICATIONS CODE

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GLOSSARY

1954 Act: the Landlord and Tenant Act 1954.

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

Alteration: paragraph 1(2) of the Code provides that “in the Code, references to the alteration of any apparatus include references to the moving, removal or replacement of the apparatus”.

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

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

Code rights: the rights that are conferred upon Code Operators by or under the current Code or any replacement Code.

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

Crown interests: these comprise The Crown Estates, the Duchy of Lancaster and the Duchy of Cornwall.

Electronic communications apparatus: defined in paragraph 1(1) of the Code as any apparatus designed or adapted for use in connection with an electronic communications network, or for a use consisting of or including sending or receiving signals transmitted by means of such a network; any line; and specified conduits, structures and so on.

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: someone with a proprietary interest in land: this includes a freeholder and a leaseholder, but not a licensee.

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

Line: defined in paragraph 1(1) of the 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 Code as land which is used wholly or mainly as, or in connection with, “a railway, canal or tramway”.

LRA 2002: the Land Registration Act 2002.

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).

Tidal waters and lands: defined in paragraph 11(11) of the Code as including “any estuary or branch of the sea, the shore below mean high water springs and the bed of any tidal water”.

PART 1

INTRODUCTION

ELECTRONIC COMMUNICATIONS AND THE CODE

- 1.1 Electronic communications have come to play a vital part in our lives. For many years our society has relied on the telephone; over the past couple of decades the transfer of information by “electrical, magnetic or electro-magnetic”¹ signals has enabled much more, including cable television, mobile and fixed line telephones and the (increasingly mobile) internet. All these are now commonplace and, many would argue, essential both in private life and in business.
- 1.2 Individuals using electronic communications services focus on handsets, keyboards, screens and mobile devices. But that equipment depends upon a complex array of hardware, stretching across the country. Networks of masts, cables, wires, servers, routers and exchanges (to name but a small sample) make electronic communications possible. And this hardware, and the networks that it forms, sometimes have to be located upon land that does not belong to those who own the equipment – fibre optic cables pass under streets and cross fields; mobile phone transmitters cling to church steeples and shop-fronts; and telephone cabinets are familiar on our roadsides and pavements.
- 1.3 The communication needs of society depend, therefore, upon the use of land. The subject matter of this project is Schedule 2 to the Telecommunications Act 1984, known as the Electronic Communications Code (“the Code”); it strikes a balance between the rights and interests of landowners and network operators.²
- 1.4 The Code gives to certain network operators rights to install and maintain their apparatus on public and private land. Only those operators that have the Code applied to them by the Office of Communications (“Ofcom”) under section 106(3)(a) of the Communications Act 2003 are able to benefit from, and be subject to the Code; we call those operators “Code Operators” throughout this Consultation Paper.³
- 1.5 The Telecommunications Act 1984 was enacted, in part, to open up the telecommunications sector to competition by privatising British Telecom and breaking its monopoly. Schedule 2 helped other operators to develop networks to compete with and supplement the network which had been developed by the public sector, predominantly through British Telecom, over the preceding years.

¹ See the definition of “electronic communications network” in the Communications Act 2003, s 32(1)(a).

² The project also considers the Electronic Communications Code (Conditions and Restrictions) Regulations 2003, SI 2003 No 2553 (see Part 9 below) and the Electronic Communications and Wireless Telegraphy Regulations 2011, SI 2011 No 1210 (see paras 2.21 and 7.5 below).

³ In applying the Code to an operator, Ofcom can limit its application to a geographical area or to a specific network: Communications Act 2003, s 106(5). The rules that govern how and when Ofcom applies the Code to an operator, and the circumstances in which its application might be limited, are outside of the scope of this project.

1.6 The Code was amended by the Communications Act 2003 to "... [translate] the telecommunications code into a code applicable in the context of the new regulatory regime established by the [Communications Act 2003]".⁴ Many of the amendments sought to reflect a change in focus – made necessary by European Directives⁵ and significant developments in technology – from "telecommunications" to the broader concept of "electronic communications". However, much of the Code remained as drafted in 1984.

1.7 We noted above that Ofcom is responsible for applying the Code to Code Operators. Ofcom is the independent regulator and competition authority for the United Kingdom's communications industries. Amongst its many duties it must ensure that:

... the UK has a wide range of electronic communications services, including high-speed services such as broadband [and that] ...

the radio spectrum (the airwaves used by everyone from taxi firms and boat owners, to mobile-phone companies and broadcasters) is used in the most effective way.⁶

1.8 Ofcom therefore plays an important role in the day-to-day business of Code Operators. Some of Ofcom's functions are directly relevant to this project; notices served by Code Operators under the provisions of the Code are to be in a form approved by it⁷ and it has powers to enforce the Electronic Communications Code (Conditions and Restrictions) Regulations 2003.⁸

THE IMPORTANCE OF ELECTRONIC COMMUNICATIONS

1.9 The electronic communications industry is essential in terms of both economic and social benefits. A recent publication by the Department for Business, Innovation and Skills gives an indication of its size:

In its most recent analysis the European Union estimates the value of the electronic communications market in Europe at about £250 billion In the UK that market is valued at about £35 billion.⁹

1.10 This is backed up by others; the BBC, citing a 2011 report commissioned by Google from the Boston Consulting Group, suggests that the "internet economy"

⁴ Communications Act 2003, s 106(2).

⁵ See paras 2.18 to 2.29 below.

⁶ See <http://www.ofcom.org.uk/about/what-is-ofcom> (last visited 19 June 2012) and Communications Act 2003, s 3(2).

⁷ See paras 7.45 and 7.49 below.

⁸ We consider these at Part 9 below.

⁹ Department for Business, Innovation and Skills, *Implementing the Revised EU Electronic Communications Framework – Overall approach and consultation on specific issues*, (September 2010) p 5, available at <http://www.bis.gov.uk/assets/biscore/business-sectors/docs/i/10-1132-implementing-revised-electronic-communications-framework-consultation.pdf> (last visited 19 June 2012).

contributes in excess of 7% to the UK's gross domestic product.¹⁰ The future of the industry is no less important; a further report¹¹ suggests that the size of the internet economy in the G20 group of nations will almost double between 2010 and 2016.

1.11 It is difficult to see how most, perhaps all, modern businesses can perform competitively without a significant degree of reliance upon electronic communications networks. The societal importance of electronic communications is equally difficult to overstate. Recent data suggests that 77% of homes have an internet connection,¹² and that there are over 80 million active mobile subscriptions in the UK.¹³

1.12 As to the internet, a United Nations Special Rapporteur has commented on:

The unique and transformative nature of the Internet not only to enable individuals to exercise their right to freedom of opinion and expression, but also a range of other human rights, and to promote the progress of society as a whole.¹⁴

He also said that:

[The internet's] current use throughout the world across different age groups, and incorporation into virtually every aspect of modern human life, has been unprecedented. ... The Special Rapporteur believes that the Internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies¹⁵

¹⁰ "UK internet economy 'worth billions'", 28 October 2010, available at www.bbc.co.uk/news/technology-11635318 (last visited 19 June 2012). A 2011 report, undertaken by Frontier Economics for the Department for Culture, Media and Sport, suggests that the electronic communications sector contributes 4.1% gross value added to the UK economy – see Frontier Economics, *Contribution of the digital communications sector to economic growth and productivity in the UK: final report prepared for the Department of Culture, Media and Sport* (September 2011), p 6, available at http://www.culture.gov.uk/images/publications/FE-Full-Report_digitalcomms_economicgrowth.pdf (last visited 19 June 2012).

¹¹ By the Boston Consulting Group: <http://www.bcg.com/media/PressReleaseDetails.aspx?id=tcm:12-96461> (last visited 19 June 2012).

¹² Office for National Statistics, *Internet Access - Households and Individuals, 2011*, Statistical Bulletin (31 August 2011), p 1, available at http://www.ons.gov.uk/ons/dcp171778_227158.pdf (last visited 19 June 2012).

¹³ Office of Communications, *Communications Market Report* (2010) p 307, available at <http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cmr10> (last visited 19 June 2012).

¹⁴ United Nations Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue* (16 May 2011), p 1 (summary), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf (last visited 19 June 2012).

¹⁵ Above, p 4.

Lord Justice Hughes, sitting in the Court of Appeal, has also observed that:

[The internet] is nowadays an essential part of everyday living for a large proportion of the public, as well as a requirement of much employment.¹⁶

- 1.13 This importance is acknowledged by Government. Amongst other measures,¹⁷ it has committed £680 million to invest in broadband¹⁸ with the stated aim of:

... [ensuring] that the UK has the best superfast broadband network in Europe by 2015, with 90 per cent of homes and businesses having access to superfast broadband and for everyone in the UK to have access to at least 2 Mbps.¹⁹

- 1.14 In addition, the European Union has stated targets “to bring basic broadband to all Europeans by 2013” and to ensure that by 2020 “all Europeans have access to much higher internet speeds of above 30 Mbps”.²⁰

- 1.15 Achieving these goals will require significant investment in modern infrastructure. Much of this will be in rural areas (some of which have yet to be reached by modern electronic communications networks). But even within towns and cities, where some of the Government’s aims are already met, there is, or will be, a need to upgrade fibre optic, copper wire and mobile networks to ensure that there is sufficient capacity, flexibility and performance to satisfy the demands of those that rely upon them.

PROJECT BACKGROUND AND TIMING

- 1.16 The Code, too, is due to be upgraded. On 16 May 2011, the Rt Hon Jeremy Hunt MP – Secretary of State for Culture, Olympics, Media and Sport – explained that:

The Government is embarking on a wide-ranging review of the regulatory regime for the UK communications sector, to ensure the regulatory framework in place is fit for the digital age. [The

¹⁶ *R v Smith* [2011] EWCA Crim 1772, [2012] 1 All ER 451 at [20].

¹⁷ The Department for Culture, Media and Sport is undertaking a review of the regulatory regime in the communications sector (http://www.culture.gov.uk/what_we_do/telecommunications_and_online/8109.aspx). See para 1.16 below.

¹⁸ Comprising allocation of £530 million to stimulate commercial investment to roll out high speed broadband in rural communities plus investment of £150 million in “superconnected cities” across the UK; Government has also committed to invest up to £150 million to improve mobile coverage in the UK in areas where coverage is poor or non-existent. See http://www.culture.gov.uk/what_we_do/telecommunications_and_online/7763.aspx (last visited 19 June 2012).

¹⁹ http://www.culture.gov.uk/news/news_stories/8389.aspx (last visited 19 June 2012). “Mbps” is an acronym 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.

²⁰ European Commission Communication, *A Digital Agenda for Europe* COM(2010) 245 final/2, p 19, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF> (last visited 19 June 2012).

Government's] ambition is to establish UK communications and media markets as amongst the most dynamic and successful in the world, with the review process culminating in a new communications framework by 2015, to support the sector for the next 10 years and beyond.²¹

1.17 As part of its wider review, the Department for Culture, Media and Sport asked the Law Commission to conduct an independent review of the Code. The project commenced in September 2011, and we expect to publish a Report in spring 2013. This will give Government an opportunity to implement our recommendations, along with its own reform, in legislation anticipated in 2015.²²

1.18 This project is therefore a general review of the Code. We are not reviewing other areas of law that impact upon the ability of network operators (whether they benefit from the Code or not) to install, upgrade and maintain their apparatus and networks; for example, we are not considering the planning regime, or the regulatory regime that governs inter-operator sharing of apparatus.

1.19 The Code is generally regarded as confusing, and unduly complicated. In the words of Mr Justice Lewison in *Geo Networks Ltd v The Bridgewater Canal Company Ltd*:

The Code is not one of Parliament's better drafting efforts. In my view it must rank as one of the least coherent and thought-through pieces of legislation on the statute book.²³

1.20 However, it is not just the Code's drafting that has been raised as a problem. More fundamental issues have been suggested regarding the balance of rights and interests of operators and landowners; and it is clear that that balance requires a re-appraisal.

1.21 In reviewing the Code, therefore, and in writing this Consultation Paper, our approach has been to start with a "blank sheet of paper" rather than limiting ourselves to considering the amendment of the Code as it now exists. We have considered the rights and powers required by Code Operators, the protections required for landowners and occupiers, and the need to provide for special cases.²⁴

1.22 Our consultation has been informed not only by research into our own legal system but by examination of other common law systems – in particular Australia – and also of the regulation of electronic communications elsewhere in Europe. We have also been assisted by a wide range of meetings with stakeholders, including Ofcom, landowners, Code Operators (both fixed line and mobile) and

²¹ Department for Culture, Media and Sport, *Open letter on A Communications Review for the Digital Age* (16 May 2011), p 1, available at http://www.culture.gov.uk/images/publications/commsreview-open-letter_160511.pdf (last visited 19 June 2012).

²² A revised code would require primary legislation, since the current Code takes that form.

²³ [2010] EWHC 548 (Ch), [2010] 1 WLR 2576 at [7].

²⁴ The Code contains provisions that affect specific categories of land: for example publicly maintained streets, tidal waters and linear obstacles (railways, tramways and canals). We consider these in Part 4 below.

bodies that represent them, individual valuation experts as well as the Royal Institution of Chartered Surveyors Telecoms Forum Board, and expert telecommunications lawyers. On 29 March 2012 we hosted a stakeholder seminar, which was attended by over 70 individuals, to give interested parties the chance to raise concerns both with us and with one another.

- 1.23 The Code applies to the whole of the United Kingdom; this review is being conducted by the Law Commission for England and Wales. We have conducted this project in consultation with the Scottish Law Commission and the Northern Ireland Law Commission, who are advising us both about issues of law specific to their jurisdictions²⁵ and about the stakeholders we should consult. Our Report will alert Government to any issues specific to Northern Ireland and Scotland that are brought to our attention.
- 1.24 The glossary facing page 1 sets out some of the technical terms and abbreviations commonly used in this Consultation Paper.

THE STRUCTURE OF THIS CONSULTATION PAPER

- 1.25 In Part 2 we ask whether there is a need for a code, and whether there are fundamental considerations that must shape its development. We consider the impact of European law and regulation and, because any revised code must include the possibility of compulsory acquisition of rights over another's land, the human rights of those landowners.
- 1.26 In Part 3 we consider, and make provisional proposals and ask questions about, the rights and obligations of Code Operators and what the test should be for conferring code rights. We also consider the issue of who should be bound by code rights. In this Part we also consider ancillary rights, such as the right found in the current Code to lop trees, and ask consultees whether the current provisions are adequate. We examine the prospect of new rights to upgrade and share apparatus. We consider the position of landowners and occupiers who wish to receive electronic communications services, but cannot do so without those services crossing the land of a third party. Finally, we consider the enforcement of code rights.
- 1.27 In Part 4 we focus upon special contexts where, because of the nature of the land over which a right is required, a separate regime governing the conferral of such rights may be required. We consider, in particular, what rights may be required where Code Operators may wish to install apparatus on, under or over streets, linear obstacles²⁶ and tidal waters and lands. We also look at the use of certain types of conduits maintained by statutory undertakers and other bodies.
- 1.28 Part 5 deals with the alteration and removal of electronic communications apparatus from the land on which it has been installed, as well as the provisions in the current Code dealing with security of tenure.

²⁵ For example, we are aware that the security of tenure provisions of the Landlord and Tenant Act 1954 do not apply to, and have no equivalent in, Scotland – see para 8.2 and following below.

²⁶ Railways, tramways and canals.

- 1.29 In Part 6 we discuss what provision should be made in a revised code for financial awards. We pay particular attention to the financial award payable for the rights conferred under the Code and make a provisional proposal for reform. We also consider the circumstances in which compensation may be payable under the Code.
- 1.30 In Part 7 we consider how Code procedures could be improved. The most important question in this context is the forum for adjudication of disputes under a revised code; we also look at notice procedures, and the possibility of standard terms. Key to reform of the procedures under the Code is the need to minimise delay where possible.
- 1.31 In Part 8 we consider the relationship of the Code with other statutory regimes, namely the Landlord and Tenant Act 1954 and the Land Registration Act 2002, and make provisional proposals in relation to how a revised code should interact with both pieces of legislation.
- 1.32 In Part 9 we look at the Electronic Communications Code (Conditions and Restrictions) Regulations 2003²⁷ which contain several requirements to be observed by Code Operators but which, because of the nature of the regulations and the way in which they are enforced, are best thought of as collateral to those set out in the Code. We refer to these regulations in this Consultation Paper as the “2003 Regulations”.
- 1.33 Finally, in Part 10, we set out in order every question and provisional proposal that we make in this Consultation Paper.

THE IMPACT OF REFORM OF THE CODE

- 1.34 The Code is an instrument with important practical and economic effects, and careful thought has to be given to the consequences of reform. The Department for Culture, Media and Sport will need to consider the impact of the Law Commission’s recommendations for change. It would therefore be helpful if, in answering the questions in this Consultation Paper, consultees could also comment on the likely costs and benefits of any changes provisionally proposed. This information will be provided to the Department to assist in the preparation of an impact assessment for any revisions to the Code. The Department for Culture, Media and Sport may contact consultees at a later date for further information.

ACKNOWLEDGEMENTS

- 1.35 We are grateful to the many people, organisations and representative groups that have assisted us with this project so far.
- 1.36 We have benefited from meetings with groups representing Code Operators, including the Mobile Operators Association and the UK Competitive Telecommunications Association. We have also met with individual Code Operators including Arqiva, Geo, Virgin Media and BT.

²⁷ SI 2003 No 2553 as amended by the Electronic Communications Code (Conditions and Restrictions) Amendment Regulations 2009, SI 2009 No 584.

- 1.37 We have held extremely useful discussions with the Country Land and Business Association²⁸ (in particular, Oliver Harwood) and with Land Securities.
- 1.38 Our stakeholder event in March 2012 was attended by the Country Land and Business Association, Code Operators, organisations such as the National Farmers' Union and a variety of interested individuals and groups. We would like to record our thanks to all who attended that event and contributed to the discussion, which we found very informative.
- 1.39 We would like to offer our particular thanks to Nicholas Taggart (Landmark Chambers) who very kindly read through and offered comments on Part 6 prior to publication. We are also indebted to the Royal Institution of Chartered Surveyors and the members of its Telecoms Forum Board for sharing their expertise with us.

²⁸ The Country Land and Business Association describes itself as “the membership organisation for owners of land, property and businesses in rural England and Wales”. We understand that it has a membership of approximately 35,000 people and organisations. For more information see http://www.cla.org.uk/About_the_CLA (last visited 19 June 2012).

PART 2

THE LEGAL AND POLICY CONTEXT FOR THE CODE

INTRODUCTION

2.1 The Code takes effect against a background of more general law and policy. In this Part we consider three issues on which we are not asking consultation questions, but which will remain as the legal and policy context for a revised code. We discuss in turn:

- (1) the need for a code;
- (2) the requirements of human rights legislation; and
- (3) the relevant European Union legislation.

THE NEED FOR A CODE

2.2 It is worth considering at the outset why a code is needed. Some landowners and Code Operators have suggested to us, during the work leading to this publication, that operators would prefer to deal with willing landowners without compulsion, and landowners in particular have suggested that it will always be possible for operators to install, develop and manage their electronic communications networks by negotiation between operators and landowners. In other words, the suggestion is that the market, along with existing landlord and tenant legislation, is sufficient without further intervention.

2.3 We take the view that that is an unrealistic argument. Inevitably, without any legal means to compel landowners (at least as a last resort) to grant access to their land, there will be landowners who either refuse to grant access or, more likely, hold out for payment at a ransom level.¹ As matters stand, we have heard from a number of operators who have experienced great difficulty in agreeing access or price, and have had either to abandon a preferred route or site or to agree to what they regard as an unrealistic payment to the landowner, because the Code does not provide either sufficiently swift compulsion or clearly defined levels of payment. In the absence of a code, such problems would only increase.

2.4 For many decades, legislation has enabled the providers of water, drainage services, telephone services, gas and electricity to compel landowners either to sell land to them or to grant them rights over land.² What all these have in

¹ That is, generally, at a level that is limited only by the operator's anticipated profit (because there is no market and no-one competing to offer a lower price); we discuss the meaning of terms describing different levels of payment at para 6.5 and following below.

² The current powers are contained in legislative provisions including: Water Industry Act 1991, s 159 and sch 12; Communications Act 2003, sch 4 and Telecommunications Act 1984, sch 2; Gas Act 1986, sch 3; Electricity Act 1989, sch 3 and sch 4. For the law in Scotland see D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) pp 821 to 822. For Northern Ireland, see: Water and Sewerage Services (Northern Ireland) Order 2006, SR 2006 No 3336, art 220 and sch 7; Gas (Northern Ireland) Order 1996, SR 1996 No 275, sch 2 and sch 3; Electricity (Northern Ireland) Order 1992, SR 1992 No 231, sch 3 and sch 4.

common is that they are dependent upon a network to provide services to customers, and that they are regarded as so important to society that compulsion is justified. The amendment of the Code in 2003 so as to extend the powers that it confers, from its original scope relating only to telephone services to providers of electronic communications in the broad sense, marks a recognition that these too provide a vital benefit to society – to individuals, businesses and other organisations.³ The action or inaction of an individual should not be able to prevent others getting access to a resource that brings with it enormous benefits and on which so much of the country's economy depends; nor should individuals be able to drive up the price of that resource.

- 2.5 Accordingly we have approached this project on the basis that there must continue to be a code that allows Code Operators to deliver electronic communications networks and services to users, where necessary by using a power to install apparatus on another's property against that person's wishes in return for payment.

HUMAN RIGHTS

- 2.6 The Code enables rights to be acquired over land without the consent of the owner or occupier of the land. For this reason it is important to consider the implications of Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms, which reads:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

- 2.7 Article 1 of the First Protocol was intended to protect the individual from arbitrary interference with possessions by the state.⁴ It is regarded by the European Court of Human Rights as comprising three rules:⁵

- (1) a general principle of peaceful enjoyment of possessions (the first sentence);
- (2) a rule about deprivation of possessions (the second sentence); and
- (3) a rule about the control of use (the second paragraph).

³ See the discussion of the importance of electronic communications at paras 1.9 to 1.15 above.

⁴ See T Allen, *Property and the Human Rights Act 1998* (2005) Introduction and ch 1.

⁵ *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 at [61]. See also T Allen, *Property and the Human Rights Act 1998* (2005) p 102; C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th ed 2012) para 1-024; Lord Reed and J Murdoch, *Human Rights and Scots Law* (3rd ed 2011) para 8.14.

But this is not a very precise categorisation. In particular there are no clear rules about when an action under consideration amounts to a deprivation rather than merely to a control of use.⁶ In practice, it does not seem to matter how a situation is classified since the same principle of proportionality applies to all interferences with possession.⁷ The important difference is that a deprivation of possessions will not usually be regarded as acceptable unless compensation is payable.

- 2.8 In considering whether the Code complies with this article we have to ask whether the article is engaged – that is, whether it is relevant to the issue under consideration. If it is, we then have to ask whether the rights that it confers are infringed by the power conferred on Code Operators to acquire compulsorily rights over land.
- 2.9 Given that, as a bare minimum, Article 1 of the First Protocol guarantees the peaceful enjoyment of one's possessions, it is clear that it will be engaged where a court or other body grants rights over a person's land without that person's consent. In some situations – such as where the effect of the rights conferred is to sterilise part of a person's land – interference may amount to a control of use or even a deprivation of possessions.⁸
- 2.10 We take it, therefore, that Article 1 of the First Protocol is engaged when powers in the Code are used. Do those powers infringe the rights that the article protects? The article makes it clear that an interference with possessions – an expression that encompasses both deprivation and control of use – must be in accordance with the law; the interference must also be in the public interest.⁹
- 2.11 The threshold for assessment of whether an interference is in accordance with the law is relatively low, and would be satisfied here, given that the Code (at present and in any revised form) fulfils the requirement inherent in Article 1 of the First Protocol that any interferences with property rights must have a basis in

⁶ The difficulty in categorising cases as falling clearly within the second or third rules is well illustrated by the case of *JA Pye (Oxford) v United Kingdom* (2008) 46 EHRR 45, where the Grand Chamber held that the operation of the English law of adverse possession fell within the third rule (control of use), notwithstanding the Chamber's view that the case fell within the second rule as a deprivation of possessions. Many commentators view this categorisation as surprising: see R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 18.110.

⁷ R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 18.99: "... in many cases classification under one of the 'rules' does not perform any real analytical function"; and T Allen, *Property and the Human Rights Act 1998* (2005) pp 121 to 122.

⁸ As we note above, it is difficult to extract from the case law of the European Court of Human Rights a clear method for classifying definitively a particular interference as either a "control of use" or "deprivation of possessions". The latter usually involves a total deprivation of ownership through the extinction of all of the owner's legal rights, whereas the former typically involves the elimination or control of one element of the owner's rights (an example of this could be planning regulations which restrict an owner's ability to use his or her property in a certain way). More information on these concepts is available in R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) paras 18.104 to 18.111.

⁹ The case law does not distinguish between the terms "public interest" in the second sentence and "general interest" in the second paragraph of Article 1 of the First Protocol. See R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 18.116, n 375.

national law which is accessible, sufficiently certain and provides protection against arbitrary abuses.¹⁰

- 2.12 Is that lawful interference in the public interest? We have identified above¹¹ the public interest in the provision of electronic communications. But to any interference a test of proportionality must also be applied: does the interference strike a “fair balance” between the general interest of the community and an individual’s fundamental rights?
- 2.13 In answering this question, the court or other body will have regard to whether there is a reasonable relationship of proportionality between the legitimate aim pursued in the general interest and the means adopted to pursue that aim; are the means used proportionate to the aim?
- 2.14 In assessing whether a fair balance has been struck, the court or other body will take into account a number of factors, including: provision of compensation,¹² 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.¹³ However, the European Court of Human Rights has held that in the context of Article 1 of the First Protocol the fact that an alternative – and less burdensome – means of achieving the legitimate aim can be found does not, by itself, upset the “fair balance”.¹⁴
- 2.15 There is a clear public interest in providing electronic communications services to homes and businesses, similar to the public interest in the provision of gas, electricity and the other networked services that have powers of compulsion.¹⁵ We take the view that the interference with private rights in the interests of the provision of electronic communications networks – whether regarded as a deprivation of possessions or as a control of their use – is proportionate to the legitimate aim pursued, so long as financial recompense for the interest granted is provided in every case.
- 2.16 It has been suggested that the Code may be vulnerable to a human rights challenge on the basis that it provides rights for private companies.¹⁶ But the fact that the right is granted to a private undertaking rather than to the state does not prevent compliance with the Convention. The European Court of Human Rights

¹⁰ See 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.

¹¹ See paras 1.9 to 1.15 above.

¹² We consider this at para 6.22 and following below.

¹³ Measures which have retrospective effect are more likely to disturb the fair balance, although tax legislation with retrospective effect has been found to be permissible: *A, B, C, D v United Kingdom* (1981) 23 DR 203.

¹⁴ See *James v United Kingdom* (1986) 8 EHRR 123 at [51]; the proportionality inquiry is of a lesser intensity than that used in relation to Articles 8 to 11 of the European Convention on Human Rights and Fundamental Freedoms.

¹⁵ There has been no successful challenge to the granting of these powers to those providers on the basis of interference with human rights.

¹⁶ See J Small and O Radley-Gardner, “Look behind the mast” (2007) 0704 *Estates Gazette* 180.

has made it clear that the use of compulsory purchase powers to transfer property from one private individual to another is permissible, provided that transfer is made in pursuance of a policy which is in the public interest.¹⁷ Moreover, water and other services with compulsory acquisition powers are now provided by private companies.

- 2.17 Accordingly we take the view that it is unrealistic to suggest that the powers given by the Code, or by any revised code, could be challenged on the basis that human rights were being infringed.

COMPLIANCE WITH EUROPEAN UNION LAW

- 2.18 The European Union takes a close interest in the provision of electronic communications. The adoption in 2002 of a series of five Directives¹⁸ was a significant factor in the implementation of the Communications Act 2003.¹⁹ The five Directives²⁰ are as follows:

- (1) Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the “Framework Directive”);
- (2) Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services (the “Authorisation Directive”);
- (3) Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (the “Access Directive”);
- (4) Directive 2002/22/EC of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (the “Universal Service Directive”); and
- (5) Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (the “Privacy and Electronic Communications Directive”).

¹⁷ See *James v United Kingdom* (1986) 8 EHRR 123 at [40] and [41].

¹⁸ 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.

¹⁹ See the Explanatory Notes to the Communications Act 2003, at [8]. For the background to the Directives, see European Commission, *Towards a new framework for Electronic Communications infrastructure and associated services – the 1999 Communications Review* COM (1999) 539. One of the principles stated to underpin this framework is technology neutrality, considered at paras 3.12 to 3.14 below.

²⁰ The Directives have been amended since their adoption; we do not identify the amending Directives here. The official website of the European Union gives a useful summary of the electronic communications framework, including all relevant legislation and amendments: see http://europa.eu/legislation_summaries/information_society/legislative_framework/l24216a_en.htm.

2.19 The Directives cover a wide range of issues, many of which are outside the scope of this project. However, where the Directives are relevant any recommendations that we make must be in accordance with them. Only one provision is directly relevant to our project.²¹

2.20 Article 11 of the Framework Directive provides that:

1. Member states shall ensure that where a competent authority considers –

– an application for the granting of rights to install facilities on, over or under public or private property to an undertaking authorised to provide public communications networks ...

the competent authority:

– acts on the basis of simple, efficient, transparent and publicly available procedures, applied ... without delay, and in any event makes its decision within six months of the application, except in cases of expropriation, and

– follows the principles of transparency and non-discrimination in attaching conditions to any such rights.

2.21 This article has been implemented in the United Kingdom by regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations 2011. The regulation applies where:

(a) a person authorised to provide public electronic communications networks applies to a competent authority for the granting of rights to install facilities on, over or under public or private property for the purposes of such a network, [or]

(b) a person authorised to provide electronic communications networks other than to the public applies to a competent authority for the granting of rights to install facilities on, over or under public property for the purposes of such a network

And it requires that:

(2) except in cases of expropriation, the competent authority must make its decision within 6 months of receiving the completed application.

²¹ The European Commission has recently launched a public consultation on the roll out of high speed internet networks, including obtaining rights of way: European Commission, *Public Consultation on an EU Initiative to Reduce the Cost of Rolling Out High Speed Communication Infrastructure in Europe* (27 April 2012), available at http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/cost_reduction_hsi/index_en.htm (last visited 19 June 2012).

2.22 The Department for Business, Innovation and Skills has described six months as a “challenging timescale” where the competent authority is the county court,²² but undertook to “work with the Ministry of Justice and the courts” to meet it.²³

2.23 Article 11 of the Framework Directive further provides that:

Member States shall ensure that effective mechanisms exist to allow undertakings to appeal against decisions on the granting of rights to install facilities to a body that is independent of the parties involved.

This requirement must be borne in mind when considering what forum is appropriate to confer rights upon Code Operators, and to settle disputes with owners.

2.24 In framing our provisional proposals we have in mind the need for compliance with Article 11 and in particular the importance of timely determination of disputes.²⁴

2.25 We note three further provisions which are not directly relevant to the Code because they relate to relationships between operators rather than to the relationship between operators and landowners. First, Article 12 of the Framework Directive provides that:

1. Where an undertaking providing electronic communications networks has the right under national legislation to install facilities on, over or under public or private property, or may take advantage of a procedure for the expropriation or use of property, national regulatory authorities shall, taking full account of the principle of proportionality, be able to impose the sharing of such facilities or property

2. Member states may require holders of the rights referred to in paragraph 1 to share facilities or property (including physical co-location) ... in order to protect the environment, public health, public security or to meet town and country planning objectives and only after an appropriate period of public consultation

2.26 Second, Article 3 of the Access Directive provides that:

Member States shall ensure that there are no restrictions which prevent undertakings in the same Member State or in different Member States from negotiating between themselves agreements on technical and commercial arrangements for access and/or interconnection

²² The county court is the main forum for adjudication of issues arising under the Code in England and Wales: see paras 7.9 to 7.13 and Appendix C below.

²³ Department for Business, Innovation and Skills, *Implementing the revised EU Electronic Communications Framework: Overall approach and consultation on specific issues*, (September 2011) p 22, available at <http://www.bis.gov.uk/Consultations/revised-eu-electronic-communications-framework> (last visited 19 June 2012). Policy responsibility for these issues has now passed to the Department for Culture, Media and Sport.

²⁴ See paras 7.4 and 7.5 below.

2.27 Neither article is directly relevant to the Code. However, we have heard repeatedly that the ability of operators to share infrastructure is a key issue for Code Operators and may be hampered by the restrictions imposed by landowners. We address this issue in Part 3.²⁵

2.28 Thirdly, Article 13a of the Framework Directive provides that:

2. Member States shall ensure that undertakings providing public communications networks take all appropriate steps to guarantee the integrity of their networks, and thus ensure the continuity of supply of services provided over those networks.

2.29 Again, this article is not directly relevant to the Code. However, the Code can assist Code Operators in establishing resilient networks.

CONCLUSION

2.30 This Part sets out our understanding of the law and policy background against which a revised code will take effect. In the next Part we consider the rights and obligations that such a code will confer.

²⁵ See paras 3.79 to 3.88 below.

PART 3

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

INTRODUCTION

- 3.1 The central issues for consultation on a revised code relate to the rights and obligations that it should confer on Code Operators and landowners. We refer in this Part, and throughout this Consultation Paper to “code rights”, by which we mean the rights that are conferred upon Code Operators by or under the Code or its replacement. Decisions about the extent of code rights are pivotal to a revised code; only code rights can be conferred against a landowner’s wishes, and only code rights will be the subject of special rules about priority (against those who hold various interests in the land concerned), about alteration, and about security of tenure.
- 3.2 This Part examines the following:
- (1) what rights and obligations a revised code should confer on Code Operators;
 - (2) the creation of code rights;
 - (3) rights ancillary to code rights;
 - (4) code rights and third parties; and
 - (5) the enforcement of code rights.
- 3.3 In this Part we look at code rights in general: the rights that Code Operators need, generally, in order to establish, operate and maintain their networks. We put it that way because the Code provides in addition for what have become known as “special regimes”¹ – these are separate rules for special contexts by reference to particular types of land (such as tidal waters), and particular types of landowner (for example harbour authorities or water companies). The special regimes are the subject of Part 4.
- 3.4 We then ask how code rights can be created. Whose agreement is necessary, and who can be bound by rights created by someone else’s agreement? What should be the test for the imposition of code rights against a landowner’s wishes? We go on to ask what ancillary rights Code Operators should have along with the code rights. Finally we discuss the issues that arise where code rights cannot be created because a third party’s land is in the way.

¹ The phrase “special regime”, in the context of the Code, was used in the judgment of Lewison J in *Geo Networks Ltd v The Bridgewater Canal Company Ltd* [2010] EWHC 548 (Ch), [2010] 1 WLR 2576. At [14] to [18], he explained his use of the term “special regime” to refer to the provisions of the Code that deal with street works (the Code, para 9), the power to fly lines (the Code, para 10), tidal waters (the Code, para 11) and linear obstacles (the Code, paras 12 to 14). We see the power to fly lines as a right ancillary to other rights in the Code – see para 3.60 and following below.

- 3.5 This Part does not address the issues of alteration or removal of equipment, which we consider separately in Part 5. Nor does this Part examine the issue of payment where code rights are conferred, which is addressed in Part 6.
- 3.6 In this Part and those that follow we use the phrase “appropriate body” to mean the forum for the determination of disputes about code rights. We consider what the “appropriate body” should be in Part 7.

CODE RIGHTS AND OBLIGATIONS

- 3.7 We examine here the general rights and obligations that should be the subject of a revised code. We also consider a closely connected issue, namely the definition of electronic communications apparatus.

Rights and obligations within a revised code

- 3.8 Although Code Operators and landowners can, by agreement, confer upon each other any rights and obligations they choose, only certain rights are code rights, attracting the special provisions of the Code as to who is bound by them.
- 3.9 The principal code rights under the current law are set out in paragraph 2(1) of the Code:
- (a) to execute any works on ... land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus; or
 - (b) to keep electronic communications apparatus installed on, under or over that land; or
 - (c) to enter that land to inspect any apparatus kept installed (whether on, under or over that land or elsewhere) for the purposes of the operator’s network.
- 3.10 The focus of these rights is on physical works and the maintenance of electronic communications apparatus² on land for the provision of the Code Operator’s network.³ In practice code rights may take the form of easements,⁴ where the common law characteristics of an easement are met, or of leases, where exclusive possession is granted for a term. Alternatively the right may be neither an easement nor a lease;⁵ the Code provides that the exercise of a right created by agreement with the landowner and/or occupier is to be treated as the exercise by the Code Operator of a statutory power.⁶ It is not clear what this means, but we take it to mean that because the rights are creatures of statute they do not

² Accordingly, questions about rights to install or maintain electronic communications apparatus beg the question: what is such apparatus? We examine that definition below.

³ See the definition of “statutory purposes” in the Code, para 1(1) and the requirement in 2(1) for an “agreement ... to confer on the operator a right for the statutory purposes”.

⁴ The Scottish equivalent of an easement is a servitude.

⁵ For example, when it consists of the right to pass a cable over or under land but there is no “dominant tenement” in the ownership of the Code Operator; such a right cannot be an easement.

⁶ The Code, para 4(1).

have to conform to the common law requirements for the creation of (for example) an easement. It may also mean that the Code Operator has a defence to an action in nuisance. Where, on the other hand, the right is conferred by court order the Code states that it is to have effect as if the right had been given by agreement; it can therefore subsequently be varied or released by agreement.⁷

3.11 We welcome consultees' views on whether the scope of the rights set out in paragraph 3.9 above is causing problems, and on whether those rights should be extended or cut down in any way.

3.12 It has been suggested to us that code rights should differ for different forms of equipment, so that the scope of rights that protect, for example, wireless equipment should be tailored to take into account the different challenges that this technology faces.⁸

3.13 We are not minded to propose different rights in connection with different technologies for two reasons:

(1) it may result in certain classes of equipment becoming easier to install (or otherwise benefiting) and, in doing so, cause Code Operators to favour one technology above another for reasons that are not connected with the better functioning of the networks, or disrupt the market by favouring a Code Operator that specialises in a particular technology; and

(2) the reasons for implementing a different regime for a class of apparatus⁹ may, over time, change or disappear making separate regimes unnecessary and potentially exacerbating the problems highlighted in (1).

3.14 We take the view that a revised code should be "technology neutral";¹⁰ it should be sufficiently broad and flexible to accommodate all types of electronic communications equipment and networks including, so far as can be foreseen, future developments. In taking this approach, we follow one of the principles that underpins the European communications regulatory framework.¹¹

3.15 Although the Code sets out obligations that arise when certain activities are undertaken,¹² it does not specify any general obligations alongside code rights.

⁷ The Code, para 5(7).

⁸ See para 3.73 below.

⁹ For example, the relative ease or difficulty of finding sites for different types of equipment.

¹⁰ The Government acknowledges that, in order to deliver superfast broadband, it should take a technology neutral approach. See the Department for Business, Innovation and Skills and the Department for Culture, Media and Sport, *Britain's superfast broadband future* (December 2010), p 4, para 10, available at <http://www.culture.gov.uk/images/publications/britainssuperfastbroadbandfuture.pdf> (last visited 19 June 2012).

¹¹ See European Commission, "Towards a new framework for Electronic Communications infrastructure and associated services – the 1999 Communications Review", COM (1999) 539, pp v to vi: "Five principles underpin the new regulatory framework ... [one is to] 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."

¹² For example, when trees are lopped the Code Operator must comply with certain requirements: see para 3.70 below.

So the grant of a right to install a mast, for example, does not by itself generate any obligation on the Code Operator to insure against any damage to the land arising from the presence of the mast.¹³ Again, we welcome consultees' views as to whether this approach is correct.

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

- (1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus;**
- (2) to keep electronic communications apparatus installed on, under or over that land; and**
- (3) to enter land to inspect any apparatus.**

Do consultees agree?

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

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

Do consultees agree?

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

3.20 As we have already noted, the discussion so far pre-supposes a definition of electronic communications apparatus, and it is to that definition that we now turn.

The definition of electronic communications apparatus

3.21 Crucial to the determination of the extent of code rights is the definition of "electronic communications apparatus"; that expression is used in our discussion and proposals above, but that discussion begs the question: what is electronic communications apparatus?

3.22 The Code does not extend to all of a Code Operator's assets. There is no case, for example, for giving Code Operators special powers to acquire or to be protected in their possession of shop premises, which are useful to that operator's business, but not to the public, businesses or society as a whole.¹⁴ The Code protects equipment that forms, or will form, a Code Operator's network – for example, the optical fibres that transmit data (and the conduits through

¹³ There is a right to compensation for loss or damage arising when the right is conferred, for example on installation: see paras 6.22 to 6.26 below.

¹⁴ Beyond that provided to the tenants of business premises generally under the provisions of Part 2 of the Landlord and Tenant Act 1954 in England and Wales (see para 8.2 and following below), the Tenancy of Shops (Scotland) Act 1949 in Scotland and the Business Tenancies (Northern Ireland) Order 1996, SR 1996 No 725, in Northern Ireland.

which they pass) and the antennae that communicate wirelessly with mobile handsets, together with the supports to which they attach.¹⁵

3.23 The approach taken in the Code is to define “electronic communications apparatus” as:

- (1) any apparatus (which includes any equipment, machinery or device and any wire or cable and the casing or coating for any wire or cable) which is designed or adapted:
 - (a) for use in connection with the provision of an electronic communications network; or
 - (b) for a use which consists of or includes the sending or receiving of communications or other signals that are transmitted by means of an electronic communications network;
- (2) any line;¹⁶
- (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.¹⁷

3.24 This is a very general definition, with equipment defined by its purpose rather than described specifically. Two issues arise. First, should the definition be made more specific? It is not clear to us that that would be useful; the current approach gives considerable flexibility. 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 it is a sector where there are frequent, significant evolutionary developments.¹⁸ It is not easy to list definitively the apparatus that should be the subject of the powers and protections in the Code, nor to take into account technology that does not exist at the time the list is prepared.¹⁹ And we think that, in the interests of enabling a revised code to extend to such technology as it arises, it would not be right to attempt to do so.

¹⁵ The Code does not protect non-physical aspects of an operator’s network – such as the “pathway” of a wireless transmission between masts. See para 3.73 below.

¹⁶ A “line” is defined in the Code, para 1(1) 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”.

¹⁷ See the definition of “electronic communications apparatus” in the Code, para 1(1). The definition must be read in light of other defined terms in the Code and in the Communications Act 2003 (and the definition above reflects this).

¹⁸ For example, the pace with which wireless communication technologies have emerged and been integrated into Code Operators’ networks (first for voice communication, and then text and data services).

¹⁹ We do not say that this is impossible. It would, for example, be possible to provide for a list of items to be managed by (for example) Ofcom or the Department for Culture, Media and Sport. However, any list would necessarily be reactive, potentially incomplete and burdensome for those maintaining it. It would also be the subject of potential debate and disagreement as to its content.

- 3.25 Second, should the definition explicitly include ancillary equipment or works that are necessary for the proper use of the apparatus; for example, electricity supply cables, upgraded access tracks, fencing and other security features? Again, we are not convinced that the inclusion of specific equipment or features would improve matters, but we would like to hear consultees' views.
- 3.26 Our provisional view is that "electronic communications apparatus" is best defined by reference to broad classes of equipment and by reference to their use in a Code Operator's electronic communications network, as at present, but we ask consultees to tell us their views on this.
- 3.27 We ask consultees to tell us their views on the definition of electronic communications apparatus in paragraph 1(1) of the Code. Should it be amended, and if so should further equipment, or classes of equipment, be included within it?**

THE CREATION OF CODE RIGHTS

- 3.28 In general, code rights can be created by agreement or by court order.²⁰ Here we consider who should be able to create these rights, who should be bound by code rights created by someone else's agreement, and what should be the test for their creation against an owner's or occupier's wishes.

Who can create code rights over land by agreement?

- 3.29 The Code provides that code rights can be created by the agreement of the occupier of land. The occupier may be the freehold owner,²¹ a long leaseholder, or even a weekly tenant.²² The occupier is the one most likely to want the supply of electronic communications services, and also the most likely to be inconvenienced by the apparatus of Code Operators. The occupier's agreement may bind others with an interest in the land, and we discuss the implications of that below.
- 3.30 We do not doubt that the occupier must remain the Code Operator's point of contact on the land, the person who can create code rights by giving agreement, and the person to whom an application to the appropriate body for the grant of code rights should be addressed. Any other arrangement would be impracticable.
- 3.31 However, nothing in the Code enables an occupier to create rights that exceed his or her own interest in the land. A weekly tenant cannot create a ten-year lease, any more than he or she can sell a freehold interest. Nor does the Code

²⁰ By the county court, in England and Wales; see paras 7.9 to 7.13 below.

²¹ The equivalent in Scotland is "owner". The definition in para 2(8)(c) of the Code predates the abolition of the feudal system of land tenure in Scotland on 28 November 2004 by the Abolition of Feudal Tenure etc (Scotland) Act 2000 and is therefore out of date.

²² The Code, para 2(8) sets out who is the occupier in certain contexts, including where land is unoccupied; in this case it means "the person ... who for the time being exercises powers of management or control over the land or, if there is no such person, to every person whose interest in the land would be prejudicially affected by the exercise of the right in question".

enable a tenant to grant a right in breach of the terms of the lease.²³ So where the Code Operator needs a right that exceeds what the occupier can grant, and the owner of the superior interest who can grant it is not willing to do so, an application will have to be made to the appropriate body, using the test discussed below.

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

- 3.32 The Code provides that where the court makes an order conferring code rights, the court may make provision for the rights to bind anyone else with an interest in the land.²⁴
- 3.33 However, where rights are created by agreement with the occupier of land, the Code provides that those rights only bind specified other parties with an interest in the land. We refer to those provisions as the "priority provisions."
- 3.34 The priority provisions go beyond the common law position. Under the common law, a licensee²⁵ of land, for example, cannot grant a right that has any effect on someone with a proprietary interest in it. A lessee of land can bind sub-lessees (where the sub-lease is created after the interest that will bind it) but not his or her own landlord or anyone else with a superior interest.
- 3.35 The priority provisions of the Code extend the classes of person who are bound by a code right created by the occupier's agreement. They are:
- (1) the occupier who conferred the right;²⁶
 - (2) anyone with a freehold or leasehold estate in the land who has agreed in writing to be bound by the right;²⁷
 - (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;²⁸
 - (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

²³ A lease may contain a covenant by the tenant not to encumber the premises, which would include entering into an agreement in favour of Code Operators. However, s 134(2) of the Communications Act 2003 has the effect that where a lease for a term of a year or more contains a "prohibition or restriction relating to an electronic communications matter", that term is converted into a fully qualified covenant – that is, one that permits the specified activity if the landlord consents to it, such consent not to be unreasonably withheld. Therefore a tenant's breach of covenant may in fact be exonerated. We consider section 134 in more detail at paras 3.85 to 3.88 below.

²⁴ The Code, para 5(2).

²⁵ By this we mean someone who is there by permission only.

²⁶ The Code, para 2(2)(a).

²⁷ The Code, para 2(2)(b).

²⁸ This and the categories numbered (4) and (5) here are set out in the Code, para 2(4). These interests must be created after the code rights and must be ones that do not have priority to the code rights.

- (5) any occupier who derives his or her right to occupy from a person who is bound.
- 3.36 These provisions enable third parties to be bound by a code right created by the occupier's agreement, because they too have agreed or because their position derives from someone who has agreed. More controversial is the provision in the Code that has the effect of binding those who have not agreed to the conferral of a right; 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
 - (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.²⁹

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 3.35 is in occupation.
- 3.37 It is therefore possible for a right conferred by an occupier to bind others, but only where the agreement entered into is for the provision to him or her (and subsequent occupiers) of electronic communications services. However, if, say, the occupier is a weekly tenant and the freeholder has not agreed to be bound, then, after the tenant's departure, the freeholder will not be bound.
- 3.38 The priority provisions are important in enabling Code Operators to deliver their services to their customers, and prevents the interruption of critical services to occupiers. However, landlords have understandably expressed concern that the actions of their tenants can stop them removing apparatus even where the tenant is in breach of the terms of the lease by agreeing to installation of the apparatus and the landlord has not agreed to it.

²⁹ This summarises the provisions of the Code, para 2(3).

3.39 Moreover, where someone with an interest in land is not bound and therefore has the right to have equipment removed,³⁰ that right is constrained by the security of tenure provisions in the Code, discussed in Part 5 of this Consultation Paper.³¹ Landlords can be left with apparatus that they are unable to remove when occupiers who were supplied with electronic communications services from that apparatus have left.³² That is the case even where a tenant has breached the terms of the lease in agreeing to have apparatus installed. The consequences for the owners of interests which are technically “not bound” may therefore be far-reaching as a result of the security provisions, which we discuss later. Any conclusion we reach about the range of persons who can be bound by code rights has therefore to be considered alongside those provisions.

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

The test for the creation of code rights

3.41 Code rights may be granted by landowners by agreement; but the Code provides for compulsion where agreement is not forthcoming. Where there is no agreement about the grant of code rights, the appropriate body must decide, on the basis of a prescribed test, whether to order the requirement for an agreement to be dispensed with. Currently, that test is found in paragraph 5 of the Code.

3.42 We discussed in Part 2 the need for the compulsory acquisition of land, or of rights over land, to be subject to considerations of public benefit.³³ The benefits to society should be balanced against the private interests of those who own and occupy the land over which rights are acquired. In assessing the test set out in the current Code and considering the test that might appear in a revised code, we have to consider the way that the balancing exercise is carried out.

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

The court shall make an order under this paragraph if, but only if, it is satisfied that any prejudice caused by the order—

(a) is capable of being adequately compensated for by money; or

(b) is outweighed by the benefit accruing from the order to the persons whose access to an electronic communications network or to electronic communications services will be secured by the order;

and in determining the extent of the prejudice, and the weight of that benefit, the court shall have regard to all the circumstances and to the

³⁰ This is expressly provided in the Code in para 4(2), but follows in any event from the general law.

³¹ See para 5.19 and following below.

³² This may cause particular difficulty if the landlord has resumed occupation with a view to re-developing the property.

³³ See paras 2.10 to 2.15 above.

principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services.

3.44 The function of the closing words (“and in determining ...”) of paragraph 5(3) is unclear. The court is directed to have regard to two things:

- (1) all the circumstances; and
- (2) the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services.

3.45 The latter principle has been described as the “overriding principle”.³⁴ However, the Code does not state that the principle is to “override”. It is a factor to be taken into account, and is a tool for use in balancing public benefit against private prejudice. We prefer to call it the “Access Principle”.³⁵ It is not easy to understand. What would constitute an unreasonable denial of access? What would be a reasonable denial?

3.46 It appears at first sight that the court is to have regard to all the circumstances and to the Access Principle both in assessing the extent of the prejudice to the landowner (relevant to limb (a) and limb (b)) and in determining the weight of the benefit that would accrue from the order to those who would thereby get access to electronic communications services (relevant to limb (b) alone). It is easy to see the relevance of the Access Principle when the court must weigh the benefit to potential customers of electronic communications services against the prejudice to the landowner; it is not easy to understand how the Access Principle could be of any assistance when only limb (a) is under consideration. It may therefore be that the Access Principle was intended only to apply to limb (b).

3.47 But if the Access Principle is not brought into play under limb (a), the test under limb (a) would not involve any balancing of the public benefit against the private prejudice. In other words, if the prejudice is capable of being adequately compensated in money then, no matter how trivial the public benefit, the court would have to make the order even if the landowner resisted this despite the availability of compensation. It is not clear that that approach would be compliant with the European Convention on Human Rights, where in general a full assessment of proportionality is important even where compensation is available.³⁶

3.48 The question of how much compensation is to be awarded is of course a separate issue; the amount payable must be determined in accordance with the Code’s provisions, which we consider in Part 6 below. It would appear to follow that the “money” under consideration in limb (a) must be limited to the amount

³⁴ *Geo Networks Ltd v The Bridgewater Canal Company Ltd* [2010] EWCA Civ 1348, [2011] 1 WLR 1487 at [25] by the Chancellor of the High Court.

³⁵ We use this term throughout this Consultation Paper.

³⁶ See para 2.14 above; contrast the test for the discharge or modification of restrictive covenants under the Law of Property Act 1925, s 84(1)(aa). An assessment of whether the prejudice to the person with the benefit of the restriction can be adequately compensated is only one of several ingredients in the test, and cannot by itself justify an order (s 84(1A)).

payable under the Code. It would be strange indeed if limb (a) were satisfied on the basis that the prejudice could be compensated by a sum far higher than that which the tribunal is able to order; but arguably the drafting does not make this clear.

- 3.49 Limbs (a) and (b) are presented as alternatives; if either is satisfied, the court must make the order. That means that an order can be made under limb (b) even if the prejudice to the landowner cannot be adequately compensated in money.³⁷

The test in a revised code

- 3.50 In Appendix A we have set out the tests applied where rights are granted to the traditional utilities: gas, water and electricity. With the exception of wayleaves acquired by water companies, these rights are granted on the basis of a test that balances public and private rights;³⁸ the test for the grant of electricity wayleaves, for example, requires a decision that it is “necessary or expedient ... to install and keep installed an electric line on, under or over land”.³⁹ We have also collated, in Appendix B, information about the tests used in other jurisdictions for the installation of electronic communications equipment. These are useful points of comparison; but their usefulness is limited by the fact that they operate in different contexts. All prescribe a procedure to be followed before a right may be exercised on the basis of the public interest weighed against private interests.

- 3.51 We ask for consultees’ views about the test that should be prescribed in a revised code. That test must be clear and readily understood; and it must balance private prejudice against public benefit.

- 3.52 The current test seeks to achieve that balance; but it may be that the public benefit is not properly captured because of the way the Access Principle is framed. The principle was developed at a time when one of the biggest issues was ensuring universal access to fixed line telephones; today, there is a mature network and many areas have access to electronic communications services. Consumers and society as a whole do not just need services, but fast, high-quality, robust and modern services. Should that additional imperative be factored in to the test? In other words, is the Access Principle correctly framed in today’s market, or should the test acknowledge the need for high-quality services?

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

- (1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought**

³⁷ Contrast the test for the discharge or modification of restrictive covenants under section 84(1)(aa) of the Law of Property Act 1925, where the tribunal must be satisfied that, among other things, the prejudice can be adequately compensated. The other grounds for discharge or modification under s 84(1) either involve no prejudice to the person with the benefit of the restriction, or arise from the consent of those with the benefit.

³⁸ See Appendix A, paras A.11 to A.13 and A.18 to A.21.

³⁹ Electricity Act 1989, sch 4, para 6(1)(a).

without also weighing the public benefit of the order against the prejudice to the landowner?

- (2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code?**
- (3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how?**

RIGHTS ANCILLARY TO CODE RIGHTS

- 3.54 By an "ancillary right" in this context we mean a right that arises as a consequence of the existence of a code right. For example, once a Code Operator has obtained, by agreement or by court order, the right to install a cell site on X's land, what other rights go along with that right, automatically and without the need for further agreement or compulsion?
- 3.55 The Code provides for several ancillary rights. One relates to the ability in certain circumstances to obstruct access to other land, another to the power to fly overhead lines. The Code also makes provision for tree lopping where a tree overhangs a street, and we ask here whether there should be a more general right to cut back vegetation that interferes with electronic communications equipment, no matter where it is. We also look at rights to upgrade, share and transfer apparatus. Finally we ask if any other ancillary rights should be created under a revised code.

Access to neighbouring land

- 3.56 The starting point is that the grant of code rights over the land of a particular occupier has no implications for other land. The fact that a mast site is installed on X's land does not enable the Code Operator to run cables beneath Y's adjoining land; to do so the operator needs Y's agreement, or an order granting the necessary code rights.
- 3.57 However, paragraph 3 of the Code makes a special provision about the ability to interfere with or obstruct access to neighbouring land. It follows the general law in stating that this cannot be done without the neighbour's agreement⁴⁰ (or the neighbour otherwise being bound – including by an order of the court). But it also provides that if that neighbour's agreement is given, then "sub-paragraphs (2) to (7) of paragraph 2 above except sub-paragraph (3)" shall apply.⁴¹ The main effect of this is that, once another landowner has given permission for access to his or her land to be interfered with or obstructed, that permission will, in accordance with the priority provisions, bind others with an interest in that land.

⁴⁰ Assuming that the neighbour's access is lawful.

⁴¹ The Code, para 3(4).

3.58 We discuss the detail of the priority provisions above.⁴² Here we ask if the provisions of paragraph 3 of the Code are useful and if they should be replicated in a revised code.

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

The right to install overhead lines

The provisions of the Code as to installation, objections and notices

3.60 Where a Code Operator has apparatus installed on or over land, paragraph 10 of the 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 three metres above the ground, nor within two metres of any building.⁴³

The exercise of this right cannot interfere with access to the land over which it passes⁴⁴ and is subject to other elements of the Code (so, for example, it would not give a right to cross a railway).⁴⁵ The power is exercisable without any need to notify the owner or occupier of the land over which the line is to pass; but a landowner or occupier can object to it.⁴⁶ In the event that land is “injuriously affected” as a result of the right being exercised, then paragraph 16 of the Code provides for compensation.⁴⁷

3.61 The right to fly overhead lines can be used in order to cut a corner, where a line is otherwise following a road; or it may be that intervening land has to be passed over in order to access private land to deliver electronic communications services.⁴⁸

⁴² See paras 3.33 to 3.40 above.

⁴³ The Code, para 10(1)(c). The right does not extend to the installation of supporting structures.

⁴⁴ Paragraph 10 of the Code is subject to paragraph 3; see the discussion of access to neighbouring land at paras 3.56 to 3.59 above.

⁴⁵ Paragraph 10 of the Code is subject to the linear obstacles regime in paragraphs 12 to 14.

⁴⁶ Under paragraph 17 of the Code, which we discuss at para 3.62 below.

⁴⁷ See para 6.25(4) below.

⁴⁸ Code Operators are required to install all lines underground (subject to some exceptions); see the 2003 Regulations, reg 4(1). However, the Department for Culture, Media and Sport commenced a consultation in November 2011 to relax this restriction: 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 19 June 2012). The outcome of that consultation is pending. If the proposed relaxation takes place, then the power to fly overhead lines may be used more often. See paras 9.29 to 9.32 below.

3.62 The right to install overhead lines can be exercised without giving notice to any owner or occupier of land crossed by the lines.⁴⁹ However, landowners and occupiers can give notice objecting to lines and other apparatus any part of which is installed three metres or more above the ground within three months of its installation,⁵⁰ provided that the apparatus does not substantially replace other previously installed apparatus.⁵¹ Application can then be made to court to have the objection upheld at any time within two and four months after raising it. In summary, the court will do this if:

The apparatus appears materially to prejudice the objector's enjoyment of, or interest in, his or her land; and

the court is not satisfied that the only possible alterations of the apparatus will:

- (a) substantially increase the cost or diminish the quality of the service provided by the Code Operator; or
- (b) involve the Code Operator in substantial expenditure (ignoring any expenditure that arises solely because the proposed alteration was not adopted originally or because the apparatus was unnecessarily installed), or
- (c) give to any person a case at least as good as the objector to have an objection upheld.⁵²

3.63 In considering these questions the court is to have regard to all the circumstances and the Access Principle. However, the court must not make an order if the applicant is in fact bound by code rights;⁵³ and it cannot do so unless it is satisfied that the Code Operator has sufficient rights to undertake the

⁴⁹ An express grant of planning permission will usually be unnecessary because Code Operators benefit from permitted development rights. Hence there may have been no opportunity for a landowner or occupier to object to a grant of planning permission. In effect, the relevant general permitted development orders grant permission for works to be lawfully undertaken (subject to various exceptions, including where the apparatus exceeds certain prescribed heights which are, in some cases, significantly in excess of three metres). 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). For the law in Scotland, see the Town and Country Planning (General Permitted Development) (Scotland) Order 1992, SI 1992 No 223, sch 1, part 20. For the law in Northern Ireland, see the Planning (General Development) Order (Northern Ireland) 1993, SR 1993 No 278.

⁵⁰ The Code, para 17(2). This requirement has been the subject of litigation: in *Jones v T Mobile (UK) Ltd* [2003] EWCA Civ 1162, [2003] 3 EGLR 55 the Court of Appeal considered what was meant by "completion of the installation"; Holman J indicated (at [40]) that he agreed with the trial judge that the "installation was complete when physical installation was complete, and not when the apparatus was operational" (see the Code, paras 11 and 16). It was also held (at [13]) that the three months begins whether or not the Code Operator has attached a notice pursuant to the Code, para 18 (see para 3.64 below).

⁵¹ The Code, para 17(3).

⁵² The Code, para 17(6).

⁵³ Again we summarise; the Code, para 17(7). It is possible, though unlikely, that a court could grant an order where a person is bound.

alteration, or that it would acquire them if it applied to court for them to be given compulsorily.⁵⁴

- 3.64 Where a Code Operator installs equipment that is over three metres high, paragraph 18 of the Code requires it to secure a notice to every major item of apparatus installed or, if no major item is installed, to the nearest major item to which the apparatus is directly or indirectly connected. The notice must be secured within three days of completion of the installation and must be affixed in a position where it is reasonably legible; it must give the name and address of the Code Operator.⁵⁵ Failure to comply with this requirement is a criminal offence.

Overhead apparatus in a revised code

- 3.65 We have heard little about the provisions of paragraphs 10, 17 and 18⁵⁶ of the Code. There has been a suggestion that the power to install overhead lines should be “modernised” to accommodate wireless transmission between masts and underground cables. We deal with transmission between masts below;⁵⁷ and we do not think that there is any question of the installation of underground cables becoming ancillary to code rights; such operations must depend upon the acquisition of code rights by order or agreement, or be installed under one of the special regimes,⁵⁸ as they are now.
- 3.66 We should like to hear from consultees about their experiences in connection with overhead lines or other apparatus, whether as operators or landowners, and their views on the need for reform.
- 3.67 We ask consultees to tell us their views about the use of the right for a Code Operator to install lines at a height of three metres or more above land without separate authorisation, and of any problems that this has caused.**
- 3.68 Consultees are asked to tell us their views about the right to object to overhead apparatus.**
- 3.69 Consultees are asked to give us their views about the obligation to affix notices on overhead apparatus, including whether failure to do so should remain a criminal offence.**

⁵⁴ The Code, para 17(10); the court has power to give directions requiring others to be given notice of the application, and can exercise the powers of compulsion given in para 5 of the Code (see para 3.41 and following above).

⁵⁵ 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.

⁵⁶ It has been suggested that the location of notices may prove to be a problem as a result of the decision in *Jones v T Mobile (UK) Ltd* [2003] EWCA Civ 1162, [2003] 3 EGLR 55: see J Tansley, “Fence over the River Kwai – a comparative view of noticing under the Electronic Communications Code considered against planning noticing under the permitted development orders through a review of recent cases” [2004] *Journal of Planning & Environment Law* 273.

⁵⁷ See para 3.73 below.

⁵⁸ See para 4.4 and following and para 4.22 and following below.

The right to cut back trees

- 3.70 Trees can interfere with a Code Operator's apparatus. Under paragraph 19 of the Code, Code Operators have the right to give notice to the occupier of land on which a tree grows requiring it to be "lopped" (that is, cut back), at the Code Operator's cost. This right only applies if the tree overhangs a street and it obstructs or interferes with the Code Operator's apparatus (or will do so). The occupier can 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" and causing the minimum of damage to the tree;⁵⁹ the relevant compensation provisions are discussed in Part 6 of this Consultation Paper.⁶⁰
- 3.71 The right to have a tree lopped extends to trees that are protected by a tree preservation order (TPO), as there is an exception in the TPO regime for "statutory undertakers" which in this context specifically includes Code Operators.⁶¹ The exception also applies to trees in conservation areas.⁶² The position is the same in Northern Ireland,⁶³ but different in Scotland.⁶⁴
- 3.72 Two suggestions have been made about the extension of this ancillary right, as follows:
- (1) that it should extend to vegetation generally; and
 - (2) that it should not be limited to interference with apparatus on a street.
- 3.73 A more far-reaching suggestion is that there should be a general right for Code Operators to protect their wireless signals against obstruction, by vegetation or buildings, as they can protect the physical apparatus which transmits those signals. To include such a right in a revised code would require substantial supporting provision as regards, for example, a system to register the invisible

⁵⁹ The Code, para 19(4).

⁶⁰ See paras 6.25(7) and 6.80 below.

⁶¹ 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 TPO, 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.

⁶² 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).

⁶³ See the Planning (Trees) Regulations (Northern Ireland) 2003, SR 2003 No 444, reg 2(1) and sch (third schedule, para 2(a)) and reg 9(1)(a).

⁶⁴ There is no Scottish equivalent to reg 14 of the Town and Country Planning (Tree Preservation) (England) Regulations 2012. In Scotland, if a Code Operator's work will breach a TPO, the operator will need to apply for the consent of the planning authority under s 160(3)(a) of the Town and Country Planning (Scotland) Act 1997 and reg 9 of the Town and Country Planning (Tree Preservation Order and Trees in Conservation Areas) (Scotland) Regulations 2010, SSI 2010 No 434. It is a criminal offence to do anything to a tree in a conservation area that would be prohibited by a TPO: see s 172 of the 1997 Act. However, s 173(3) of the Act provides a defence where the person served notice on the planning authority and acted with its consent.

paths of such signals; we would also regard it as far too broad a right to interfere with development. However, we have considered whether there should be a power to have vegetation cut back to allow the passage of the wireless signals.

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

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

Upgrading, sharing and assignment of code rights

3.75 It has been suggested to us that Code Operators should benefit from ancillary rights to upgrade and share their apparatus. We have also considered whether issues arise where a Code Operator wishes to assign the benefit of its code rights. These issues are distinct and we consider them separately.

Upgrading

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

- (1) because new technology has become available or because greater capacity is required and a different medium is better able to supply it (a physical upgrade); or
- (2) because it would like to expand the use of its apparatus, for example to transmit wireless signals on a different frequency or to supply another customer in a building without undertaking additional works (a purposive upgrade).

3.77 Any code rights that are conferred by agreement on the Code Operator must be “exercised in accordance with the terms ... subject to which [they are] conferred”.⁶⁵ This means that a Code Operator may be prevented by the terms of its agreement with a landowner from upgrading its apparatus, either physically or purposively. Where a right is conferred without limitation it is not clear what works would be permitted in the future – for example, does the right to “alter” apparatus include a right to substantially upgrade it? We would be interested to hear about consultees’ experiences, and their views as to whether Code Operators should benefit from an ancillary right to upgrade apparatus. Should any such right be exercisable with or without a requirement to pay a sum to the landowner?⁶⁶

⁶⁵ The Code, para 2(5).

⁶⁶ We consider the measure of payments in Part 6.

3.78 We ask consultees:

- (1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and
- (2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus.

Sharing

3.79 The sharing of apparatus can take many forms. A Code Operator might allow another operator to install physical infrastructure (for example, to install fibre optic cables in the unused space in its network of conduits, or to install an antenna on its mast); or a Code Operator could allow another operator (or its customers) access to its infrastructure (for example, by allowing another operator's customers to use its apparatus for sending and receiving calls).⁶⁷

3.80 Sharing may be desirable or necessary for a variety of reasons. It may be useful where one Code Operator merges or enters into a joint venture with another; it may assist Code Operators to comply with regulatory pressures to open access to their infrastructure. Sharing apparatus can also help to reduce infrastructure costs and the visual and environmental impacts of apparatus; it is encouraged by both Government and the European Union.⁶⁸

3.81 The Code contains very little on sharing, although paragraph 29 is relevant; it applies where:

- (1) the Code has been applied to an operator ("Operator A");
- (2) the Code expressly or impliedly limits the use to which apparatus installed under the Code can be put; and
- (3) Operator A is (or becomes) party to an agreement to share apparatus installed under the Code.⁶⁹

Where this is the case, the limitation referred to in point (2) above is deemed not to preclude doing anything, or using any apparatus, in pursuance of that sharing agreement. Although convoluted, paragraph 29 may have the effect of permitting a Code Operator to share its apparatus with another operator.⁷⁰

⁶⁷ Giving customers the ability to benefit from greater coverage as they "roam".

⁶⁸ See paras 2.25 to 2.27 above and the 2003 Regulations, reg 3(4) (see para 9.22 below). 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 <http://communities.gov.uk/publications/planningandbuilding/nppf> (last visited 19 June 2012).

⁶⁹ The Code, para 29(1) refers to a "relevant agreement"; by virtue of paras 29(4), (5) and (6) this means an agreement which relates to sharing of apparatus installed under the Code between a Code Operator and another Code Operator or a non-Code Operator which provides an electronic communications network.

⁷⁰ The other operator does not necessarily have to be a Code Operator.

3.82 However, paragraph 29 does not override the constraints of agreements with landowners and occupiers. So where a landowner includes a term in an agreement with a Code Operator that the rights conferred benefit that Code Operator only, paragraph 29 will not operate. For landowners and occupiers this is beneficial – if a Code Operator wants to share its apparatus, then another agreement (with attendant delays in concluding negotiations or seeking an order) must be sought, and a second payment of consideration will be due.

3.83 We ask consultees:

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

3.84 We note a further point in respect of sharing where the agreement conferring code rights is a lease.

LEASES CONFERRING CODE RIGHTS

3.85 Where an agreement conferring a code right is a lease it may be caught by the provisions of section 134 of the Communications Act 2003. We have mentioned this provision above in a different context.⁷¹ Section 134(2) of the 2003 Act 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.

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

3.87 Because the prohibition or restriction is only qualified in respect of things done inside a building occupied by the lessee, or where it is connected with the provision of an electronic communications network to the tenant (in other words, the Code Operator) its application is limited. However, where it does apply,

⁷¹ See para 3.31, n 23 above.

section 134 turns an absolute prohibition on sharing into one that requires the landlord's consent, such consent not to be unreasonably withheld.

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

Assignment of code rights

3.89 Code Operators may enter into joint ventures, or otherwise co-operate; they may merge their undertakings; they may buy and sell equipment. Such arrangements may lead to a need for one Code Operator to transfer code rights to another.

3.90 Code Operator A can transfer its ownership of physical apparatus to Code Operator B but, without more, Code Operator B may have no code rights in the land where it is situated.⁷² If the landowner is not bound by any rights of B, then he or she can request the removal of the apparatus⁷³ and Code Operator B will need to negotiate another agreement, or seek to acquire a right compulsorily. There will be cost and, potentially, further consideration payable.⁷⁴

3.91 Some rights may be assignable. For example, a lease conferring code rights may allow for its assignment to another. If this is the case then it is likely that the rights that are within the lease pass with the assignment; the lease is "[an] agreement in writing" for the purposes of paragraph 2 of the Code.⁷⁵ But a lease, or an easement or other code rights, may not be assignable.⁷⁶ Should the landowner or occupier be able to resist the transfer of code rights from one operator to another, and should he or she be able to require renewed consideration when such transfers take place?

3.92 We ask consultees:

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

⁷² Ownership of any property is unaffected by the fact that it is installed on or under, or affixed to, any land by any person in exercise of a right conferred by or in accordance with the Code: the Code, para 27(4). So electronic communications apparatus always remains the property of the Code Operator unless it is transferred by that operator.

⁷³ See para 5.19 and following below.

⁷⁴ Where an operator's ability to use the Code has been revoked or modified, Ofcom has a statutory power to make, by order, a transitional scheme for that operator's rights and liabilities to be transferred: Communications Act 2003, s 117.

⁷⁵ The wording of the Code is not entirely clear; it is geared towards a single operator. The Code, para 2(1) requires "the agreement in writing of the occupier for the time being of any land shall be required for conferring on the operator a right ..." rather than, for example, the "operator from time to time".

⁷⁶ A true easement (in Scotland, a servitude), appurtenant to land held by the dominant owner, cannot be assigned apart from that land; but when the land is transferred to another the easement passes with it. Accordingly, the discussion in this paragraph and the questions that follow are not relevant to code rights that are easements appurtenant to land.

- (2) whether Code Operators should benefit from a general right to assign code rights to other Code Operators (so that a contractual term restricting that right would be void); and
- (3) if so, whether any additional payment should be made by a Code Operator to a landowner and/or occupier when it assigns the benefit of any agreement.

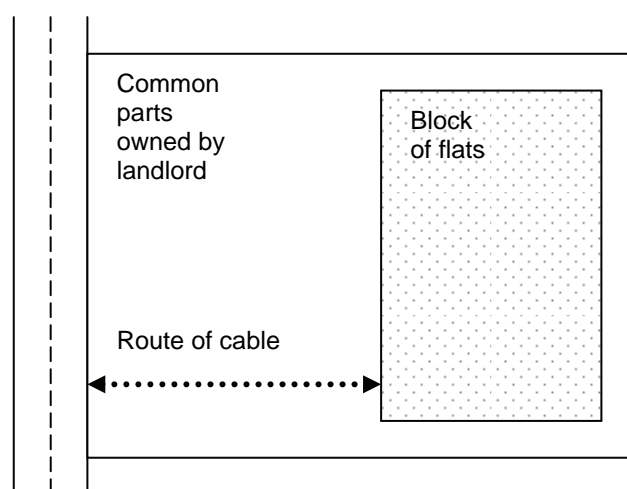
Further ancillary rights

3.93 Our discussion here has examined the ancillary rights already provided by the Code, and discussed some possible additions to that range of rights.

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

CODE RIGHTS AND THIRD PARTIES

3.95 We turn here to the practical problems that arise when a landowner wants access to electronic communications, but a third party's land is in the way. A typical situation can be explained with a diagram:



In this example, the tenants of a block of flats (each with a 99-year lease) want cable television, broadband and telephone services to be supplied by ABC plc, a Code Operator. The tenants own only their flats, and cannot grant code rights across the landlord's retained land.

3.96 The same problem can arise where the cable would have to cross the land of a neighbour; our diagram highlights the position of flat owners because the Department for Culture, Media and Sport has asked the Law Commission to consider whether there should be any specific powers to enable Code Operators to reach multi-dwelling units (for example, the flats within a converted house or tower block). But the same problem can arise between freeholder neighbours, or for commercial tenants on a trading or industrial estate.

3.97 Clearly if the Code Operator is willing to supply the services and the third party (landlord or neighbour) is willing to grant it the necessary rights across his or her land, there is no difficulty. But if the third party refuses, and the Code Operator for whatever reason refuses to take steps to compel the third party to grant access

(perhaps because it would be uneconomic to do so), those who want access (the potential subscribers) to that Code Operator's services appear to have a problem.⁷⁷

- 3.98 Should it be possible for the potential subscribers to compel the Code Operator to use its powers under the Code so as to acquire the necessary rights? Paragraph 8 of the Code contains a provision that has this effect. It provides that a potential subscriber can serve on a Code Operator a notice requiring it to use its powers 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 operator's behalf.
- 3.99 We are not aware that this power has been used, and we question its worth; we think it unlikely that a potential subscriber would take proceedings in the Code Operator's name. We also wonder whether the provision is an excessive intrusion into a Code Operator's strategic management of its network.
- 3.100 We ask consultees to tell us if they are aware of difficulties experienced in accessing electronic communications because of the inability to get access to a third party's land, whether by the occupiers of multi-dwelling units or others.**
- 3.101 Do consultees see a need for a revised code to enable landowners and occupiers to compel Code Operators to use their powers to gain code rights against third parties?**
- 3.102 Are consultees aware of circumstances where the power to do so, currently in paragraph 8 of the Code, has been used?**

⁷⁷ That problem is not solved, for tenants, by the Communications Act 2003, s 134 (discussed at paras 3.85 to 3.88 above). That provision in effect may require a landlord to give permission for something prohibited in the terms of a lease. But the landlord's control over his retained land is unaffected by the lease. As Peter Gibson LJ put it in *Iqbal v Thakrar* [2004] EWCA Civ 592 [2004] 3 EGLR 21 at [47], "the landlord has the right to refuse, even unreasonably, any alteration or addition which trespasses on what is retained by him". We note that the European Court of Human Rights in *Khurshid Mustafa and Tarzibachi v Sweden* Application No 23883/06 [2008] ECHR 1710 has held that a term in a private tenancy agreement prohibiting access to electronic communications services (here a satellite dish) may in some circumstances amount to an unlawful interference with the tenants' human right of freedom to receive information (Art 10 of the European Convention on Human Rights). However, the Court did not explicitly consider whether a tenant could enforce such a right where, rather than being a matter in the tenancy agreement, this would require access to the landlord's retained premises.

ENFORCEMENT OF CODE RIGHTS

- 3.103 The Code does not make clear how code rights are to be enforced. In the absence of any special provision, where a landowner interferes with the exercise of a right, or a Code Operator fails to comply with the obligations to which the exercise is subject then the remedies available would be those available under the general law.⁷⁸ The most obvious remedies would be damages, or an injunction.⁷⁹ So, for instance, if a Code Operator has a right to install and thereafter maintain a fibre optic cable across a field, but the landowner digs up the cable and refuses to allow the Code Operator onto the site to reinstate it, the Code Operator is likely to enforce its right by applying to court for a remedy. This is likely to take the form of a demand for the landowner to pay damages (including the cost of reinstating the cable) as well as an injunction to stop the landowner from restricting the Code Operator's access or digging up the cable again.
- 3.104 Some Code Operators have suggested that the enforcement of their rights using the existing methods is too slow, and that they need faster, and, in some cases, extra protection. Where a landowner blocks the access to apparatus, or disconnects a power supply to it, it is argued that the severe impact upon the Code Operator's customers means that tougher enforcement powers are needed.
- 3.105 One option that has been proposed to us is for the creation of a criminal offence, making it illegal to interfere with a Code Operator's apparatus.⁸⁰ It would then be possible for the offending action to be stopped almost immediately, through the intervention of the police, if necessary. However, we would be reluctant to recommend the creation of a criminal offence. In many cases the offence of criminal damage will cover the facts; where prosecution is not appropriate, the Code Operator might sue in tort for trespass to goods or negligence.

⁷⁸ The Code, para 27(3), provides that:

Except as provided under the preceding provisions of this code, the operator shall not be liable to compensate any person for, or be subject to any other liability in respect of, any loss or damage caused by the lawful exercise of any right conferred by or in accordance with this code.

Where a Code Operator has breached the terms of its right, or the obligations to which its exercise is subject, it cannot be said to be lawfully exercising its rights and therefore additional remedies will be available.

⁷⁹ 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. The Scottish equivalent is an interdict. Moreover, where a landowner is interfering with a Code Operator's right to access the property, then the Code Operator may be able to seek to abate the nuisance being caused. However, this is risky for the Code Operator and is limited to "simple cases which would not justify the expense of legal proceedings and urgent cases which required an immediate remedy" (J R Gaunt and P Morgan, *Gale on Easements* (18th ed 2008) para 14-02).

⁸⁰ It has been suggested that the Telecommunications Act 1984, s 46 (now repealed) might formerly have assisted Code Operators. It provided as follows:

A person who ... whilst in any premises used for the purposes of the business of [an operator], intentionally obstructs the course of business of the operator, shall be guilty of an offence

It is arguable that the offence is not sufficiently wide to cover the problem set out in paragraph 3.104 above; obstructing the access to, or removing the electricity supply to a Code Operator's apparatus may well not require a person to be "in ... premises used for the purposes of the business of [an operator]".

3.106 We ask consultees:

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

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

PART 4

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

INTRODUCTION

- 4.1 Having examined the general rights and obligations of Code Operators, we now consider instances where a special regime is required, either because of the nature of the land over which a right is required, or to deal with the situation where a Code Operator's apparatus needs to make way for the infrastructure of another body with statutory powers.
- 4.2 In this Part we consider the existing provisions in the Code dealing with:
- (1) street works;
 - (2) tidal waters and lands;
 - (3) linear obstacles;
 - (4) the use of certain existing conduits; and
 - (5) undertakers' works.

The first four of these regimes set out special provisions where a Code Operator wishes to acquire a right in relation to a particular type of land. The final regime gives Code Operators rights where the infrastructure of other bodies¹ would interfere with a Code Operator's apparatus.

- 4.3 The overall policy that we are likely to recommend in our final Report is that these regimes should be retained unless we are persuaded that they are causing difficulties (whether for landowners or Code Operators) or that they are not used and so are unnecessary. We examine each regime in turn and conclude by asking whether there are any other particular contexts deserving of special treatment.

STREET WORKS

- 4.4 Much of a Code Operator's apparatus is sited on, over or under publicly maintained streets and roads. This includes cables, public telephone boxes, a variety of wireless infrastructure and much more. It is essential for Code Operators to have access to the highway network to develop their own electronic communications networks.

¹ See para 4.35 below.

- 4.5 This access is currently provided for by paragraph 9 of the Code. Paragraph 9 gives to Code Operators a broad right to install, inspect, maintain, adjust, repair and alter apparatus. It also includes ancillary rights to break up or open (and bore beneath) streets² and to break up or open sewers, drains and tunnels.³
- 4.6 These rights differ from the rights that arise under the general regime discussed in Part 3 (we call this the General Regime in this Part) in that they are not contingent on agreement, or the court's power to dispense with agreement. Whilst broad, the rights are expressly limited by paragraph 9(2) which provides that they are:
- (1) only exercisable in a street which is a "maintainable highway";⁴
 - (2) subject to paragraph 3 of the Code, which prevents Code Operators from exercising their rights in a way that obstructs access to neighbouring land;⁵ and
 - (3) subject to the Code provisions that follow paragraph 9.
- 4.7 We have heard very little regarding the right granted by paragraph 9. However it has been suggested that the exception at (2) above is too limited because it does not take account of the potential for a Code Operator to restrict future access to land from the public highway, for example where a landowner has planning permission for development that will result in a new access to the property being constructed. Should Code Operators be exercising their rights in a way that will obstruct access that has yet to be constructed?
- 4.8 We would welcome consultees' views on whether and how often the scope of the paragraph 3 limitation on the right to carry out street works in paragraph 9 is a problem in practice. It should be noted that as a Code Operator's powers in respect of street works are subject to later provisions of the Code, adjacent landowners can request the alteration or removal of equipment where they wish to carry out an improvement to their land (at the landowner's cost)⁶ and require a Code Operator to pay compensation where the exercise of a right on adjoining land – here the street – causes injury to the landowner's land.

² A "street", for the purposes of the Code, means any highway, road, lane, footway, alley, passage, square, court and any land laid out as a way. It includes bridges and tunnels. Its definition is taken from the New Roads and Street Works Act 1991, s 48(1) (the Code, para 1). The rights apply to public roads in Scotland.

³ Although see the Code, para 15, discussed at paras 4.31 to 4.34 below. Exercise of the rights in the Code, para 9, is subject to the general regime contained in the New Roads and Street Works Act 1991 that governs, amongst other things, the way in which works on streets and roads are carried out. It falls outside the scope of this project because it is a regime that affects all undertakers rather than just Code Operators.

⁴ Defined in the Code, para 1 as excepting footpaths, bridleways and byways that cross agricultural land (or land that is being brought into use for agriculture). In Scotland the rights apply only to public roads and in Northern Ireland there is an exception of special roads. Where the street in question is not a maintainable highway or, in Scotland, a public road the provisions of paras 2 and 5 of the Code apply.

⁵ See para 3.57 above.

⁶ See paras 5.3 to 5.8 below.

- 4.9 Where the landowner has planning permission which is conditional on providing access at a particular point, compensation may therefore be payable by the Code Operator for the loss caused where that planning permission has become impossible to implement by reason of the obstruction caused by the Code Operator's apparatus.⁷
- 4.10 So on the basis of the information we have we do not think that there is any need to include an explicit prohibition on the obstruction of access that is as yet undeveloped; but we would welcome consultees' views on this.
- 4.11 We provisionally propose that the right in paragraph 9 of the Code to conduct street works should be incorporated into a revised code, subject to the limitations in the existing provision.**

Do consultees agree?

- 4.12 We note, for completeness, that we have heard that Code Operators sometimes have difficulty in establishing what constitutes a "street" for the purposes of the Code. We appreciate the problem; if details of the extent of a street (that is maintainable at the public expense) are incorrect then works could be undertaken in the mistaken belief that they are covered by the power in paragraph 9 of the Code. However, to the extent that this is problematic, it is not an issue that affects only the providers of electronic communications networks, and it is therefore beyond the scope of this project.

TIDAL WATERS AND LANDS

- 4.13 Tidal waters and lands are also of critical importance to Code Operators; in particular, submarine fibre optic cables represent a crucial means by which data is transmitted around the globe.⁸
- 4.14 Paragraph 11 of the Code gives Code Operators the right:
- (a) to execute any works (including placing any buoy or seamark) on any tidal water or lands for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus;
 - (b) to keep electronic communications apparatus installed on, under or over tidal water or lands; and
 - (c) to enter any tidal water or lands to inspect any electronic communications apparatus so installed.⁹

⁷ See para 6.25(4) below.

⁸ For an indication of the number of submarine cables that make landfall in the UK, see <http://www.telegeography.com/assets/website/images/maps/submarine-cable-map-2012/submarine-cable-map-2012-l.jpg> (last visited 19 June 2012).

⁹ The Code, para 11(1).

- 4.15 This must be read in the light of the statutory regime governing coastal waters set out in the Marine and Coastal Access Act 2009.¹⁰ Under that Act a licence¹¹ is required to undertake most actions that are included within the right established in the Code.
- 4.16 With one exception, the paragraph 11 power needs no agreement from the landowner or court order. The exception is, however, crucial; where the tidal water or land over which a right is going to be exercised is subject to a Crown interest,¹² it can be exercised only with the relevant Crown body's agreement.¹³ There is no provision to dispense with the need for an agreement (as there is in the General Regime), nor is there any provision for settling the terms of an agreement in the event of a dispute.¹⁴ The extent of the Crown's ownership of tidal waters and lands is such that the majority of tidal waters and lands fall within the exception.¹⁵ The rest of the Code, including the General Regime, applies to non-tidal land in which the Crown has an interest.¹⁶ The Code therefore distinguishes between Crown tidal waters or lands and other Crown land.

¹⁰ The equivalent Scottish legislation is the Marine (Scotland) Act 2010. For a discussion of the Crown's proprietary interest in the Scottish foreshore and sea bed and the legal definitions of those terms, see Report on the Law of the Foreshore and Sea Bed (2003) Scot Law Com No 190, Part 2.

¹¹ Licences are given by the "appropriate licensing authority"; see s 113 of the Marine and Coastal Access Act 2009. Section 80 of the 2009 Act provides that no licence may be granted which amounts to or involves the exercise of a right under the Code, para 11 unless adequate compensation arrangements have been made.

¹² As defined in the Code, para 26(2). In this context we understand that the relevant Crown interests are The Crown Estate (which operates in Scotland and Northern Ireland as well as in England and Wales), the Duchy of Lancaster and the Duchy of Cornwall.

¹³ The Code, para 11(2).

¹⁴ The Crown Estate Act 1961, s 3(1) provides as follows:

... the Commissioners shall not sell, lease or otherwise dispose of any land of the Crown Estate, or any right or privilege over or in relation to any such land, except 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.

We note the Crown Estate's practical approach to the valuation of interests on disposal, as explained by the Crown Estate Commissioners' Chief Executive in response to the "widespread concern about the [Crown Estate Commissioners'] monopoly position in the marine environment" (see House of Commons Treasury Committee, "The management of the Crown Estate: Eighth Report of Session 2009 - 10" (vol 1) 22 March 2010, at para 87). It was explained that:

[The Crown Estate Act 1961] expressly says that we may not take advantage of our monopoly position; so we are quite clear, it is spelt out that we cannot exploit our monopoly position

¹⁵ The Crown Estate (which excludes the holdings of the Duchies of Cornwall and Lancaster) owns "Around half of the UK's foreshore (non-Crown Estate ownership is geographically scattered and includes some substantial areas of coastline, eg Cornwall and Lancashire, vested in the respective Duchies) [and] virtually all the UK's seabed from mean low water to the 12 nautical mile limit": the Crown Estate, *Schedule of The Crown Estate's property rights and interests*, (December 2011) p 10, available at www.thecrownestate.co.uk/media/206857/schedule_of_properties_rights_and_interests.pdf (last visited 19 June 2012).

¹⁶ The Code, para 26(1).

- 4.17 There may be very good reason why Crown tidal waters and tidal lands should be protected. The presence of electronic communications infrastructure could have a major impact on other activities that would otherwise be carried out in, on or under the tidal waters. For example, the presence of a Code Operator's apparatus (whether on the seabed or at the point it makes landfall) may restrict the availability of an area for use as an offshore wind farm, or for certain types of fishing. That may justify special treatment for Crown tidal property above non-tidal property, but it does not explain the greater protection granted by the Code to Crown tidal waters and lands as opposed to other tidal waters and lands. If there are good reasons for giving tidal waters and lands greater protection than other land, it is difficult to see why those reasons are restricted to tidal property in Crown ownership.
- 4.18 We therefore have to consider whether the Crown should continue to have the ability to bar the exercise of paragraph 11 rights by withholding agreement or whether the General Regime (including the provisions about payment, under a revised code) should apply to Crown tidal waters and lands. The General Regime requires agreement in order to execute works and install apparatus, subject to a power to dispense with the need for agreement where an order is made following a balancing exercise between the benefit accruing from granting the right and the prejudice caused by the order. Would that, together with the provisions of the Marine and Coastal Access Act 2009, be sufficient protection, or is a special regime still needed?
- 4.19 If we conclude that a special regime is required, what rights and protections should it provide? Are the provisions of the current paragraph 11 adequate or should the special regime find a different balance between Code Operators and the owners of tidal waters and lands? And should that regime apply in a consistent way to all tidal waters and lands, irrespective of who owns them?
- 4.20 We ask consultees to let us know their experiences in relation to the current regime for tidal waters and lands held by Crown interests.**
- 4.21 We seek consultees' views on the following questions.**
- (1) Should there be a special regime for tidal waters and lands or should tidal waters and lands be subject to the General Regime?**
 - (2) If there is to be a special regime for tidal waters and lands, what rights and protections should it provide, and why?**
 - (3) Should tidal waters and lands held by Crown interests be treated differently from other tidal waters and lands?**

LINEAR OBSTACLES

- 4.22 Paragraph 12 of the Code gives to Code Operators a right to cross¹⁷ certain types of land with a line¹⁸ and to install and keep the line and other apparatus on, under or over that land, together with rights to execute works and to enter and inspect. This special regime applies to land which is used wholly or mainly as, or in connection with, “a railway, canal or tramway”.¹⁹ These are commonly called “linear obstacles” (the term used in the heading to paragraph 12).
- 4.23 The right granted by paragraph 12 extends only to the crossing of the linear obstacle; it does not benefit a Code Operator who wishes to install apparatus along the side of a railway that links two towns, for example. Code Operators who wish to do this will have to negotiate with the occupier (rather than the “person with control of the land”²⁰ as required by the linear obstacle regime)²¹ as they would with any other land and, in the absence of agreement, make an application to court to dispense with it.²² The linear obstacle provisions cannot be used by a Code Operator where the apparatus to be installed would interfere with traffic on the relevant railway, tramway or canal.²³
- 4.24 In order to exercise the right the operator must give 28 days’ notice to the person with control of the land providing specified details of the proposed works, unless the works are emergency works.²⁴ If this person objects within the 28 days the Code Operator can only proceed with the works if:
- (1) neither party has, within 28 days of the notice of objection, given further notice requiring agreement to the appointment of an arbitrator;
 - (2) an arbitrator has been appointed and the works are being carried out in accordance with the arbitrator’s award; or
 - (3) the works have become emergency works.²⁵
- 4.25 Paragraph 13 of the Code sets out what happens at arbitration. In determining what award to make, an arbitrator is to have regard to all the circumstances and to the Access Principle. But, unlike rights arising under the General Regime, the right to cross a linear obstacle with a line exists without requiring an agreement to

¹⁷ What constitutes “crossing” land is tightly controlled: the route taken to cross the land with a line need not be direct, or by the shortest route, but it cannot exceed the shortest route (on a horizontal plane) by more than 400 metres, see the Code, para 12(2).

¹⁸ See para 3.23, n 16 above.

¹⁹ The Code, para 12(10).

²⁰ Defined as the person carrying on the relevant undertaking – see the Code, para 12(10).

²¹ Although see the Code, para 2(8)(a)(iii); where land which is not a street is unoccupied then that paragraph causes references to “the occupier” to be a reference to “the person (if any) who for the time being exercises powers of management or control over the land or, if there is no such person, to every person whose interest in the land would be prejudicially affected by the exercise of the right in question”.

²² See para 3.28 and following above.

²³ The Code, para 12(3).

²⁴ The Code, para 12(4). There is an exception for emergency works which are governed by a different procedure set out in para 12(7).

²⁵ The Code, para 12(6).

be in place; consequently there is no balancing exercise to be undertaken between the prejudice caused by the right, the measure of compensation and the public benefit to others that will emerge.

- 4.26 The arbitrator has a variety of powers, including ordering the modification of the works, awarding to the person objecting to the works a sum for compensation in respect of loss or damage sustained by that person in consequence of the carrying out of the works, and granting that person consideration for the right to carry out the works.²⁶
- 4.27 The differences between the linear obstacles regime and the General Regime do not stop there. Where works have been undertaken pursuant to the paragraph 12 provisions, the Code makes separate provision for a Code Operator's apparatus to be altered in certain circumstances. As we go on to explain in Part 5, it is distinct from the alterations regime that is applicable to apparatus installed elsewhere.²⁷ Furthermore, the execution of works on a linear obstacle otherwise than in accordance with the provisions of the Code is a criminal offence.²⁸
- 4.28 We can see a number of reasons why these differences might be appropriate: paragraph 12 rights can be employed only against certain types of undertakings and over linear obstacles that represent fixed barriers that Code Operators cannot navigate around when establishing their networks. This may support the need for a separate set of rules governing the right to execute works. Likewise, the nature of the operations forming linear obstacles may justify a separate alterations regime and criminal sanctions for unauthorised works. It has been suggested to us that the ability to cross boundaries wirelessly removes the need for special treatment, but our provisional view is that it does not because the need to use a physical "line" in many cases remains.
- 4.29 We have heard little to suggest that the existence of the special regime is causing problems, save in respect of the financial award, which we consider separately.²⁹ We would welcome consultees' views on whether the differences between the operation of the linear obstacle regime and the General Regime are appropriate, leaving aside at this stage the financial elements of the regimes (which we consider in Part 6), and the use of an arbitrator (which we discuss in Part 7).

4.30 We ask consultees:

- (1) Is it necessary to have a special regime for linear obstacles or would the General Regime suffice?**
- (2) To what extent is the linear obstacle regime currently used?**
- (3) Should the carrying out of works not in accordance with the linear obstacle regime continue to be a criminal offence, or should it alternatively be subject to a civil sanction?**

²⁶ The Code, para 13(2).

²⁷ See paras 5.14 to 5.18 below.

²⁸ The Code, para 12(9).

²⁹ See paras 6.75 to 6.78 below.

- (4) **Are the rights that can be acquired under the linear obstacle regime sufficient (in particular, is limiting the crossing of the linear obstacle with a line and ancillary apparatus appropriate)?**
- (5) **Should the linear obstacle regime grant any additional rights or impose any other obligations (excluding financial obligations)?**

USE OF SPECIFIED CONDUITS

4.31 Paragraph 15 of the Code is a slightly different type of special regime; it limits the effect of the Code insofar as the Code Operator's proposed activities would take place inside certain types of conduit. The conduits in question are those set out in section 98(6) of the Telecommunications Act 1984:

(a) any conduit which, whether or not it is itself an electric line, is maintained by an electricity authority for the purpose of enclosing, surrounding or supporting such a line, including where such a conduit is connected to any box, chamber or other structure (including a building) maintained by an electricity authority for purposes connected with the conveyance, transmission or distribution of electricity, that box, chamber or structure; or

(b) a water main or any other conduit maintained by a water authority for the purpose of conveying water from one place to another; or

(c) a public sewer; or

(d) a culvert which is a designated watercourse within the meaning of the Drainage (Northern Ireland) Order 1973.

Paragraph 15 makes it clear that nothing in the earlier provisions of the Code authorises a Code Operator do anything inside a relevant conduit without the agreement of the authority controlling it.

4.32 Paragraph 15 operates against the backdrop of the street works regime discussed above. Without specific provision, the wide rights granted to Code Operators under the street works regime would apply to many of these conduits.

4.33 Given the potential risk and public disruption flowing from interference with the sorts of conduits in question, we consider the paragraph 15 restriction to be a sensible precaution. We have heard nothing to suggest that the restriction is problematic. We therefore provisionally propose its retention.

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

Do consultees agree?

UNDERTAKERS' WORKS

- 4.35 The final special regime relates to circumstances where an undertaker of public works needs to move or alter a Code Operator's apparatus. The list of undertakers expressly bound by paragraph 23 of the Code is relatively short; it includes other Code Operators, and statutorily authorised operators of railways, tramways, road transport, water transport, canals, inland navigation, docks, harbours, piers and lighthouse undertakings. However, the protection that it affords can be extended to "any person to whom [paragraph 23] is applied by any Act amended by or under or passed after [the Telecommunications Act 1984]".³⁰ The paragraph has been applied in several Acts.³¹
- 4.36 This special regime is of an entirely different sort from the others discussed in this Part. Rather than imposing special rights and limitations on account of the nature of the land on which the Code Operator is proposing to execute works, paragraph 23 of the Code deals with the situation where a Code Operator's apparatus requires alteration or removal because another undertaker needs to carry out works on its own infrastructure for its own purposes. Paragraph 23 of the Code anticipates this by establishing a notice system that (except in an emergency) gives the Code Operator, at the undertaker's expense, an opportunity to undertake the works itself, or to require the undertaker to conduct the works under the Code Operator's supervision and to its satisfaction.³² Failure by an undertaker to comply with this provision is a criminal offence.³³
- 4.37 We have heard nothing to suggest that this provision is causing problems or should be amended.
- 4.38 We make one observation regarding the current provision in paragraph 23 of the Code: it provides no mechanism for a Code Operator to argue that the works to its apparatus should not be undertaken. We can envisage, for example, circumstances where an undertaker requires apparatus to be altered but the alteration would lead to a breach of the terms of an agreement entered into with the landowner on whose land the apparatus is situated. In these circumstances it is not clear what would happen; we would expect that, if the issue were raised by the landowner, the Code Operator might be forced to seek a new right.³⁴
- 4.39 In making our provisional proposal to retain a special regime for undertakers' works, we invite consultees to comment on whether they think the provisions of paragraph 23 of the Code are sufficient to balance the needs of undertakers. We also ask consultees to let us know whether there are any additional undertakers to which paragraph 23 of the Code should apply.

³⁰ The Code, para 23(10)(c).

³¹ See, for example, the Water Industry Act 1991, sch 13, para 4.

³² The Code, para 23(4).

³³ The Code, para 23(8). It is interesting to note that the severity of the potential penalty is linked to whether the service of the Code Operator is interrupted (the Code, para 23(8)(i) and (ii)).

³⁴ See also para 6.25(6) below.

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

Do consultees agree?

SPECIAL REGIME: OTHER RIGHTS?

4.41 We have considered the regimes in the Code guided by a general policy to replicate these provisions in a revised code, unless we are presented with good reason not to do so.

4.42 We do not propose to create any new special regimes. We think that it is important to limit the rights and powers that are unique to particular circumstances. Nevertheless, we will consider carefully any arguments put forward by consultees that there should be further special regimes dealing with particular types of land or other specific circumstances.

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

Do consultees agree?

PART 5

ALTERATIONS AND SECURITY

INTRODUCTION

5.1 We considered in Parts 3 and 4 how code rights are created and enforced. In this Part we consider the situations that may arise once electronic communications apparatus is installed on land and there is a need for it to be moved or removed. We look at:

- (1) the alteration of apparatus;
- (2) security for apparatus; and
- (3) the retrospective effect of the Code.

ALTERATION OF APPARATUS

5.2 The Code gives landowners the opportunity in some circumstances to have electronic communications apparatus moved or removed (the term used in the Code is “alteration”, which includes removal),¹ where the landowner is not otherwise entitled to do so. The Code’s provisions differ depending upon whether or not the land concerned is a “linear obstacle”. We look first at the general rules contained in paragraph 20 of the Code, and then consider whether different rules should apply in the case of linear obstacles.

Alteration: general

5.3 Paragraph 20 gives an opportunity for any person with an interest in land to require the alteration of apparatus where “the alteration is necessary to enable that person to carry out a proposed improvement of land in which he has an interest”.² “Alteration” is defined to include “the moving, removal or replacement of the apparatus”.³ “Improvement” is defined to include development and change of use.⁴ The right is relevant to apparatus that is in use; we consider abandoned apparatus below.⁵ The landowner may be someone with an interest in the land on which the apparatus is installed or in adjacent land.⁶

5.4 The right to require alteration can be exercised “notwithstanding the terms of any agreement binding that person”.⁷ We take this to mean that it can be exercised

¹ The Code, para 1(2).

² The Code, para 20(1).

³ The Code, para 1(2).

⁴ The Code, para 20(9).

⁵ See paras 5.23 and 5.26(3) below.

⁶ The Code, para 20(1).

⁷ The Code, para 20(1). It is apparently possible for the agreement between a landowner and Code Operator to provide for another regime to apply – for example one where the Code Operator is to pay for alterations; this follows from para 27(2) which provides that the provisions of the Code, subject to two exceptions, shall be without prejudice to any rights or liabilities arising under any agreement to which the Code Operator is a party.

by a landlord during the currency of a lease (where the landlord would otherwise have no right to require alteration), and also that it can be exercised even where an express term of an agreement between the Code Operator and the landowner states otherwise.⁸

5.5 As with many procedures in the Code, the mechanism for requiring alteration follows a notice and counter-notice procedure.⁹ Where the court has to decide the question, it must make an order for an alteration only if, having regard to all the circumstances and to the Access Principle, it is satisfied that:

- (1) the alteration is necessary to enable the person requiring it to carry out a proposed improvement of his or her land; and
- (2) the alteration will not substantially interfere with any service which is or is likely to be provided using the Code Operator's network.¹⁰

5.6 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 Code.

5.7 Therefore the court can order that apparatus be moved, modified,¹¹ or replaced on the landowner's own land; or it can make an order that the apparatus be moved to a neighbour's land if the neighbour agrees. If the neighbour does not agree and the test for the creation of code rights is made out¹² then the court can give the Code Operator the requisite rights over the neighbour's land.¹³ The court's order may provide for alteration in a different way from that requested by the applicant, if the applicant consents – but if the applicant does not consent the court can refuse to make the order, depending on the evidence before it.

⁸ However, if a landowner wants a Code Operator's apparatus to be moved during the currency of the lease that granted the right to install and use the apparatus, then it may be difficult for the landowner to satisfy the test in the Code, para 20(4) (see below). The lease will entitle the Code Operator to possession of the land, which may itself prevent the development. It may be very difficult for the landowner to show an alteration is "necessary" where this is the case. See Wayne Clark (Barrister, Falcon Chambers), "36th Annual Series Blundell Lectures – Property Problems Under the Electronic Communications Code" delivered on 29 June 2011 at the Royal College of Surgeons of England, London, p 27, para 50.

⁹ The Code, paras 20(2) and (3). A Code Operator must comply with a notice requiring an alteration unless it gives a counter-notice within 28 days; in that event a Code Operator only has to make the alteration where a court orders it to do so. See further discussion on notices at paras 7.39 to 7.54 below.

¹⁰ The Code, para 20(4).

¹¹ The Code does not say this explicitly but it is part of the natural meaning of the word "alteration"; the definition in para1(2) is not an exhaustive one.

¹² See para 3.41 and following above.

¹³ The Code, para 20(5).

- 5.8 Where an application is successful, the order must include (unless the court otherwise thinks fit) a requirement that the applicant reimburse the expenses that the operator incurs in, or in connection with, the execution of any works in compliance with the order.¹⁴
- 5.9 The Code thus provides a flexible regime enabling alteration – including removal – but protecting the Code Operator’s network and protecting the Code Operator financially. Our provisional view is that this is an important feature of the Code and balances the Code Operator’s right to install apparatus against the landowner’s wishes.
- 5.10 We have heard views that the right to require removal goes too far and jeopardises the security provisions of paragraph 21;¹⁵ but removal under paragraph 20 operates in a very different context and on different terms, with protection for the Code Operator as described above. We have also heard views that the procedure for alteration could be stated more clearly. However, we have no data on the extent to which paragraph 20 is used, nor on whether it has worked well or badly in particular instances. Our provisional view is that the Code strikes a fair balance here, but we should like to hear consultees’ views. We also take the view that it should not be possible for Code Operators and landowners to contract out of the alteration regime; again, we would like to hear consultees’ views.
- 5.11 We provisionally propose that a revised code should contain a procedure for those with an interest in land or adjacent land to require the alteration of apparatus, including its removal, on terms that balance the interests of Code Operators and landowners and do not put the Code Operators’ networks at risk.**

Do consultees agree?

- 5.12 Consultees are asked to tell us their views about the alteration regime in paragraph 20 of the Code; does it strike the right balance between landowners and Code Operators?**
- 5.13 We provisionally propose that it should not be possible for Code Operators and landowners to contract out of the alterations regime in a revised code.**

Do consultees agree?

The alteration regime for linear obstacles

- 5.14 In Part 4 we explained the meaning of a “linear obstacle”. The general right to require alteration is applicable also to apparatus that crosses a linear obstacle; but in addition there is a special regime applicable to such apparatus.¹⁶ We have to consider whether this should be replicated in a revised code.

¹⁴ The Code, para 20(8). See para 6.25(5) below.

¹⁵ See para 5.19 and following below.

¹⁶ See paras 4.22 to 4.30 above.

- 5.15 Paragraph 14 of the Code provides a right for the person with control of the linear obstacle to give notice to a Code Operator requiring it 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.¹⁷
- 5.16 So the ground for requiring alteration is different from the general right, which relates to the improvement of the burdened land; otherwise, however, the procedure is the same. The person requiring alteration can apply to court if the Code Operator does not comply with the notice, and the court must then decide the issue.¹⁸
- 5.17 The court may only make an order for alteration if it is satisfied that the grounds described above are made out, having regard (as under paragraph 20) to all the circumstances and to the Access Principle.¹⁹ But there is no requirement, as there is under paragraph 20, 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.²⁰ So the balance between Code Operator and the person requiring alteration is different in the context of linear obstacles, doubtless because of the public importance of the railways, canals and tramways, although the public interest in electronic communications remains an explicit factor for the court to consider. The court is empowered to make an order in "such form and ... on such terms as the court thinks fit", including any conditions or directions "necessary for resolving any difference between the operator and [the person requiring alteration] and for protecting their respective interests".²¹
- 5.18 We seek consultees' views on the provisions in paragraph 14 of the Code relating to the alteration of a linear obstacle. Do consultees take the view that they strike an appropriate balance between the interests involved, and should they be modified in a revised code?**

SECURITY FOR APPARATUS

- 5.19 Paragraph 21 of the Code states that anyone who is entitled to require the removal of electronic communications apparatus from his or her land cannot do so except in accordance with the provisions of that paragraph. It then creates a procedure for serving notice requiring removal and enables the court to make an order requiring removal; but that order cannot be made unless a test (set out in paragraph 21(6)) is satisfied. If the order is made, the paragraph sets out a procedure for removal and for the landowner to recover expenses where necessary.²²

¹⁷ The Code, para 14(1).

¹⁸ The Code, para 14(2) and (3).

¹⁹ The Code, para 14(4).

²⁰ See para 5.5 above and the Code, para 20(4).

²¹ The Code, para 14(5).

²² These are discussed in more detail at paras 5.25 to 5.31 below.

- 5.20 Paragraph 21 is often referred to as a security provision. It ensures that apparatus installed under code rights²³ cannot simply be removed when code rights come to an end or when the Code Operator no longer uses it. It may result in fresh code rights being created.²⁴
- 5.21 The practical uses of paragraph 21 are obvious. It is simply pointless for apparatus to be removed at the end of a lease, say, and then reinstalled a short while afterwards because the Code Operator has applied for and been granted fresh code rights under paragraph 5. We might refer to paragraph 21 as a continuity provision; without it, electronic communications would be more readily interrupted, causing expense for operators and therefore for customers – and overall there would be more disruption to landowners and to land.
- 5.22 But the security provisions have given rise to concern. Landowners have suggested to us that there is a lack of clarity over when a person is entitled to require the removal of apparatus; that the procedure for enforcing removal is inappropriate because the timescales for resolution are unclear and because it places the onus on the landowner to take action to remove apparatus rather than on the Code Operator to retain it; and that it should be possible to contract out of the security provisions. In the following discussion we go through the paragraph 21 procedure and then discuss the issues that have been raised with us, before asking consultees' views.

Security provision in paragraph 21 of the Code

- 5.23 Paragraph 21 of the Code restricts the right of anyone entitled to require the removal of a Code Operator's network apparatus. It applies to apparatus that is being used, is likely to be used, or has been used for the purposes of the operator's network (whether or not the apparatus is owned by the operator);²⁵ it therefore applies to equipment that has been abandoned.
- 5.24 The protection of paragraph 21 is extensive: apparatus is deemed to be kept on land lawfully during the time that paragraph 21 restricts its removal; so a landowner who would otherwise be entitled to sue in trespass or nuisance cannot do so until the paragraph 21 procedures have been pursued.²⁶
- 5.25 Paragraph 21 states that a person can be "for the time being entitled to require the removal" of apparatus:
- (1) if they are so entitled under any enactment;²⁷

²³ Or, as below, by a business which subsequently becomes a Code Operator; see paras 5.52 to 5.56 below.

²⁴ It is therefore analogous to the security of tenure provisions of Part 2 of the Landlord and Tenant Act 1954, and we discuss its interaction with that Act at paras 8.2 to 8.22 below.

²⁵ The Code, para 21(11).

²⁶ The Code, para 21(9).

²⁷ For example, a person entitled to require the alteration of any apparatus following the stopping up or diversion of a highway, under the Town and Country Planning Act 1990, s 256(2). In such a case the Code, para 21 applies not only to a required removal, but also to alteration (s 256(6) of the 1990 Act); but see para 21(10). For the equivalent Scottish provisions, see the Town and Country Planning (Scotland) Act 1997, s 212(2) and (8).

- (2) if the apparatus is kept on, under or over the person's land otherwise than in pursuance of a right binding that person; or
- (3) for any other reason.

5.26 We think that the categories of person entitled to require removal must include:

- (1) a landowner against whom code rights have expired – for example at the end of a lease;
- (2) a landowner on whose land apparatus has been installed pursuant to code rights, who has never been bound by those rights;²⁸
- (3) a landowner on whose land apparatus has been abandoned, because paragraph 22 provides that in these circumstances the operator is not entitled to keep the apparatus there; and
- (4) a landowner on whose land electronic communications apparatus has been installed by mistake – for example because of an error over the position of a boundary.

5.27 By “landowner” we mean someone with a proprietary interest in the land; a licensee – someone on the land only by permission – would not normally have the right to remove physical features on the land. However, where a line crosses a linear obstacle the Code refers to “the person with control of any relevant land”; a railway operator, for example, may have the right to require removal without having an interest in the land. And paragraph 4(2) of the Code provides that an occupier of land who is not bound by code rights conferred on someone else is entitled to require a Code Operator which has exercised its rights to restore the land.

5.28 The procedure required under paragraph 21 is as follows.

- (1) A person entitled to remove the apparatus must give notice to the Code Operator requiring the removal of the apparatus – only after 28 days with no response is the person entitled to enforce the removal.²⁹
- (2) The Code Operator can serve a counter-notice within the 28 days:
 - (a) stating that the person is not entitled to require the removal; or
 - (b) specifying steps that the Code Operator proposes to take to secure a right against the person.³⁰
- (3) If a counter-notice is served, then removal of the apparatus can only happen where a court orders it; where a Code Operator has indicated that it intends to take steps to secure a right against the person, a court cannot order the removal unless:

²⁸ See paras 3.32 to 3.40 above.

²⁹ The Code, para 21(2) and (3).

³⁰ The Code, para 21(4).

- (a) the Code Operator is not intending to take steps to secure a right or is being unreasonably dilatory in taking them; or
- (b) the taking of those steps has not secured, or will not secure, any right to keep the apparatus installed or to reinstall it if it were removed.³¹

The steps that a Code Operator can take include an application to court for a right binding the person who has requested the removal of the apparatus.

- 5.29 We can paraphrase by saying that the Code Operator will not be required to remove the apparatus if the court finds that the operator is going to take steps to obtain the right to keep the apparatus on the land and is likely to succeed.
- 5.30 Paragraph 7(3) of the Code makes provision for the financial consequences of the retention of apparatus on land during a period where the landowner was entitled to remove it but could not enforce removal because of the provisions of paragraph 21. So where the operator is able to acquire code rights to retain the apparatus on land, some time after the expiry of an earlier agreement, the consideration and compensation ordered for the landowner must take into account the time during which the apparatus stayed on the land between the expiry of the old rights and the grant of the new.
- 5.31 Paragraph 21(7) and (8) provide for a landowner, having been through the paragraph 21 procedure, to apply to the court for authority to remove the apparatus and to recover expenses incurred in doing so from the operator, and indeed to sell the apparatus and retain the proceeds against expenses.³²

Problems with the security provisions in the Code

- 5.32 We noted above three issues raised with us about these provisions, which we now discuss.

Who is “entitled to require the removal” of apparatus

- 5.33 We set out above a number of categories of landowner entitled to require the removal of apparatus.³³
- 5.34 Wayne Clark has also highlighted another relevant group:

... [when] removal is required by a statutory body [for example] the apparatus has been installed in breach of planning control and the

³¹ The Code, para 21(6).

³² Para 21(10) makes provision for the situation where a person is entitled to require a removal or alteration of apparatus because, for instance, a street or road has been stopped up or diverted, or a public right of way extinguished or altered (for example, under the Town and Country Planning Act 1990, s 256). In such a case para 21(8) does not apply, among other modifications. We have not heard that para 21(10) causes any problem in practice; we welcome the input of consultees if this is not the case.

³³ See paras 5.25 and 5.26 above.

planning authority is entitled to take enforcement action for its removal.³⁴

- 5.35 Our provisional proposals below include a proposal that local planning authorities should not be restricted by the security provisions in a revised code.

The procedure for enforcing removal

- 5.36 Where a notice is served on a Code Operator requiring the removal of apparatus, the operator can serve a counter-notice within 28 days; if the Code Operator wishes to keep the apparatus on site then it must indicate in a counter-notice what steps it intends to take to secure a right against the person seeking the removal.³⁵ After that point, there is no requirement for the Code Operator to do anything to secure its right to keep the apparatus on site; the onus is on the person who served the notice to seek to enforce it by arguing that the Code Operator “is not intending to take those steps or is being unreasonably dilatory in [doing so]”.³⁶ This is regarded as unacceptable by landowners who have then to embark upon a lengthy and expensive action to rid the land of apparatus.
- 5.37 We ask consultees below whether this is right. Should the onus be reversed, so that Code Operators have to take positive steps to secure their position? Or should the onus rest with the landowner, whose position could be improved considerably by a swifter adjudication procedure,³⁷ and by costs sanctions where a Code Operator fails to take action when requested to remove apparatus that is later found to have been abandoned?
- 5.38 We also ask consultees to tell us if problems have arisen during periods in which Code Operators have retained apparatus on land after the expiry of an agreement and therefore in the absence of provisions requiring the operator to, for example, pay rent or to insure. Where new code rights arise later, paragraph 7(3) provides for the financial consequences of the gap between the expiry of rights and the grant of new ones. But we question whether the provision at paragraph 21(8) of the Code for payment of the landowner’s expenses³⁸ in removing the equipment deals adequately with the period between the expiry of rights and the subsequent removal.

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

- 5.39 Currently, it is not possible to contract out of the security provisions of paragraph 21.³⁹ This may cause concerns for both landowners and Code Operators. As matters stand, landowners have no certainty that they can recover possession of their land on a particular date. And some Code Operators take the view that

³⁴ Wayne Clark, “36th Annual Series Blundell Lectures – Property Problems Under the Electronic Communications Code” delivered on 29 June 2011 at the Royal College of Surgeons of England, London, p16, para 31.

³⁵ The Code, para 21(4).

³⁶ The Code, para 21(6).

³⁷ See Part 7 below.

³⁸ Such as disposal costs, equipment hire (if any) and the cost of making good the land and/or buildings involved.

³⁹ See the Code, para 27(2).

landowners are reluctant to deal with them because of the security provisions, forcing Code Operators to pursue proceedings under paragraph 5 (with time, cost and reputational downsides) or to look for an alternative location for their network apparatus.

- 5.40 Without the ability to contract out of security, some landowners are imposing “workaround” terms, including:
- (1) making provision in agreements with Code Operators that provide for punitive payments for periods of occupation after expiration of an agreement; and
 - (2) requiring a full indemnity for losses that arise as a result of continued occupation (including losses arising from any inability to re-develop a property).
- 5.41 The effectiveness of such terms is untested. If a revised code provides security for a Code Operator’s apparatus, and there is no ability to contract out of its provisions, then the effect of any attempt to work around this provision must be made clear.⁴⁰
- 5.42 In view of those concerns, should it be possible for the parties to contract out of security?⁴¹
- 5.43 That would mean that a Code Operator would be free, but could not be obliged, to agree to an installation for a fixed term, on the basis that it would have to remove the apparatus at the end of that term. For contracting out to be meaningful, removal would have to be obligatory even in circumstances where the Code Operator would otherwise be able to secure rights under a revised code to install the apparatus afresh. Both parties would be able to plan ahead: the landowner for development or re-use of the land, and the operator for re-siting the equipment.
- 5.44 Contracting out could be absolute as described; or it could be at a more restricted level, so that the landowner would be able to recover possession in accordance with the terms of the agreement only if the land was required for development.⁴²
- 5.45 We are attracted to the idea that parties should be able to contract out of the security provisions of a revised code. But this must be truly consensual; we do

⁴⁰ The Code, para 27(2) provides that “the provisions of [the Code] except paragraphs 8(5) and 21 ... shall be without prejudice to any rights or liabilities arising under any agreement to which the operator is a party”. It is not clear what effect this has where, for example, a Code Operator covenants in an agreement not to seek to rely on the security provisions of paragraph 21.

⁴¹ Compare the right to contract out of the security of tenure provisions in Part 2 of the Landlord and Tenant Act 1954: see para 8.3 below. The 1954 Act does not apply in Scotland.

⁴² Compare the grounds for possession under the Landlord and Tenant Act 1954. Note also the parallel here with the provisions about alteration. This level of contracting out would mean that where code rights were granted for a fixed term, the landowner would be able to have the equipment removed to make way for re-development in accordance with what is now para 20 of the Code during the currency of the agreement, and therefore subject to the protections that that paragraph provides for operators; but on the expiry of the term the landowner would have an unqualified right to re-possess the land in order to re-develop.

not suggest that the appropriate body under a revised code should have any power to confer code rights without security. Therefore a Code Operator whose network requires security will be able to obtain it.

Questions for consultation

5.46 We take the view that security provisions will be required in a revised code, in order to avoid interruptions to Code Operators' networks and to prevent the waste of time and resources involved in removing and reinstalling apparatus.⁴³ But we ask for consultees' views about aspects of the current provisions that have given rise to concern.

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

Do consultees agree?

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

Do consultees agree?

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

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

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

Do consultees agree?

RETROSPECTIVITY OF THE CODE

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

⁴³ See para 5.21 above.

- 5.53 As a result of this, landowners may obtain the right to require alteration of a Code Operator's apparatus – including its removal – even where under the agreement with the new Code Operator the landowner had no such right. Conversely, the landowner will also find that his or her right to get the equipment removed is now subject to paragraph 21.
- 5.54 At first glance this appears disturbing. The alternative is, however, perverse: a landowner would have a right, when an agreement had expired, to seek the removal of the Code Operator's apparatus (under the common law), but the Code Operator would then in separate proceedings be able to seek, by the acquisition of code rights, the right to keep its apparatus installed.
- 5.55 So the "retrospectivity" of the application of the Code is in a sense inevitable, and we make no proposal to change that. But we welcome consultees' views on the point.
- 5.56 Do consultees agree that the provisions of a revised code relating to the landowner's right to require alteration of apparatus, and relating to the security of the apparatus, should apply to all equipment installed by a Code Operator, even if it was installed before the Code Operator had the benefit of a revised code?**

PART 6

FINANCIAL AWARDS UNDER THE CODE

INTRODUCTION

- 6.1 In Parts 3 and 4 we have discussed the rights and obligations that should be available under a revised code. In this Part we turn to look at the related issue of financial awards. We begin by explaining the meaning of the words “compensation” and “consideration”, which are crucial to this discussion.
- 6.2 We then consider the classes of persons eligible for payments under the Code and whether any further categories of payee should be added in a revised code; we make a provisional proposal for one additional category of payee to be added to those who are entitled to compensation.
- 6.3 Next we examine consideration; we propose that it should continue to be payable under a revised code. We make a provisional proposal for a definition of consideration for a revised code and ask for the views of consultees about that proposal and its potential impact, and about an alternative basis.
- 6.4 Finally, we make a number of provisional proposals about some minor issues relating to compensation and to the payment of expenses.

THE MEANING OF “COMPENSATION” AND “CONSIDERATION” IN THIS PART

- 6.5 The Code contains a number of provisions about payment, described in a number of different ways. Key to these provisions are two terms:
 - (1) compensation; and
 - (2) consideration.
- 6.6 These words are used in the Code, and we use them in this Part. We begin, therefore, by explaining what is meant, in this context, by each.

Compensation

- 6.7 We use the term “compensation” as it is used in the Code: to indicate a payment that compensates for a loss. For example, paragraph 7(1)(b) of the Code refers to the need for a landowner to be “adequately compensated ... for any loss or damage sustained by them” as a result of the exercise of rights conferred under the Code. Those losses may include, for example, the cost of disruption to a farm business while a cable is laid under agricultural land, or the cost of making good after a cell site is attached to a building. It also includes, where relevant, a payment to compensate the landowner for any reduction in the value of his or her land – that is, where the land is worth less after the installation of the electronic communications equipment than it was beforehand.
- 6.8 This is a familiar basis of compensation from contexts where compulsory purchase powers are used to acquire rights over land. For example, under section 13 of the Local Government (Miscellaneous Provisions) Act 1976 local

authorities are empowered to acquire rights over private land.¹ The provision for compensation reads (with emphasis added):

In assessing the compensation to be paid by the acquiring authority under this Act *regard shall be had not only to the extent (if any) to which the value of the land over which the right is to be acquired is depreciated by the acquisition of the right* but also to the damage (if any) to be sustained by the owner of the land by reason of its severance from other land of his, or injuriously affecting that other land by the exercise of the powers conferred by this or the special Act.²

6.9 The idea here is that where the value of the land subject to the acquired right is less than it was worth beforehand, the landowner is compensated by being paid the difference. The same provisions are found in the legislation governing the acquisition of “statutory easements” by the traditional utilities of gas, water and electricity.³ Such compensation leaves the landowner no worse off, but no better off – the term often used in the context of compulsory acquisition is diminution in value.

6.10 So the term “compensation” in the Code, and in this Part, is used to denote a sum that makes good the payee’s losses, whether that is the loss caused by the disturbance of having work done or the loss in value of the payee’s land at the end of such operations.⁴

Consideration

6.11 “Consideration”, by contrast, is something more than compensation. It leaves the recipient better off than he or she was beforehand; it is a price.

6.12 Put like that, there are infinite possibilities for the level of consideration. A price can be great or small. For the purposes of this discussion we can identify three different levels of consideration that are familiar to valuers.⁵ We set them out here, and then make use of them in the discussion later in this Part.

¹ For Scotland, see the Local Government (Scotland) Act 1973, s 71.

² Para 6 of Schedule 1 to the Local Government (Miscellaneous Provisions) Act 1976, adapting section 7 of the Compulsory Purchase Act 1965.

³ For an explanation of what a “statutory easement” is see Appendix A, para A.3 below. For commentary in relation to the adaptations to section 7 of the Compulsory Purchase Act 1965 made in the Gas Act 1986, see B Denyer-Green, *Compulsory Purchase and Compensation* (9th ed 2009) pp 517 to 518.

⁴ We note that compensation is used in other contexts to include an element of what we refer to as “consideration”. For example, paragraph 7 of Schedule 4 to the Electricity Act 1989 provides that compensation “in respect of the grant” is payable for electricity wayleaves acquired pursuant to statutory powers contained in that Schedule. This provision was interpreted by the Lands Tribunal in *Welford v EDF Energy Networks (LPN) Plc* [2006] 3 EGLR 165, LCA/30/2004 (affirmed by the Court of Appeal [2007] EWCA Civ 293, [2007] 2 P & CR 15) to mean an element of price – in that case £2,360 was awarded by the Tribunal “in respect of the value of the wayleave” to keep installed under private land eleven 11kV and four 66kV cables.

⁵ We are extremely grateful to Nicholas Taggart (Barrister, Landmark Chambers) for his assistance and suggestions on the issues covered in this Part.

Ransom or profit share

- 6.13 This is the highest of the measures of consideration to which we need to refer. A ransom payment is one that can be demanded when the payee is in a unique position, usually because he or she is the only one who can sell what is wanted: there is no “market” of other potential sellers. The only limit on the price is therefore the level of profit that the payer anticipates. This is easy to see in the example of a “ransom strip” in a typical development situation; where X owns the only strip of land that can give access to an area for development, he is said to have a ransom strip, and can (unless the price is regulated in some way) demand whatever he wishes; the developer will pay up to a level that makes the development not worthwhile, in the light of the anticipated profit. The ransom price therefore comes down to a demand for a profit share.⁶
- 6.14 Similarly, without regulation of price, a landowner who held the only land through which a cable must be passed in order to get electronic communications to a particular area could demand a ransom price or profit share. There is no market. A similar situation ensues where the landowner does not hold the only possible land, but where the others who could grant the right also demand a ransom price, rather than functioning as a competitive market.

Market value

- 6.15 Contrast the position where a Code Operator needs to install apparatus, but could use any one of several pieces of land in different ownership. Absent any agreement by the landowners not to compete on price, there is a market comprising several willing grantors, and the Code Operator can “shop around”. The market value of the right is the price that would have to be paid on this basis, assuming competition and no compulsion, and in the context where the right is valuable to the operator.
- 6.16 This is the same concept as the open market value of a house, of shares, or of any other commodity; we are all familiar with it from everyday life. Valuers deal with it constantly; in order to assess, say, the open market value of a house they need information, not only about the house but also about other similar properties and similar deals, so that they can determine how the market is behaving. The valuer can factor into the valuation the special circumstances of the acquisition and any special value that the land has; so the market value of one’s house might be rather higher than it would otherwise have been if the buyer owns adjoining land, or has a special reason for wanting this particular house. Similarly, the market value of a 25-year lease of, say, ten square metres of a field where the only potential lessees were neighbouring farmers might be very much lower than it would be where the market included one or more Code Operators who could put the land to use as a mast site.

⁶ The quantification of the value of a ransom strip often starts from an assumption that the landowner should receive 33% of the developer’s net profits, following the Lands Tribunal decision in *Stokes v Cambridge Corporation* (1961) 13 P & CR 77. This is a matter of practice, not of law. Moreover, there are circumstances where profit is not a limiting factor, for example where the payer agrees to a price for the sake of its reputation, even if it is not in fact profitable.

- 6.17 Crucial, therefore, to the ability of a valuer to determine market value is the availability of “comparables”; that is, information about similar deals.

Market value on compulsory purchase principles

- 6.18 When land is acquired by compulsory purchase – say, by a local authority for urban development in the public interest – the seller is paid a market value for the land. The determination of this market value stems from the courts’ interpretation of the second rule contained in section 5 of the Land Compensation Act 1961,⁷ which provides that:

The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise.⁸

- 6.19 Around this rule has developed a strong body of legal principles, derived from judicial decisions, on the meaning of “willing seller”, the “open market”, and the amount which “might be expected”. The case law makes it clear that account cannot be taken of any purported enhancement or diminution in the value of the land which is entirely attributable to the scheme underlying the acquisition.⁹ The approach to valuation is thus theoretical, determining the value of the land on the basis of an artificial limitation of the information that the valuer or tribunal takes into account. The value of the land is based on its value to the owner at the time of acquisition, rather than its value to the potential buyer.
- 6.20 This is commonly known as the *Pointe Gourde* principle; the name deriving from the relevant case.¹⁰ If we take again the example of land being acquired compulsorily for urban development, the price payable by the acquiring authority would be the value of the land as it would have been, absent the development, assuming a sale by an estate agent in the ordinary way. The authority would not have had to pay an enhanced value on the basis that the land was important to the development, nor would the value of the land be deemed to be diminished because of the existence of the forthcoming development. The result arrived at is the value at which the land would be sold on the open market, as that market would be if there were no scheme or project generating a compulsory acquisition.
- 6.21 If we extend that reasoning to the acquisition of a right, such as an easement, rather than, say, freehold land, the price paid would be the price of such an easement on the open market in a hypothetical world where there was no project or scheme giving rise to the compulsory creation or acquisition of the right. It is of

⁷ For information on the other rules contained in section 5, see G Roots QC and others, *The Law of Compulsory Purchase* (2nd ed 2011) Division E, ch 2.

⁸ The same wording is used in the Land Compensation (Scotland) Act 1963, s 12(2), and the Land Compensation (Northern Ireland) Order 1982, SI 1982 No 172, NI 9, art 6(2).

⁹ In *Waters v Welsh Development Agency* [2004] UKHL 19, [2004] 1 WLR 2004 at [58], Lord Nicholls said: “A scheme essentially consists of a project to carry out certain works for a particular purpose or purposes. ... Both elements of a project, the proposed works and the purpose for which they are being carried out, are material when deciding which works are to be regarded as a single scheme”

¹⁰ *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565. The principle also applies in Scotland: see J Rowan Robinson, *Compulsory Purchase and Compensation: The Law in Scotland* (3rd ed 2009) ch 8.

course important to be clear what is the “scheme” that is to be disregarded, and we come back to this when we look at this method of valuation in the context of Code installations.¹¹

ELIGIBILITY FOR PAYMENTS

Eligibility for compensation and consideration under the Code

- 6.22 At present the Code provides for payments to be made in a number of situations. In most cases, these are payments made by the Code Operator to one or more landowners; in some cases they are made by a landowner to a Code Operator. The issues that arise on the subject of payment are, for the most part, about the level of payment that should be made, and not so much about whether or not there should be a payment in a particular type of case.
- 6.23 For the purposes of this discussion the issues relating to payment are most conveniently organised into two groups, making use of the current provisions of the Code:
- (1) cases where the Code makes provision for the payment of both compensation and consideration;
 - (2) cases where the Code provides only for the payment of compensation.
- 6.24 In other words, the Code makes provision for a number of different classes of persons to receive compensation because of work done and so on; of those, a subset is also entitled to consideration.
- 6.25 The categories of those entitled to payment under the Code are:
- (1) persons against whom code rights are created, whether directly under paragraph 5 or as a result of another landowner’s application for alteration under paragraph 20;¹²
 - (2) persons against whom code rights are created in respect of linear obstacles;¹³
 - (3) persons who are bound by code rights created under paragraphs 5 and 20;¹⁴

¹¹ See paras 6.65 to 6.66 below.

¹² The Code, para 7; payment includes consideration (see para 7(1)(a)) as well as compensation for loss or damage (see para 7(1)(b), 7(2) and 7(3)). As to the use of para 5 powers when there is a request for alteration under para 20, see para 5.7 above.

¹³ The Code, paras 12 and 13. Although para 12(8) 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.

¹⁴ Whether bound by the rights under para 2(3) (see para 3.36 above) or 2(4) (see para 3.35(3) to (5) above); the payments are of compensation, not consideration, and arise under paras 4(4) (compensation for depreciation in value of the land over which a right has been conferred due to the effect of the Code’s security provisions) and 7(1)(b), 7(2) and 7(3) (compensation for loss or damage). We discuss these at paras 6.27 to 6.36 below.

- (4) persons who suffer depreciation in the value of an interest in neighbouring land;¹⁵
 - (5) Code Operators who are ordered to alter their apparatus (who can recover expenses incurred in doing so);¹⁶
 - (6) Code Operators who are entitled to compensation under paragraph 23(5) and 23(6) for any loss or damage caused by effecting alterations which are necessary due to a relevant undertaker's¹⁷ works and for any expenses incurred in supervising or carrying out the alteration works;
 - (7) persons who are required to lop trees that overhang a street pursuant to a notice served by a Code Operator (who may recover their expenses incurred in doing so under paragraph 19(5)); and
 - (8) persons who are entitled to require the removal of a Code Operator's apparatus where the Code Operator does not effect that removal; such persons may apply to court for authority to remove it themselves and reclaim expenses incurred in doing so under paragraph 21(7) and (8).
- 6.26 Of those, persons falling into categories (1) and (2) are also entitled to consideration. In other words, when equipment is installed or retained on land, the occupier is entitled both to compensation and to consideration; in all other cases, only compensation is in issue.¹⁸

Extending eligibility for compensation

- 6.27 The creation of code rights, by agreement or by order, has far-reaching effects that extend beyond the occupier of the land – who may be the person who made the agreement or against whom the order was made. Where a right has been conferred by an occupier on a Code Operator in connection with the provision of services to the occupier, everyone with an interest in that land is bound by the right for as long as that occupier remains in occupation, pursuant to paragraph 2(3) of the Code.¹⁹
- 6.28 As we noted above, compensation is payable not only to those against whom code rights are ordered, but also to persons who are bound by code rights created under paragraphs 5 and 20. So the installation of equipment on land generates an eligibility for payment, not only for the occupiers of the land, but for others with an interest in the land.
- 6.29 However, the provisions of the Code to this effect are complex.

¹⁵ That is, injurious affection: see the Code, para 16.

¹⁶ The Code, para 20(8) (generally) and 20(10) (street works)

¹⁷ Defined at para 23(10) of the Code.

¹⁸ There is no provision in the 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 (or more).

¹⁹ In addition, the security provisions of the Code apply to all persons with an interest in the land, regardless of whether they are bound by the code rights. See paras 5.23 to 5.31 above.

- 6.30 It will be recalled from Part 3 that persons can be bound by code rights in different ways. Paragraph 2(4)²⁰ 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 under paragraph 7(1)(b) to compensation for loss or damage sustained by them as a result of the exercise of code rights. Loss can include diminution in the value of the land affected by the rights or of other land.²¹
- 6.31 Others may be bound by code rights as a result of paragraph 2(3); we explained in Part 3 that where electronic communications services are provided to the occupier of land, persons who have not agreed to be bound by those rights may in some circumstances be bound by them.²² Those persons are entitled to compensation for diminution in the value of their interest in the land concerned, under paragraph 4(4),²³ and in other land (paragraph 16).
- 6.32 Still others who are not bound by code rights may find that when they take possession of the land they are unable to remove electronic communications apparatus. We discussed this in Part 5;²⁴ paragraph 21 makes provision for them eventually to be compensated if code rights are awarded against them as a result of the paragraph 21 procedure. They would also appear to be able to recover compensation for the diminution in value of other land (paragraph 16).
- 6.33 The problem here is largely one of complexity. Our provisional proposal is for a single entitlement to compensation for all persons bound by code rights, including compensation for loss in value to the claimant's interest in the land concerned or in any other land. That does not mean that all possible heads of loss will always be awarded, but it will ensure a more straightforward process of assessment.
- 6.34 It is less clear what financial provision should be made for those who are not bound by code rights when they are created but are subsequently unable to remove electronic communications apparatus from their land, and we seek consultees' views about this. Should they be entitled to compensation at the point when those rights are created, in view of the fact that their land too may have lost value due to the creation of the rights?
- 6.35 We provisionally propose that a single entitlement to compensation for loss or damage sustained by the exercise of rights conferred under the Code, including the diminution in value of the claimant's interest in the land concerned or in other land, should be available to all persons bound by the rights granted by an order conferring code rights.**

Do consultees agree?

²⁰ See para 3.35(3) to (5) above.

²¹ The Code, para 7(2).

²² See para 3.36 above.

²³ Those who are bound under para 2(4) would not require compensation under para 4(4), because they are successors in title to, or hold interests derived from, those who created the code rights or were originally bound by them and so would have taken the land at its reduced value.

²⁴ See para 5.19 and following.

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

6.37 Our proposal and question refer only to entitlement to compensation for loss or damage. We are not aware of any calls for addition to the categories of persons currently entitled also to consideration and we therefore make no provisional proposal about eligibility for consideration. The issues that do arise in relation to consideration are, first, whether it should be payable at all and, secondly, how it should be valued. It is to those questions that we now turn.

CONSIDERATION AND ITS VALUATION

6.38 Under the Code consideration is payable, in addition to compensation, in the following situations.

- (1) Where the court confers rights under paragraph 5, compensation and consideration are payable under paragraph 7(1), which provides:

The terms and conditions ... in an order under [paragraph 5] dispensing with the need for a person's agreement, shall include:

(a) such terms with respect to the payment of consideration in respect of the giving of the agreement, or the exercise of the rights to which the order relates, as it appears to the court would have been fair and reasonable if the agreement had been given willingly and subject to the other provisions of the order; and

(b) such terms as appear to the court appropriate for ensuring that that person and persons from time to time bound by virtue of paragraph 2(4) above by the rights to which the order relates are adequately compensated (whether by the payment of consideration or otherwise) for any loss or damage sustained by them in consequence of the exercise of those rights.

- (2) Where the court makes an order for the alteration of apparatus under paragraph 20, and needs to dispense with the agreement of another landowner in order to do so (because, for example the alteration will involve moving apparatus from X's land on to Y's land), the court has all the powers that it would have had if an application had been made to it under paragraph 5. Again, this means that compensation and consideration would be payable to Y.²⁵
- (3) Where a dispute over the installation of apparatus over a linear obstacle is referred to an arbitrator under paragraph 13, the arbitrator may award

²⁵ The Code, para 20(5).

compensation and consideration in respect of the carrying out of the works.²⁶

- 6.39 So consideration, as well as compensation, is currently payable where apparatus is installed on land under paragraph 5 (generally), paragraph 20 (following alteration) or paragraph 13 (linear obstacles).
- 6.40 Consideration, as discussed, is a price. It leaves the payee better off, financially, than he or she would have been if code rights had not been conferred. Those who drafted the Code took the view that in the circumstances described above, consideration – something over and above compensation – should be payable.
- 6.41 Our discussion of consideration looks first at the question whether it should be payable at all, and then at the basis of valuation of consideration under the Code and the possibilities for reform. We then look at the other controversy in this area, namely the consideration payable when apparatus crosses a linear obstacle, which currently receives different and apparently anomalous treatment under the Code.

Should consideration be payable at all?

- 6.42 Clearly there are arguments for and against the payment of consideration in addition to compensation. For instance, we noted above that consideration is not payable for rights created under most of the legislation used by gas, electricity and water companies to acquire “statutory easements” over private land.²⁷ On the other hand, where electricity providers use statutory powers to acquire wayleaves, something akin to consideration is payable.²⁸ We explain the difference between a “statutory easement” and a wayleave at Appendix A,²⁹ as well as discussing the different regimes and compensation principles relevant to gas, electricity and water.
- 6.43 Many of the stakeholders who have discussed this with us believe that consideration should be payable. It is significant that many of the Code Operators – so far as we have been able to discover at this stage in the project – have no objection to the payment of consideration. Their concern is about levels of consideration and also about the practical difficulties they encounter in reaching agreement with landowners because of the lack of a clear definition of consideration in the Code – a matter to which we now turn.

The basis of the valuation of consideration

- 6.44 There is considerable controversy about the meaning of “consideration” and how it is to be valued in the context of the Code; we examine below the available possibilities and make a provisional proposal for reform.

²⁶ The Code, para 13(2)(e).

²⁷ See para 6.9 above and Appendix A, paras A.22 to A.28 below.

²⁸ See para 6.10, n 4 above and Appendix A, paras A.30 to A.33 below.

²⁹ See Appendix A, paras A.2 to A.9 below.

The interpretation of the current law

- 6.45 How, then, is consideration assessed under the current law, and how should it be assessed in the future? The text of the Code states that the payment of consideration is to be assessed as a figure that “would have been fair and reasonable if the agreement had been given willingly”.³⁰
- 6.46 The leading case of *Mercury Communications Ltd v London and India Dock Investments Ltd*³¹ decided that “fair and reasonable” consideration does not involve an element of profit share or ransom,³² but does go beyond a figure which simply reflects the diminution in value of the claimant’s interest in his or her land. In other words it includes an element of price. In *Mercury*, HHJ Hague QC was of the view that what is “fair and reasonable” consideration is best determined by looking at comparable transactions, bearing in mind the bargaining strengths of both parties and the importance and value of the proposed right to the grantee.³³ That of course requires the use of comparables; the best comparables available in *Mercury* were deals made between the same parties. However, the judge took the view that what was required was not simply market value.
- 6.47 He noted that his decision involved “an element of subjective judicial opinion”, depending on his own perception of what is fair and reasonable; consideration was not to be determined simply by a determination of a right’s market value, which would involve an “objective assessment of a factual matter”.³⁴ This was explained in the following terms:

It is in my judgment clear that what I have to determine is not the same as what the result in the market would have if the grant had been given willingly. That is, however, far from saying that the market result is irrelevant or can afford no guidance. Indeed, in my view the market result is the obvious starting point; and in most cases it will come to the same thing as what is “fair and reasonable” But there may be circumstances, of which the absence of any real market may be one, in which a judge could properly conclude that what the evidence may point to as being the likely market result is not a result which is “fair and reasonable”.³⁵

- 6.48 These points of principle were adopted by the parties in *Cabletel Surrey and Hampshire Ltd v Brookwood Cemetery Ltd*.³⁶ The Court of Appeal emphasised that it had not therefore heard argument on whether the approach taken in *Mercury* was correct and expressed no view on the point.

³⁰ The Code, para 7(1)(a).

³¹ (1995) 69 P & CR 135.

³² *Mercury Communications Ltd v London and India Dock Investments Ltd* (1995) 69 P & CR 135, 161 to 164.

³³ *Mercury Communications Ltd v London and India Dock Investments Ltd* (1995) 69 P & CR 135, 159, 163 and following; and 168 to 169.

³⁴ *Mercury Communications Ltd v London and India Dock Investments Ltd* (1995) 69 P & CR 135, 144.

³⁵ *Mercury Communications Ltd v London and India Dock Investments Ltd* (1995) 69 P & CR 135, 144 and 145.

³⁶ [2002] EWCA Civ 720 at [6].

- 6.49 The basis of valuation in *Mercury* is not well understood. We have been told that at present it is almost impossible for an operator or a landowner to come to a view on what a court may decide constitutes fair and reasonable consideration. What would be a judge's "subjective opinion" about this? Moreover, we note that in the telecommunications industry it can be extremely difficult for operators to obtain a sufficient range of appropriate comparables to assess the true going rate, bearing in mind the need for operators to remain competitive with one another.
- 6.50 This difficulty with consideration means that the Code is rarely used by Code Operators to acquire rights to install apparatus. In some instances this does not cause a problem – we are aware that standard pricing structures have been negotiated between organisations such as the Country Land and Business Association (CLA), the National Farmers Union (NFU), BT Openreach and Cable & Wireless, which are often used as templates for agreements.
- 6.51 Arrangements of this nature have much to commend them, and reform of the Code will not prevent these types of agreements continuing to be used in the future. But on many occasions the lack of a clear basis of consideration under the Code does cause difficulties for both Code Operators and landowners; it may present particular difficulties where an operator deals with landowners who are not members of an organisation which has negotiated standard terms and conditions; or, conversely, where a landowner who is a member of the CLA or NFU is dealing with a smaller Code Operator, with whom the CLA or NFU has not negotiated a standard pricing structure.
- 6.52 However, the approach to consideration taken by HHJ Hague QC in *Mercury* may be open to doubt following the decision of the Supreme Court in *Bocado SA v Star Energy UK Onshore Ltd.*³⁷ *Bocado* concerned the extraction of oil from deep underneath private land by Star Energy UK. Without the knowledge of the owner of the land in which the reservoir of oil was situated, Star Energy UK bored three pipelines into the land and began extracting oil. Some years later the landowner claimed in trespass for damages; the measure of those damages depended upon what Star Energy UK would have paid for the right to extract the oil, assessed against the relevant statutory background. The Petroleum (Production) Act 1934³⁸ provided that Star Energy UK could compulsorily acquire rights over private land; the assessment of compensation for those rights would have been governed by section 8 of the Mines (Working Facilities and Support) Act 1966, which provides that:

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

- 6.53 This wording is similar to the wording of paragraph 7(1) of the Code, although it is not identical; the Code requires consideration of what would be fair and reasonable as between the two parties to the case "if the agreement had been

³⁷ [2010] UKSC 35, [2011] 1 AC 380.

³⁸ Petroleum (Production) Act 1934, s 3, which applied the provisions of the Mines (Working Facilities and Support) Act 1966.

given willingly”, rather than a hypothetical “willing grantor” and “willing grantee”, as noted by HHJ Hague QC in *Mercury*.³⁹

- 6.54 The Supreme Court in *Bocado* had to decide the value of the rights under section 8 of the 1966 Act. At first instance Mr Justice Peter Smith found that a hypothetical negotiation between the parties would have resulted in a price of 9% of the income received from the oil being paid by Star Energy UK to Bocado. The Supreme Court disagreed with this approach. Importantly, it held that general principles of compulsory acquisition law were applicable, even though they were not expressly incorporated into the legislation.⁴⁰
- 6.55 The consequence was that compensation was not assessed on the basis of the value of the rights to Bocado (the owner of the land), because compulsory purchase principles required that valuation take place on a “value to the owner” (rather than “value to the grantee”) basis.⁴¹ The *Pointe Gourde* principle, discussed above, required that any value in the rights attributable to the scheme or project underlying the acquisition – in this case, any value attributable to the fact that they were being used to extract oil from underneath the claimant’s land – had to be disregarded. The Supreme Court therefore upheld the Court of Appeal’s award of damages of £1,000, agreeing that the trial judge’s assessment of £621,180 was incorrect.⁴²
- 6.56 The Supreme Court’s decision in *Bocado* casts doubt upon the correctness of the decision in *Mercury* as to the basis for the valuation of consideration. There is an argument that because the relevant wording of the two statutory provisions is so nearly identical, both should be interpreted in the same way. It is also notable that the same arguments as to matters of principle that succeeded before HHJ Hague QC in *Mercury* were rejected by the majority in *Bocado*. It is, at least, questionable whether it is correct to take into account the importance and value of the right to the grantee, as HHJ Hague QC held in *Mercury*.

Reform of the basis of consideration

- 6.57 The main problem with consideration under the Code is the lack of certainty. A clear basis for the valuation of consideration would provide the parties with a vital starting point for negotiations, saving them time, effort and money. The Code, as interpreted in the *Mercury* case, does not achieve this; and, as we have noted above, there may also be an argument that *Mercury* no longer represents the

³⁹ *Mercury Communications Ltd v London and India Dock Investments Ltd* (1995) 69 P & CR 135 (1995) 69 P & CR 135, 144.

⁴⁰ Lord Clarke, dissenting, approved the view of HHJ Hague QC in *Mercury*, who held that because the Code did not expressly incorporate principles of compulsory acquisition into the formula for the assessment of compensation they could not apply. See *Bocado SA v Star Energy UK Onshore Ltd* [2010] UKSC 35, [2011] 1 AC 380 at [138].

⁴¹ See paras 6.18 to 6.20 above.

⁴² The Court of Appeal had arrived at that figure by starting from a notional £50 for a deep tunnel, including a 10% uplift to account for the fact that the acquisition was compulsory as provided by section 3(2) of the Petroleum (Production) Act 1934, and then multiplying by more than ten times in order to reflect what might have happened in negotiations between the parties: see [2010] UKSC 35, [2011] 1 AC 380 at [86], and the Court of Appeal decision [2009] EWCA Civ 579, [2010] Ch 100 at [116].

correct approach to the assessment of consideration under the Code, following the Supreme Court's decision in *Bocado*.⁴³

- 6.58 The position of the Country Land and Business Association is that consideration should be substantial because Code Operators are commercial entities who run their business on a competitive basis to generate profits for their shareholders. It points to the fact that most Code Operators are not obliged to provide a universal service, and so cannot be equated to the traditional utilities which are subject to such obligations.⁴⁴ The CLA therefore argues that it would 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.
- 6.59 We understand and see the sense in this argument but it does not take account of the public benefit involved in the provision of electronic communications services to individuals, businesses and society as a whole; a benefit that can only be achieved by building a network. This element of public good has been acknowledged in Government policy; for example, there is a clear objective of achieving the European Union's best superfast broadband network by 2015⁴⁵ and the Code is one of the tools on which electronic communications operators need to rely in rolling out new and improving existing networks to fulfil this goal. Telecommunications (now electronic communications) operators have since 1984 been able compulsorily to acquire rights over private land; true, they are private companies, but they are delivering a service that has public benefit,⁴⁶ as do the providers of the traditional utilities, which are themselves now private companies operating for profit.
- 6.60 We therefore take the view that the public nature of the endeavour to provide electronic communications services makes it difficult to argue that landowners should be wholly unregulated in the price they can demand. However, as we noted above, many Code Operators are content to offer consideration.⁴⁷ The issue is how much, and the need for a clear basis of valuation.
- 6.61 In formulating our provisional proposals we have had in mind the need to provide as much certainty as possible, and to strike a fair balance between the interests of Code Operators and landowners. We take the view that the interpretation of "consideration" in paragraph 7(1) of the Code in the *Mercury* case is too vague and should be replaced. Our discussions with valuers lead us to the view that

⁴³ See paras 6.52 to 6.56 above.

⁴⁴ A universal service obligation means that, where a customer requests the services of a provider, that provider is legally obliged to provide it, subject to various exceptions. Universal service obligations are found in the legislation governing the traditional utilities; for example, section 16 of the Electricity Act 1989 places an obligation upon electricity distributors to make a connection between its distribution system and any premises, where requested to do so by the owner or occupier of that premises. A list of exceptions to this obligation is contained in section 17 of the 1989 Act. Among Code Operators, BT and KCom (formerly Kingston Communications) do have a universal service obligation.

⁴⁵ See para 1.13 above.

⁴⁶ We mean this in the widest sense; where an operator installs a network intended only for business to business communications that network is nevertheless bringing a public benefit by facilitating the creation of jobs and growth.

⁴⁷ See para 6.43 above.

there are then four options, drawing upon the bases of valuation that we discussed at the beginning of this Part:

- (1) profit share or ransom;
- (2) market value;
- (3) market value assessed using compulsory acquisition principles; and
- (4) an uplift on compensation.

(1) PROFIT SHARE OR RANSOM

6.62 As we discussed above, we do not think that profit share provides an appropriate measure for assessing consideration. The Code provides for the compulsory acquisition of rights over private land, as does the legislation governing the traditional utilities such as gas, water and electricity, which is summarised in Appendix A to this Consultation Paper. Powers of compulsory acquisition are afforded only to persons pursuing schemes which are in some way in the public interest; in the light of this it would be counter-productive to allow those in possession of those powers (in this case Code Operators) to be held to ransom by landowners seeking to achieve a share of the profits. It would be unreasonably onerous to Code Operators, particularly as we understand that the need for certain apparatus, such as mobile cell sites, will proliferate in the future; and it would make the delivery of services to locations that are not economically viable more difficult and therefore unlikely to be achieved.

(2) MARKET VALUE

6.63 The second option that we have considered is market value. By this we mean that consideration could be assessed on the basis of the price that the Code Operator and the landowner would have willingly agreed in the market. It is hard to distinguish this from the approach to consideration taken in *Mercury*. One major difficulty with this measure – namely the lack of comparables – was outlined above; we have heard from valuers that it is extremely difficult to obtain comparables in the electronic communications sector.⁴⁸ There is also an argument that this method of assessing consideration is too onerous to Code Operators – it does not equate to profit share but it nevertheless results in an artificially high price being paid on the basis that the right is very valuable to the Code Operator. For these reasons we do not feel that this approach is workable.

(3) MARKET VALUE ASSESSED USING COMPULSORY PURCHASE PRINCIPLES

6.64 A third alternative is the view of the majority in *Bocardo* that, where a statute deals in substance with matters of compulsory acquisition, the valuation principles of compulsory acquisition law should apply. We are of the view that consideration could be assessed on the basis of the market value of the right, but without taking into account the value of the right to the Code Operator. The second rule contained in section 5 of the Land Compensation Act 1961 could be adapted for this purpose. This would mean that the price of, say, a right to run a fibre optic cable under private land would be assessed on the basis of the market

⁴⁸ See para 6.49 above.

value of that right, disregarding its value to the Code Operator and the scheme pursuant to which the right is being acquired.

- 6.65 As we noted above,⁴⁹ this approach begs the question: what is the scheme? If the “scheme” is only the acquisition plans of a particular Code Operator, then a price that disregarded only those plans would nevertheless have to take into account the price that any other Code Operator might pay. That might yield a very high figure for a site, or route, that was of geographical importance to the network. In other words, even if the reasons for the acquisition of the right by Operator A were disregarded, the landowner could point to the fact that (real or hypothetical) Operator B may be willing to pay a high price for the right. This would result in the artificial inflation of the value of the right in the no-scheme world by reference to another scheme which was not being disregarded.
- 6.66 That is not our intention in suggesting this possibility. Rather, we would exclude the value to the Code Operator and to any other Code Operator by treating the national electronic communications network as “the scheme” to be disregarded.
- 6.67 Like any other valuation method, of course, this approach requires comparables; its attraction lies in the fact that it disregards the importance of the transaction to the particular Code Operator. It would therefore yield a value lower than the *Mercury* basis, and would not require evidence of comparable deals involving Code Operators. Some rights are of course difficult to value on any market basis where there is little or no market for them and valuers are familiar with the idea of notional values for some rights.⁵⁰

(4) UPLIFT ON COMPENSATION

- 6.68 We rejected, in our discussion above,⁵¹ the idea of abandoning consideration altogether, leaving only compensation (which would of course reflect the diminution in the value of the land over which the right has been taken; see above).⁵² Such an approach would reduce greatly the amount payable to landowners in return for rights granted over their land. For example, where a right is acquired to run a fibre optic cable under agricultural land with no development prospects, the diminution in the value of the land over which the right has been taken is likely to be small, perhaps nil. This would result in little or no compensation being payable for the grant of the right (although compensation would still be available if, for instance, the land could not be farmed whilst the cable was being installed).
- 6.69 A compromise approach to the issue of consideration would be for a statutory uplift on compensation to be payable, to take into account the fact that the acquisition has taken place on a compulsory basis. There are precedents: section 3(2) of the Petroleum (Production) Act 1934 (now repealed) provided for a 10%

⁴⁹ See para 6.21 above.

⁵⁰ As we noted at para 6.55, n 42 above, the figure awarded by the Court of Appeal in *Bocado SA v Star Energy UK Onshore Ltd*, and upheld by the Supreme Court, included a nominal figure of £50 as “the standard compulsory purchase compensation paid for a deep tunnel”. See [2010] UKSC 35, [2011] 1 AC 380 at [86].

⁵¹ See paras 6.42 to 6.43 above.

⁵² See paras 6.7 to 6.10 above.

uplift in compensation to be awarded. Whether or not this reduced the sums currently payable to landowners would depend upon the level at which that uplift was fixed. It would be possible to make statutory provision for a minimum payment to be made even in cases where there is no ascertainable diminution in value, which would ensure that landowners continued to receive some form of payment in return for the grant of the right.

EVALUATING THE ALTERNATIVES

- 6.70 We have rejected the use of a profit share to assess consideration, and also of market value and of value assessed in accordance with the *Mercury* case. There appear to be two remaining options: the market value of the right assessed using compulsory purchase principles, or the provision of an uplift on the compensation (with the possibility of a minimum payment where the payment figure falls below a particular threshold) available for the diminution in value of the land over which the right is conferred.
- 6.71 Our preference is for the first of these options. We take the view that assessing consideration on the basis of the market value of the right, but discounting the value of the right to the Code Operator and the scheme underlying the transaction, strikes the right balance between giving a price to the landowner but not setting that price at a level which is unduly onerous for Code Operators.
- 6.72 However, we should like to hear from valuers about the impact of such a change. How difficult would such a valuation be? We would also appreciate consultees' views on the alternative, namely the provision of an uplift on the compensation for diminution in value of the land over which the right has been conferred, perhaps with a minimum payment figure even in cases where there is no clear diminution in value.
- 6.73 We provisionally propose that consideration for rights conferred under a revised code be assessed on the basis of their market value between a willing seller and a willing buyer, assessed using the second rule contained in section 5 of the Land Compensation Act 1961; without regard to their special value to the grantee or to any other Code Operator.**

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

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

Compensation and consideration: linear obstacles

- 6.75 Paragraph 13 of the Code makes provision for the award by an arbitrator of compensation and consideration where a Code Operator gives notice to a landowner that it wishes to exercise its right to cross a linear obstacle pursuant to paragraph 12.⁵³ The arbitrator may make an award of consideration in respect of

⁵³ We explain at paras 4.24 to 4.26 above the circumstances in which a matter can be referred to arbitration and the powers of the arbitrator when that happens.

the right to carry out works for the initial installation of the apparatus; the arbitrator may also make an award of compensation in respect of any loss or damage sustained by the person in control of the land on which the linear obstacle is situated⁵⁴ as a result of the Code Operator carrying out those works. Consideration under paragraph 13 falls to be assessed in the same manner as was discussed above, with the exception that consideration is awarded under paragraph 13 only in respect of the right to carry out the works, and not for the retention of the apparatus on the land.

6.76 For example, if a Code Operator applies to court for an order under paragraph 5 to give it the right to run a fibre optic cable through a conduit under agricultural land, the operator will have to pay consideration to the occupier of that land for the right to perform the works to install the cable and conduit and, importantly, to keep it there. If the operator subsequently wishes to run a second cable under the same land then, depending on the terms of the original order, another order under paragraph 5 may be required, and further consideration will be payable. In contrast, if the cable was being run under a linear obstacle, consideration would be payable only in relation to the works carried out to install the first cable and conduit. If, when a second cable is required under the linear obstacle, no further works are required because, for instance, the conduit now sited on the land can accommodate another cable, no further consideration will be payable.

6.77 This was the result reached by the Court of Appeal in *Geo Networks Ltd v The Bridgewater Canal Company Ltd*.⁵⁵ We do not question the Court of Appeal's construction of the wording of the Code, but we question the logic of the distinction made by the Code here. Where a Code Operator needs a right to lay cables that run along (but not across) a linear obstacle, paragraph 5 applies and consideration and compensation is assessed under paragraph 7 in the usual way. It is only when a right is required to cross a linear obstacle that the special provisions are applicable. This seems to be a rather arbitrary distinction.

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

Do consultees agree?

COMPENSATION AND EXPENSES: MINOR ISSUES

6.79 We discuss below two minor issues:

- (1) compensation for expenses incurred in lopping trees; and
- (2) a general discretion for the appropriate body to re-visit previous awards made for compensation and consideration.

⁵⁴ This unusual wording comes from the Code, para 12.

⁵⁵ [2010] EWCA Civ 1348, [2011] 1 WLR 1487.

The right to cut back vegetation

- 6.80 In Part 3 we requested consultees' views on whether the tree lopping provisions in the Code should be extended in a revised code to cover private land as well as streets, and whether they should be extended to other forms of vegetation.⁵⁶ If these proposals were put into effect the compensation provisions would have to be extended to cover private landowners who are required to cut back vegetation on their land.

A power to re-visit previous financial awards made under the Code

- 6.81 There is currently no provision in the Code which allows a court to re-visit previous financial awards made under the Code. But consider the following example.

A Code Operator wishes to acquire a 20-year right over part of X's land, to install a mast and other apparatus. X therefore applies to court for an order under paragraph 5. The court grants the order and includes, pursuant to paragraph 7, an award to X of consideration and compensation amounting to £50,000, which reflects the fact that X will not be able to use the relevant land for 20 years.

Two years later, X wishes to re-develop his land and applies to the court under paragraph 20 for an order to have the apparatus altered so as to remove it completely from his land. The application is successful and the Code Operator is ordered to remove the apparatus on X's land and instead install it upon Y's land.

Y may be paid compensation and consideration, as appropriate, under paragraph 20(5), and X is likely to have to pay the Code Operator's expenses incurred in relocating the apparatus under paragraph 20(8). But it is not clear that X can be compelled to repay any of the previous award of £50,000.

- 6.82 The example demonstrates that there is a case for a provision that enables the appropriate body to re-open awards of consideration in such circumstances.
- 6.83 **We provisionally propose that, where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid.**

Do consultees agree?

⁵⁶ See paras 3.70 to 3.74 above.

PART 7

TOWARDS A BETTER PROCEDURE

INTRODUCTION

- 7.1 It is clear to us from our discussions with stakeholders that the procedures associated with the Code are problematic. It takes too long to agree terms and to resolve disputes; disputes are resolved in various different forums, not all of which are appropriate in terms of expertise and of time taken; notice procedures are inconsistent; and there may be some more general problems of obtaining information.
- 7.2 Poor procedure, and in particular delay, is problematic not only for landowners and Code Operators but also for the public; delayed dispute resolution means that the provision of electronic communications services is delayed.
- 7.3 Our understanding from Code Operators is that their response to the poor procedures under the Code is not to use them; very few disputes are adjudicated because commercial pressures are such that Code Operators cannot take the time to go through them. That changes the balance of power in negotiations, because Code Operators can only use price as an incentive for landowners, without (in practical terms) being able to fall back on the Code procedures for compulsion. That in turn has an effect on pricing for consumers.
- 7.4 The problem of delay has a wider dimension. We noted in Part 2 that a Directive of the European Union requires that, where a competent authority considers an application for the granting of rights to install facilities on, over or under public or private property to Code Operators, it must act:
- ... on the basis of simple, efficient, transparent and publicly available procedures, applied ... without delay, and in any event [make] its decision within six months of the application, except in cases of expropriation ...¹
- 7.5 This requirement has been implemented by the Electronic Communications and Wireless Telegraphy Regulations 2011, which provides that where:
- (a) a person authorised to provide public electronic communications networks applies to a competent authority for the granting of rights to install facilities on, over or under public or private property for the purposes of such a network,
 - (b) a person authorised to provide electronic communications networks other than to the public applies to a competent authority for the granting of rights to install facilities on, over or under public property for the purposes of such a network, or

¹ Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the "Framework Directive"), art 11. See paras 2.18 to 2.22 above.

(c) a person applies to Ofcom for a direction applying the electronic communications code in the person's case

... the competent authority must² make its decision within 6 months of receiving the completed application.³

- 7.6 A revised code will address the rights and obligations between landowners and Code Operators. It cannot directly control the time taken over adjudication, but it should facilitate the better resolution of disputes, by appropriate procedures and by prescribing the right forum for adjudication.
- 7.7 Another way to address the time taken to resolve disputes is to ask: what is at stake? Our approach to consideration in Part 6 is, in part, driven by a need for more certainty; both landowners and Code Operators should be able to work out, with a reasonable degree of accuracy, what financial award would be made to the landowner if the matter were to be adjudicated; greater certainty about price should mean that there is less reason for delay. The Code Operator would be free to offer higher rates of consideration where timing was especially important.
- 7.8 This Part looks at procedure and forums. We discuss how the Code could be reformed to enable better procedures for negotiation and adjudication. We begin with adjudication as it is the most important of the three areas discussed here:
- (1) the forum for adjudication;
 - (2) notice procedures; and
 - (3) the possibility of standard terms.

THE FORUM FOR ADJUDICATION

The provisions of the Code

- 7.9 The Code specifies a number of forums for adjudication of the issues that can arise under it. The main forum is the county court,⁴ but a number of matters are dealt with elsewhere; usually by the Lands Chamber of the Upper Tribunal⁵ or arbitration, but occasionally by “any court of competent jurisdiction”.⁶
- 7.10 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

² Except in cases of expropriation – see reg 3(2).

³ The Electronic Communications and Wireless Telegraphy Regulations 2011, SI 2011 No 1210, reg 3.

⁴ In Scotland, the sheriff court.

⁵ We refer to the Lands Chamber of the Upper Tribunal as the “Lands Chamber” in the remainder of this Consultation Paper. The Scottish and Northern Irish equivalents to the Lands Chamber are the Lands Tribunal for Scotland and the Lands Tribunal for Northern Ireland.

⁶ The Code, paras 21(8), 23(5)(b) and 23(6)(b).

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 operator temporary rights so as to ensure that the operator's 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 to require the operator to alter or remove the apparatus.

7.11 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 Code, there is a diminution in value of a relevant interest in the land due to the security provisions of the Code, the operator is obliged to pay compensation under paragraph 4(4) of the Code.⁷ 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 operator must pay compensation under paragraph 16 of the Code.⁸ The amount of compensation is determined by the Lands Chamber.

7.12 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 Code.
- (2) In addition, where a landowner's agreement is dispensed with by the county court making an order under paragraph 5, 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.

7.13 A full description of the dispute resolution procedures in the Code can be found in Appendix C. The expectation seems to be that most disputes go to the county court, but that some merit specialist adjudication elsewhere. However, it is not easy to discern a consistent rationale. For example, arbitration is used in the majority of disputes that concern the crossing of a linear obstacle,⁹ but an application requiring the alteration of apparatus crossing a linear obstacle is referred to the county court.¹⁰ Disputes over sums payable are generally dealt

⁷ See paras 6.25(3) and 6.31 above.

⁸ See paras 6.25(4) and 6.31 to 6.32 above.

⁹ The Code, paras 12 and 13.

¹⁰ The Code, para 14.

with by the county court, but the Lands Chamber is the first port of call in some specific circumstances such as where there is a claim for injurious affection.¹¹

- 7.14 Moreover, questions have been raised over whether the county court is the right forum for disputes involving valuation. In *Mercury Communications Ltd v London and India Dock Investments Ltd*,¹² HHJ Hague QC criticised the use of the county courts for disputes under paragraphs 5 and 7 of the Code. He noted that the case before him had placed a considerable administrative burden on the court:

“The court” is defined by paragraph 1 of the Code as meaning the county court. Presumably Parliament thought that cases under the Code would be relatively straightforward and could be accommodated in the normal county court listings without difficulty. The hearing before me extended over seven full days. The papers are contained in eight lever-arch files, some of them quite bulky. As well as considering the several reports from each expert and hearing their oral evidence, I have read statements from seven other persons and four of them also gave oral evidence. Counsel made their submissions to me with economy, but their written outline submissions together covered 60 pages.¹³

- 7.15 He also commented on the adjudication of valuation issues:

Further, the valuation issues which I have considered are of the kind which are familiar to the Lands Tribunal, but not to most county court judges.¹⁴

- 7.16 We have also heard anecdotal evidence from practitioners that proceedings in the county court on Code matters can be slow, as judges are unfamiliar with the Code.

Options for reform

The forum for disputes

- 7.17 Given these difficulties with the use of the county court, and the general dissatisfaction with the time taken over adjudication, we have to ask whether a revised code should make different provision for adjudication.
- 7.18 Two options for reform present themselves. One is for a revised code to prescribe the Lands Chamber as the forum for all or most¹⁵ questions, in the light of its expertise on valuation matters. It also has the relevant legal expertise; we noted in our report *Making Land Work: Easements, Covenants and Profits à*

¹¹ The Code, para 16.

¹² (1995) 69 P & CR 135.

¹³ *Mercury Communications Ltd v London and India Dock Investments Ltd* (1995) 69 P & CR 135, 142.

¹⁴ *Mercury Communications Ltd v London and India Dock Investments Ltd* (1995) 69 P & CR 135, 142.

¹⁵ We say “most” because there may be issues that could more appropriately be dealt with by an expert arbitrator.

Prendre¹⁶ that the Lands Chamber differs from its former incarnation as the Lands Tribunal. Today, all judges (except Justices of the Supreme Court) including High Court judges are also now judges of the Upper Tribunal,¹⁷ and so the Lands Chamber has the ability to call upon judges with the relevant expertise to sit in particular cases as necessary. At the stakeholders' meeting we held in March 2012¹⁸ there was a significant consensus that the Lands Chamber would be best placed to hear disputes under the Code.

7.19 Of course, this solution presents its own challenges. In particular, the Lands Chamber would potentially be faced with a higher volume of cases.

7.20 We have discussed this option for reform with the President of the Lands Chamber. He has expressed to us the view that there is:

... obvious merit in sorting out all these confusing procedures and having a single recipient for all disputes under the code. The Lands Chamber would be the only possible tribunal for this purpose, and ... it has the necessary expertise.

A new First-tier chamber, the Property Chamber, will come into existence in 2013, and the Valuation Tribunal will be incorporated into it in 2014. Accordingly, the President notes:

The Property Chamber could well be the appropriate recipient of smaller disputes under the Electronic Communications Code.

7.21 We have also discussed this option with the President of the Lands Tribunal for Scotland, which is the Scottish equivalent of the Lands Chamber. He has indicated that the Lands Tribunal for Scotland would, at least in theory, be a suitable forum for resolution of issues arising under the Code. The President has noted, however, that any change would need to be worked out in the light of the conclusions of the current review of the tribunal system in Scotland. It would, for example, be necessary to consider issues relating to judicial staffing.

7.22 Another option that has been suggested to us could be to prescribe the Lands Chamber as the forum for deciding the conferral of code rights but, where the only dispute is over the amount payable for the rights, this could be decided by using an extended or adapted version of the current procedure used for party wall disputes.

7.23 The party wall dispute resolution procedure is contained in section 10 of the Party Wall etc Act 1996¹⁹ 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

¹⁶ (2011) Law Com No 327, para 7.48.

¹⁷ Tribunals, Courts and Enforcement Act 2007, s 6.

¹⁸ See para 1.22 above.

¹⁹ For which there is no equivalent in Scotland or Northern Ireland.

the scope of his or her authority under the Act. Appeal of the surveyor's award lies to the county court.

- 7.24 A procedure similar to this could be utilised in a revised code, particularly where the only issue is the amount of compensation payable. The parties could agree to jointly instruct a valuer, potentially from an approved list, or each instruct their own who could then together instruct an independent valuer. That valuer could then make an award on the amount payable under a revised code, which could (if necessary) be appealed to the Lands Chamber (or the Property Chamber of the First-tier Tribunal).
- 7.25 The benefit in this option is its speed and the expertise it brings. While the Lands Chamber or Property Chamber will obviously have the relevant expertise to quantify the amount payable under a revised code, we are mindful that moving all code disputes to the Tribunals system could cause delay problems of its own. Utilising an alternative dispute resolution method such as this would go some way to alleviating these concerns.
- 7.26 We provisionally propose that a revised code should no longer specify the county court as the forum for most disputes.**

Do consultees agree?

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

The procedure for dispute resolution

- 7.28 Disputes over the grant of code rights may be about the Code Operator's entitlement to the rights – applying the test currently found in paragraph 5²⁰ – or it may be about the financial terms on which rights are granted. Where the only dispute is about financial terms, the operator's access to land may be delayed unnecessarily.
- 7.29 We note that section 159(4) of the Water Industry Act 1991 states that the power of water undertakers to lay, maintain, repair and so on a pipe over private land can be exercised after notice has been given to the landowner, without prior adjudication of the right to take access. We take the view that it would not be right to give that facility to Code Operators. However, it has been suggested to us that delay could be mitigated if adjudication procedures enabled Code Operators to apply for early access to land pending resolution of any dispute over financial terms.

²⁰ See para 3.41 and following above.

7.30 That would involve provision for a two-stage hearing so that the appropriate body would consider first the need for, and scope of a right and who it should bind, but defer consideration of any financial award until a later hearing; that would enable the appropriate body to order, or the landowner and/or occupier to concede, that a right should be given, but not the sum that should be payable for it.

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

Do consultees agree?

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

Costs

7.33 We now consider which party should pay the legal costs where a case is adjudicated under the Code.²¹

7.34 The Lands Chamber's general rule is that claimants whose land is compulsorily acquired are awarded their costs as long as they have delivered a notice of claim to the acquiring authority.²² However, the general rule will not apply where the claimant's conduct has unnecessarily increased the costs incurred by the authority.²³ The Lands Chamber also has the general right to order one party to pay the other's "wasted costs". These include any costs which the Lands Chamber holds that it would be unreasonable to require the other party to pay.²⁴

7.35 Similarly, a revised code could provide that the costs of dispensing with agreement for the creation of code rights would always be paid by Code Operators. That approach could encourage landowners to litigate rather than to reach an agreement with operators; litigation would become a relatively risk-free option, although rules similar to those currently used by the Lands Chamber could shift unnecessarily incurred or wasted costs onto the party whose actions caused them.

7.36 The other option would be for costs to "follow the case": that is, to be paid by the party who loses the case, which might be more appropriate where the dispute does not relate to the compulsory acquisition of a right, or the exercise of a power by a Code Operator. It would give greater bargaining power to operators where a landowner does not have significant funds available and the outcome of the case is uncertain; but it could be seen as giving parties an increased incentive to settle without recourse to expensive litigation.

²¹ We make one other context-specific reference to costs at para 5.37 above. We consider costs generally in this Part.

²² However, if the authority has made an admissible offer of compensation which is higher than the Lands Chamber's award, the claimant will normally be ordered to pay the authority's costs incurred after the date of the offer.

²³ See the Lands Chamber, *Explanatory Leaflet: A Guide For Users*, p 21, available at <http://www.justice.gov.uk/downloads/tribunals/lands/forms-and-guidance/ExplanatoryLeaflet.pdf> (last visited 19 June 2012).

²⁴ See the Lands Chamber, *Explanatory Leaflet: A Guide For Users*, p 12.

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

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

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

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

NOTICE PROCEDURES

The notice provisions in the Code

7.39 Currently, many procedural aspects of the Code – for example the process followed to dispense with an occupier's or landowner's agreement to the conferral of a right – are dealt with using a notice procedure. These procedures vary as to detail, but follow a broadly similar structure: one party is required to serve a notice on the other before it can carry out a particular act or obtain a particular right, and the other is given a set period in which a response can be made. Sometimes, the response can be to serve a counter-notice on the person who issued the original notice. The response, or lack of it, determines what further action can be taken by the notifying party.

7.40 Procedures therefore follow two patterns.

Example 1: No option of a counter-notice: Paragraph 5

7.41 A straightforward example is found in paragraph 5 of the Code. Paragraph 5 sets out the notice procedure to be followed where a Code Operator requires any person to agree for the purposes of paragraph 2 or 3 that any right should be conferred on the operator, or that any right should bind that person or any interest in land. The procedure is as follows.

(1) The operator gives a notice to the person, specifying the right and the agreement which the operator requires.

(2) After 28 days, if the person notified has not granted the required right, the operator can apply to the court for an order conferring the proposed right, or providing for it to bind the relevant person or interest. The court's order dispenses with the need for the notified person's agreement.

7.42 In this example, the person notified does not have to issue a counter-notice to the paragraph 5 notice.

Example 2: Notice and counter-notice: Paragraph 21

7.43 Paragraph 21 contains a notice and counter-notice procedure where a person who is entitled to require the removal of a Code Operator's apparatus from land in which that person has an interest wishes to enforce the removal. The steps are as follows.

- (1) The person seeking removal issues a notice to the operator requiring removal.
- (2) The operator then has 28 days in which to issue a counter-notice. If the operator does so, removal can only be enforced in accordance with a court order. The Code Operator's counter-notice must set out either why the landowner is not entitled to enforce removal, or what steps the operator proposes to take under paragraph 5 to acquire a right against the landowner to remain on the land.
- (3) Where the operator has issued a counter-notice within the allotted time, paragraph 21(6) provides that the court can only make an order for removal in certain limited circumstances.

7.44 More than one notice procedure may therefore operate concurrently – the operator might be seeking a right to remain under paragraph 5 whilst the landowner seeks removal under paragraph 21.

7.45 Paragraph 24(1) of the Code requires operators to use forms of notice approved by Ofcom.²⁵ They must be “adequate for indicating to [the recipient] the effect of the notice and of so much of [the Code] as is relevant to the notice and to the steps that may be taken by [the recipient] under [the Code] in respect of that notice.” The objective is that landowners are properly informed about the effect of notices received.²⁶

7.46 The need for information may be particularly acute because code rights can bind people who have not agreed to them, either because of the operation of paragraph 2(3) of the Code,²⁷ or because code rights were conferred or agreed to by a predecessor in title.²⁸ Landowners may have no idea what rights they are subject to, nor who owns the apparatus on their land. There is no central register for Code Operators' apparatus,²⁹ and not all code rights are registered at the Land Registry even where they constitute registrable interests (which is the case only for leases of over seven years³⁰ and for easements).³¹

²⁵ Paragraph 24(1) refers to “any notice required to be given by the operator”, which we take to refer to all instances in which the Code contemplates an operator giving a notice.

²⁶ See, for example, the explanatory notes to the notice prepared by Ofcom to be used where a right is required pursuant to paragraph 5(1) of the Code, available at http://stakeholders.ofcom.org.uk/binaries/telecoms/cop/5_1_2.doc (last visited 19 June 2012). Other model notices are available on Ofcom's website at <http://stakeholders.ofcom.org.uk/telecoms/policy/electronic-comm-code/notices/models> (last visited 19 June 2012).

²⁷ See para 3.36 above.

²⁸ See para 3.35(3) to (5) above.

²⁹ We note that Code Operators are required to make available for inspection records of the location of their infrastructure installed in highways. However, there is no corresponding provision for private land; see para 9.37 below.

³⁰ In Scotland, a lease must be for a term of over 20 years to be a registrable interest.

³¹ See paras 8.23 to 8.28 below.

Notice provisions in a revised code

- 7.47 We have already provisionally proposed that a revised code should incorporate procedural mechanisms that are based on notice (and, sometimes, counter-notice) procedures. We have highlighted the potential for a change in procedure where a landowner requires a Code Operator to remove its apparatus.³² But overall, notice procedures under a revised code must follow the pattern of one of the examples given above. A revised code should provide standardised notice procedures, rather than setting out the procedure separately for each type of negotiation. The Code also makes provision in paragraph 24 for service of notices, by registered or recorded delivery or by fixing notices to land, and a revised code must do the same.
- 7.48 Is anything needed to improve notice procedures? It has been suggested to us that landowners too should be required to use standard form notices; that single notices might cover multiple sites owned by the same landowner, and that more or better quality information should be available to landowners.
- 7.49 The forms of notice produced by Ofcom in fact contain detailed information, together with a warning that the landowner should take legal advice. It is not clear to us that further regulation is desirable here. We would be interested to hear suggestions from consultees as to whether additional information is needed, or whether any form of “information pack” might be produced for landowners when a Code Operator makes initial contact.
- 7.50 However, to force landowners to use a standard form of notice is unrealistic and will only increase the burdens which landowners currently face in seeking to understand and exercise their rights under the Code. We note that Code Operators sometimes have difficulties in assessing whether or not a letter, for example, amounts to a counter-notice; but we think that Code Operators are adequately resourced to consider, categorise and respond to correspondence in an appropriate manner.
- 7.51 We do not think that the forms of notice available to Code Operators are insufficiently flexible, nor that the use of one form for several areas of land would be appropriate. However, we ask consultees to give us their views about this.
- 7.52 We provisionally propose that a revised code should prescribe consistent notice procedures – with and without counter-notices where appropriate – and should set out rules for service.**

Do consultees agree?

- 7.53 Do consultees consider that the forms of notices available to Code Operators could be improved? If so, how?**
- 7.54 Do consultees consider that more information is needed for landowners? If so, what is required and how should it be provided?**

³² See paras 5.36 to 5.38 and 5.49 above.

THE FORM OF CODE RIGHTS – STANDARD TERMS

- 7.55 It has been suggested to us that standard form agreements, or terms, would assist in delivering rights more quickly. Whether this would be the case would depend upon how such agreements or terms were produced, and on whether their use was mandatory or they were simply available as a precedent.
- 7.56 Standard terms could cover, for example, obligations to maintain adequate insurance against damage caused to the landowner's property and to keep apparatus in good repair.
- 7.57 Standard terms could be set out in a revised code, or a revised code could make provision for the production of standard terms by a specified body, for example by Ofcom. There would have to be provision for the standard form to be reviewed from time to time.
- 7.58 In practice the rights required, and the conditions on which they are conferred, will depend on numerous factors, including the nature of the technology that the Code Operator plans to install, the physical characteristics of the site and the importance of the apparatus to the Code Operator's network (including any anticipated future use). Mandatory agreements could not deal satisfactorily with every situation that arises in practice, and we are not convinced that even carefully selected individual terms – for example, for insurance – would be adequate for all or most situations.
- 7.59 So it is not practicable to propose mandatory forms of agreement. But a voluntary form could give a starting point for negotiations and there would be sufficient flexibility to cater for individual circumstances. There is scope for those involved in the electronic communications industry to work together to agree model agreements. For example, we are aware of the work done by the Country Land and Business Association and the National Farmers' Union with BT Openreach to produce a memorandum of understanding and agreed form of wayleave agreement.
- 7.60 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms.**

PART 8

INTERACTION WITH OTHER REGIMES

INTRODUCTION

8.1 The Code governs the relationship between landowners, occupiers and Code Operators. It works alongside other statutory regimes; for example town and country planning. Planning issues that relate to the installation of electronic communications apparatus are not the subject matter of this project. But there are two instances where problems caused specifically by the Code's interaction with other regimes fall within the scope of our consultation. These are:

- (1) the security of tenure regime for business tenants contained in the Landlord and Tenant Act 1954; and
- (2) the requirement contained in the Land Registration Act 2002 to register certain estates and interests at Land Registry.

We consider each of these below.

LANDLORD AND TENANT ACT 1954, PART 2

8.2 A Code Operator may acquire the right to place apparatus on a piece of land or a building by entering into a lease. Unless the parties have contracted out, such a lease will fall within the protection of the statutory provisions contained in Part 2 of the Landlord and Tenant Act 1954 ("the 1954 Act"), on the basis that the Code Operator is occupying the property for the purpose of carrying on a business.¹ These provisions protect the tenant against the landlord obtaining possession at the end of the lease unless one of the specified grounds for termination is shown. Otherwise, the tenancy continues and the court has the power to determine the terms of a new tenancy between the parties, in default of agreement.

8.3 If the parties are in agreement, it is straightforward for them to contract out of these provisions by the landlord serving the appropriate notice on the tenant.² If they have not done so, it appears that the protections offered by the Code and by the 1954 Act apply concurrently.

8.4 If the lease is not contracted out, then in order to terminate a business tenancy in accordance with Part 2 of the 1954 Act the landlord must give notice to the tenant under section 25 of the Act, stating a termination date. This cannot be used to bring the lease to an end prematurely.³ The notice must generally be given

¹ The issues discussed in this section are not relevant to Scotland, as Scotland has no equivalent to Part 2 of the Landlord and Tenant Act 1954. The Northern Irish equivalent of Part 2 of the 1954 Act is the Business Tenancies (Northern Ireland) Order 1996, SR 1996 No 725. We consider that the issues discussed in this section are also relevant to Northern Ireland.

² Landlord and Tenant Act 1954, s 38A; the form specified for the notice, and the requirements to be met in relation to it, are set out in schedules 1 to 4 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003 No 3096.

³ See the Landlord and Tenant Act 1954, s 25(3) and (4).

between six and twelve months in advance of the stated termination date.⁴ The tenant may then respond to the notice by applying to the court for the grant of a new tenancy.⁵

- 8.5 Such a notice may be given when the landlord is content for a new tenancy to be granted, but wishes to renegotiate the terms (for example, the rent). However, if the landlord wishes to remove the tenant from possession altogether, the landlord must rely upon one of the seven possible grounds of opposition set out in section 30 of the 1954 Act.⁶
- 8.6 The first three are concerned with the tenant's breach of obligations under the lease (such as delay in paying rent). The landlord can also oppose the grant of a new tenancy of the original property on the basis that the landlord offers the tenant suitable alternative accommodation on reasonable terms.⁷ Another ground is that the property let to the tenant is part of larger premises which the landlord itself is holding under a lease, and the landlord could obtain a substantially higher rent by sub-letting those larger premises as a whole (section 30(1)(e)).
- 8.7 The final two grounds depend on the landlord's intention in relation to the property. Section 30(1)(f) applies where the landlord intends to demolish or reconstruct the property which is subject to the lease (or a substantial part of that property), or to carry out substantial works of construction on that property or part of it which cannot reasonably be carried out without obtaining possession.⁸ Section 30(1)(g) applies where the landlord intends to occupy the property for the purposes (or partly for the purposes) of a business which the landlord will carry on, or as the landlord's residence.⁹
- 8.8 Where the landlord successfully opposes the grant of a new tenancy under paragraph (e), (f) or (g) of section 30(1), the tenant is entitled to compensation under section 37 of the 1954 Act.

Interaction with code rights

- 8.9 A Code Operator who is a business tenant may therefore be protected by two sets of provisions: Part 2 of the 1954 Act, and paragraphs 20 and 21 of the Code. This gives rise to complications, in particular because the two regimes are not compatibly drafted.
- 8.10 First, there are different notice requirements. Section 25 of the 1954 Act requires that the landlord's notice is served within a specified period before the proposed

⁴ Landlord and Tenant Act 1954, s 25(2). The period may be longer depending on when a landlord could have otherwise given notice: see s 25(3)(b).

⁵ Landlord and Tenant Act 1954, s 24(1). The application must usually be made on or before the termination date: s 29A.

⁶ The same position may be reached if instead the tenant gives notice requesting a new tenancy (Landlord and Tenant Act 1954, s 26). The landlord may within two months give a counter-notice that an application to the court for the grant of a new tenancy will be opposed, specifying the ground of opposition in section 30 (s 26(6)).

⁷ Landlord and Tenant Act 1954, s 30(1)(a) to (d).

⁸ See the Landlord and Tenant Act 1954, s 31A.

⁹ This is subject to a condition as to the duration of the landlord's interest in the land: Landlord and Tenant Act 1954, s 30(2).

termination date, and the tenant does not have to give any counter-notice in order for the tenancy to continue. Under paragraph 21 of the Code, it appears that the landlord's notice cannot be served until the term of the lease has ended; in relation to paragraph 20, there are no special provisions as to timing of the notice. The Code Operator must also serve a counter-notice in order to avoid being required to remove the apparatus.

- 8.11 The grounds on which the landlord may recover possession of the land are also different. Under the Code, the landlord may press for removal of the apparatus either because he or she proposes to improve the land,¹⁰ or on the basis that the lease has ended so the landlord is entitled to require the removal of the apparatus.¹¹ Under section 30 of the 1954 Act there are seven possible grounds of opposition to the grant of a new lease. Some overlap is apparent between the ground of opposition at section 30(1)(f) and paragraph 20 of the Code. Section 30(1)(f) of the 1954 Act refers to the landlord's intention "to demolish or reconstruct the premises" or "to carry out substantial work of construction" which cannot reasonably be done without obtaining possession. Paragraph 20 is concerned with alteration (including removal) of apparatus which is necessary to enable the landlord "to carry out a proposed improvement of the land in which he has an interest"; "improvement" includes development and change of use.¹² However, the tests do not map onto each other, so a proposed re-development may fall within section 30(1)(f) and not within paragraph 20, and vice versa.
- 8.12 In order for the landlord to serve a notice under paragraph 21, the lease must already have ended. However, a tenancy which is protected by Part 2 of the 1954 Act may only be terminated in accordance with that Act. This can give rise to a particularly acute problem with the interaction of the provisions.
- 8.13 Suppose that A, a landowner, has leased land to Code Operator B, who has placed apparatus there; the lease is now coming to an end and A wishes to have the apparatus removed. Logically, in order to terminate B's lease, and therefore put himself in a position to serve a paragraph 21 notice, A would expect to take proceedings under the 1954 Act first.
- 8.14 If A is invoking, for example, B's delay in paying rent to oppose the grant of a new lease, this should be unproblematic. But it is more likely in practice that A will have to rely on the grounds in section 30(1) of the 1954 Act which relate to his intention to carry out work on the property within paragraph (f), or to occupy the property within paragraph (g). However, the case law on section 30 establishes that in order to oppose the grant of a new tenancy to B under paragraph (f) or (g), A must be able to show not only a subjective intention to take the relevant action, but a reasonable prospect that he can carry out the action he has decided on.¹³

¹⁰ The Code, para 20(1); see paras 5.2 to 5.8 above.

¹¹ The Code, para 21; see paras 5.23 to 5.28 above.

¹² The Code, para 20(9).

¹³ See, for example, *Gregson v Cyril Lord Ltd* [1963] 1 WLR 41. In *Westminster City Council v British Waterways Board* [1985] AC 676 there was uncertainty as to whether planning permission could be obtained for the landlord's proposed works. The House of Lords held that the test was whether a reasonable person, shown the available evidence, would think that there was a reasonable prospect that the landlord would obtain planning permission.

- 8.15 However, it may be difficult for A to show that he has the requisite intention, because the provisions of paragraph 21 of the Code restricting A's ability to require the removal of B's apparatus affect A's prospects of success.¹⁴ It has been argued that, in order to escape this anomaly, it is necessary to construe paragraph 21 of the Code in such a way that A is entitled to "require the removal of [B's apparatus]"¹⁵ and give notice under the Code when he has grounds to oppose the renewal of B's lease under Part 2 of the 1954 Act.¹⁶ However, given that A will not necessarily succeed in doing so, this is not a natural construction of the wording.
- 8.16 If A intends to re-develop the property, and can rely on paragraph 20 of the Code instead, this may be more appropriate since there is no particular timing requirement for the giving of the notice. It may, however, be less attractive to A because he may not be able to obtain an order under paragraph 20(4), and under paragraph 20(8) will be required to reimburse B for expenses, unless the court otherwise thinks fit. This should shortcut the problem described above (although if A is not yet entitled to give notice under the 1954 Act, it is not clear what weight the fact that B's lease is ongoing would have on the court's decision under paragraph 20).
- 8.17 In the usual case, A would intend the removal of the apparatus to coincide with the termination of B's lease. He would therefore give both the notice under paragraph 20 of the Code, and the notice under section 25 of the 1954 Act (relying on the ground at section 30(1)(f)).¹⁷ It has been suggested that the two sets of proceedings should be heard together, or that an order under paragraph 20 should only be made conditionally on successful termination of B's lease under the 1954 Act.¹⁸ If A is able to obtain a paragraph 20 order and enforce the removal of B's apparatus first, there is an argument that B no longer occupies the land for business purposes, so B's tenancy would no longer be protected by Part 2 of the 1954 Act and would come to an end in accordance with its terms.

¹⁴ See, for example, G Healey, "Landlords of telecommunications operators beware" (2011) *Woodfall Landlord & Tenant Bulletin* 1, p 3; D Margolin, "The Electronic Communications Code – an introduction for property litigators" (2011) para 57, available at http://www.pla.org.uk/_data/assets/pdf_file/0009/97749/NotesMARGOLINweb.pdf (last visited 19 June 2012); J Small and O Radley-Gardner, "Look behind the mast" (2007) 0704 *Estates Gazette* 179, 180.

¹⁵ The Code, para 21(1).

¹⁶ O Radley-Gardner, "Some things you might not know about the Electronic Communications Code, but were too busy to ask", a talk to Dickinson Dees, 15 July 2010, para 23, available online at: http://www.falcon-chambers.com/uploads/docs/section9/Some_Things_You_Might_Not_Know_About_the_Electronic_Communications_Code.pdf (last visited 19 June 2012).

¹⁷ It has been suggested to us that in practice a section 25 notice relying on section 30(1)(f) of the 1954 Act is taken as notice under paragraph 20 of the Code, but it is not clear that this is technically correct. Wayne Clark, "36th Annual Series Blundell Lectures – Property Problems Under the Electronic Communications Code" delivered on 29 June 2011 at the Royal College of Surgeons of England, London, p 26, para 49.

¹⁸ Wayne Clark, "36th Annual Series Blundell Lectures – Property Problems Under the Electronic Communications Code" delivered on 29 June 2011 at the Royal College of Surgeons of England, London, p 27, para 50.

Discussion

- 8.18 The existence of two regimes protecting a Code Operator who holds a lease for the purpose of placing apparatus on land clearly gives rise to difficulties and uncertainties. These are not simply procedural, although the existence of two sets of notice procedures is undesirable. Because there is little congruence between the grounds on which the landlord may seek to terminate the tenant's rights, the substantive balance struck by the law between the rights of the Code Operator and of the landlord is affected. A landowner will potentially find it much more difficult to obtain possession as against a Code Operator who is a tenant, due to the need to work through both layers of protection.
- 8.19 We note that tenancies which are entered into primarily in order to place electronic communications apparatus on land or buildings are not typical of business tenancies and are not necessarily what the 1954 Act was originally intended to protect. The original aim of the Act was, rather, to protect someone who had built up goodwill for a business based on its location at a particular premises, in particular from being forced out by demands for a ransom rent at the end of the contractual term.¹⁹ The grounds for opposing the renewal of a lease were therefore not drawn up in the context of the issues raised by leases for Code protected apparatus.²⁰ Code Operators already have the protection of a specialised scheme under the Code for rights to place apparatus on land; we consider that it is unnecessary to overlay this with Part 2 of the 1954 Act. Indeed current practice appears to reflect this view: we understand that it is common for leases for apparatus to be contracted out of the 1954 Act.²¹
- 8.20 We therefore consider that where a Code Operator leases land for the placement and use of electronic communications apparatus it should be protected by the provisions of the Code; the 1954 Act should not apply.
- 8.21 However, as we have explained above, a Code Operator may have the Code applied to it at any time;²² so a non-Code operator may take a lease of a mast site with the benefit of the security provisions in the 1954 Act, but then have the Code applied to it. The security provisions of Part 2 of the 1954 Act benefit a tenant where premises:

... are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes.²³

¹⁹ M Haley, "Contracting out and the Landlord and Tenant Act 1954: the ascendancy of market forces" (2008) *Conveyancer and Property Lawyer* 281.

²⁰ For example, the terms of section 30(1)(g) of the 1954 Act are not clear as to whether a landlord can seek to oppose renewal of a Code Operator's lease of a site on the roof of a building on the grounds that he intends to occupy the holding for the purposes of a business to be carried on "therein", even if he himself intends to place apparatus on the roof. Wayne Clark, "36th Annual Series Blundell Lectures – Property Problems Under the Electronic Communications Code" delivered on 29 June 2011 at the Royal College of Surgeons of England, London, pp 32 to 34.

²¹ See, for example, N Dunn, "Smooth Operators" (2009) 153(36) *Solicitors Journal* 11, where it is explained that "it is paramount from the site provider's perspective to ensure that any lease is contracted outside the Landlord and Tenant Act 1954".

²² See paras 5.52 and 5.53 above.

²³ The 1954 Act, s 23(1).

The test is not one that is undertaken only at the start of the lease, rather there must be a “thread of continuity of business user”.²⁴ We think that the simplest approach is to ensure that where a Code Operator occupies land for the purposes of installing and using electronic communications apparatus then, even if the benefit of the security of tenure provisions in the 1954 Act would otherwise apply, for the purposes of the 1954 Act the premises should be deemed not to be occupied for the purposes of a business.

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

Do consultees agree?

LAND REGISTRATION ACT 2002

8.23 The Land Registration Act 2002 (“LRA 2002”) provides for the compulsory registration at the Land Registry of specified estates and interests in land.²⁵ These include freehold and leasehold estates (where there is more than seven years of the term left to run at the time of creation or transfer) and easements (where the title to the dominant land is registered).

8.24 We have noted above that an agreement conferring a right on a Code Operator may, in some cases, create an easement or a lease. For example, a ten-year agreement for a mast site that gives a right for a Code Operator to erect a fence and exclude others from the land, in return for the Code Operator paying a sum of money each year, is likely to create a lease – whether or not it is expressed to be a lease.²⁶ The conferral of a right by the owner of a private road to lay a subterranean fibre optic cable across it so that a Code Operator’s data centre on one side of the road and its mast on the other benefit from it may amount to an easement.

8.25 If the grant of a registrable lease or easement is not registered, it will fail to take effect at law. That means both that its validity is not guaranteed by the register²⁷ and that its priority may be postponed to a later disposition for value.²⁸ This language is technical and an example will help:

²⁴ See, for example, *Aspinall Finance Ltd v Viscount Chelsea* [1989] 09 EG 77.

²⁵ The Northern Irish equivalent of the 2002 Act is the Land Registration Act (Northern Ireland) Act 1970. The Scottish equivalent is currently the Land Registration (Scotland) Act 1979 (see, however, the Land Registration etc (Scotland) Bill passed by the Scottish Parliament on 31 May 2012, based on the Scottish Law Commission’s Report on Land Registration (2010) Scot Law Com No 222 and the draft Bill annexed to it). As to the registration of servitudes in Scotland, see also the Title Conditions (Scotland) Act 2003, s 75. We note that some provisions of the Northern Irish and Scottish land registration schemes differ from those in England and Wales – for example, under s 2 of the Land Registration (Scotland) Act 1979, leases are only registrable if they are for a term of over 20 years. These differences do not affect our recommendation at para 8.33 below.

²⁶ *Street v Mountford* [1985] AC 809. For the law in Scotland, compare *Brador Properties Ltd v British Telecommunications plc* 1992 SLT 490.

²⁷ Section 58 of the LRA 2002 will not take effect.

²⁸ LRA 2002, s 29.

If a freehold owner, A, grants to her neighbour, B, a right of way over her property (the title to which is registered) for the benefit of B's property (the title to which is also registered), then an application must be made by one of them to register the benefit of the right on the title to B's property and note the burden of the right on the title to A's property. If this is not done then the disposition – the grant of the easement by A – is said not to have been completed; it then becomes vulnerable to later dispositions by A. If A sells her land to C, then B cannot enforce the right of way against C; the priority of B's easement is postponed to C's interest in the burdened land.

8.26 Moreover, if the transfer of a lease is not registered, the transfer will fail to take effect at law (and, again, the transferee's interest will not be properly protected by the register's guarantee of validity and its priority may be postponed to a later disposition).

8.27 There is a further purpose to registration, namely publicity; when a right is registered, it is visible to all who search the register. In the absence of any possibility of a universal register of code rights, the ability to discover the existence at least of those registrable at Land Registry is invaluable to purchasers and to lenders. It is the Law Commission's policy that "the register should be as complete and accurate a record of information relevant to the title of a particular estate in the land as is possible".²⁹

8.28 The Code makes the requirements and effects of the LRA 2002 unclear. It does so in two ways:

- (1) it provides for its own mechanism for the enforceability and priority of rights that are conferred under the Code; and
- (2) it contains a provision that casts doubt on whether, even if the agreement conferring a right is one that would ordinarily be registrable (in our case a lease or an easement), the LRA 2002 provisions apply at all:

It is hereby declared that [a right set out in paragraph 2(1) of the Code] is not subject to the provisions of any enactment requiring the registration of interests in, charges on or other obligations affecting land.³⁰

8.29 We have already asked consultees for their view on the range of persons against whom a right conferred under the Code should be enforceable.³¹ We think that a revised code must set out clearly who is bound, and that that provision must apply regardless of whether the agreement that confers it is one that requires registration under the LRA 2002.

²⁹ Property Law: Third Report on Land Registration (1987) Law Com No 158, para 4.13; see also Land Registration for the Twenty-First Century: A Conveyancing Revolution (2001) Law Com No 271, para 1.14.

³⁰ The Code, para 2(7). It is unclear to what extent this provision applies. The focus is on the right created, rather than the agreement by which it is created; if a lease contains other obligations then is the lease as a whole registrable? What if the provisions in the lease are only ancillary to the right?

³¹ See para 3.40 above.

- 8.30 But the other effects of registration, namely the guarantee of title and the provision of a public record of rights, are unaffected by the Code.
- 8.31 We do not think that it should be debatable whether a right conferred by way of a lease or easement should, itself, be registrable.
- 8.32 A revised code should make it clear that its provisions as to who is bound by code rights prevail over those in any other enactment. Subject to that, the code should have no effect on the land registration legislation; registrable leases and easements remain registrable. The result is a hybrid situation where Code Operators may fail to register leases and will not be subject to any particular sanction for failing to do so, since they are protected by the priority provisions in the code in any event. We do not see that this can be avoided, although we are open to suggestions from consultees.
- 8.33 We provisionally propose that, where an agreement conferring a right on a Code Operator also creates an interest in land of a type that is ordinarily registrable under the land registration legislation, the interest created by the agreement should be registrable in accordance with the provisions of the land registration legislation, but that a revised code should make it clear that its provisions as to who is bound by the interest prevail over those of the land registration legislation.**

Do consultees agree?

PART 9

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

INTRODUCTION

- 9.1 In this Part we consider the 2003 Regulations. We deal with these separately because, unlike the provisions of the Code discussed in the preceding Parts of this Consultation Paper, the 2003 Regulations do not relate to the legal rights and obligations between Code Operators and private landowners. Instead, 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.
- 9.2 In this Part we consider:
- (1) the legal background to the 2003 Regulations;
 - (2) regulation 16: funds for meeting liabilities; and
 - (3) the rest of the 2003 Regulations.

THE LEGAL BACKGROUND TO THE 2003 REGULATIONS

- 9.3 The 2003 Regulations were made by the Secretary of State. They take the form of a statutory instrument; power to make them comes from section 109 of the Communications Act 2003. The factors that the Secretary of State is to take into account when exercising the power are set out in section 109, and they go some way to explaining the diverse subject matter of the 2003 Regulations:
- (1) the duties imposed on Ofcom by sections 3 and 4 [of the Communications Act 2003];¹
 - (2) the need to protect the environment and, in particular, to conserve the natural beauty and amenity of the countryside;
 - (3) the need to ensure that highways are not damaged or obstructed, and traffic not interfered with, to any greater extent than is reasonably necessary;
 - (4) the need to encourage the sharing of the use of electronic communications apparatus;
 - (5) the need to ensure that restrictions and conditions are objectively justifiable and proportionate to what they are intended to achieve;
 - (6) the need to secure that a person in whose case the code is applied will be able to meet liabilities arising as a consequence of–

¹ We do not summarise these here as they are not relevant to this project.

- (a) the application of the code in his case; and
- (b) any conduct of his in relation to the matters with which the code deals.

9.4 The 2003 Regulations are enforced by Ofcom under sections 110 to 111B of the 2003 Act. Ofcom can take enforcement measures where it determines:

... that there are reasonable grounds for believing that a [Code Operator] is contravening, or has contravened, a requirement imposed by virtue of any of the restrictions or conditions contained in the [2003 Regulations].²

9.5 Enforcement commences with a notification to the Code Operator setting out various matters, including the steps that Ofcom thinks should be taken to comply with the relevant regulation and remedy the consequences of the contravention.³ Ofcom can also propose a financial penalty⁴ and, in serious cases, suspend the application of the Code to the operator.⁵

9.6 Subject to one exception, we have heard of no difficulties with the 2003 Regulations. Our provisional view is therefore that the 2003 Regulations should be retained alongside a revised code, but we would be grateful for consultees' views on this; we ask a general question at the end of this Part. The exception, to which we now turn, relates to regulation 16, which requires Code Operators to maintain a fund to meet certain specified liabilities.

REGULATION 16: FUNDS FOR MEETING LIABILITIES

9.7 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].⁶

9.8 The specified liabilities are set out in regulation 16(10), which we summarise as follows:

- (1) certain liabilities in respect of costs and expenses that arise under the New Roads and Street Works Act 1991 or (in Northern Ireland) the Street Works (Northern Ireland) Order 1995;⁷

² Communications Act 2003, s 110(1).

³ Communications Act 2003, s 110(2)(d).

⁴ Communications Act 2003, s 110(2)(e) and s 110A.

⁵ Communications Act 2003, ss 110(2)(f) and 113(4). Sections 111A and 111B contain different provisions where a case is urgent.

⁶ 2003 Regulations, para 16(1). We consider the street works regime at paras 4.4 to 4.12 above.

⁷ SR 1995 No 3210, NI 19.

- (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 occurred⁸ in removing electronic communications apparatus from the street.⁹
- 9.9 In order to confirm that it is complying with the obligation set out in paragraph 9.7 above, a Code Operator must provide an annual certificate to Ofcom. The certificate must set out certain prescribed information.¹⁰
- 9.10 Where Ofcom is not satisfied that a Code Operator has discharged the duty set out in paragraph 9.7 above then it can direct that operator to take such steps as Ofcom considers “appropriate for the purpose of securing that sufficient funds are available to meet the ... liabilities”; and can publish details of any such direction.¹¹

The potential problem

- 9.11 It has been suggested to us that the funds set aside pursuant to regulation 16 have never been called upon¹² and that, where a Code Operator goes into liquidation (or another event arises that could trigger the release of funds) another Code Operator is likely to step in and acquire the apparatus that might otherwise have to be removed.
- 9.12 In the light of this, it has been suggested that regulation 16 imposes a disproportionately heavy burden on Code Operators; in order to comply with its requirements Code Operators must justify the amount that is ring-fenced through complex calculations and incur costs for bank guarantees to cover the sums required. Ofcom have commented to us that the provision is inappropriately burdensome on them, and that they support consultation on an alternative regime for covering liabilities.
- 9.13 The Office of Telecommunications (the predecessor body to Ofcom) prepared guidelines on how to assess the fund required in order for a Code Operator to

⁸ 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.

⁹ The circumstances in which this liability arises are more complicated than we set out here; see reg 16(10)(c)(ii) and (iii).

¹⁰ 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.

¹¹ 2003 Regulations, reg 16(7)(a) and (b).

¹² We do not know whether this is the case, but we are aware of an instance where Ofcom has taken enforcement action for non-compliance with the duty set out in reg 16: 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) <http://stakeholders.ofcom.org.uk/binaries/telecoms/cop/enforcement.pdf> (last visited 19 June 2012).

comply with regulation 16.¹³ The guidelines highlight several concerns of Code Operators that existed when the guidelines were introduced in 2003 and we welcome consultees' views on whether they are still relevant. They include concerns centred on the methodology for assessing the liabilities that the fund must cover, difficulties experienced in obtaining financial instruments to cover the potential liabilities, concerns over whether the fund should cover all potential liabilities and the accessibility (by public authorities) of funds.

9.14 We ask consultees to tell us:

- (1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon;**
- (2) what impact regulation 16 has on Code Operators and on Ofcom;**
- (3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and**
- (4) if the answer to (3) is yes, what form should it take?**

OTHER ELEMENTS OF THE 2003 REGULATIONS

9.15 In this section we present a brief overview of other areas of the 2003 Regulations on which consultees may wish to offer comment.

Planning, conservation and protected areas

9.16 The 2003 Regulations include various requirements for Code Operators relating to planning. These are additional to other requirements which are imposed under the relevant planning laws.¹⁴ Regulation 3(1) requires a Code Operator to consult the appropriate planning authority for the installation of electronic communications apparatus, including installation in a local nature reserve.¹⁵

9.17 Regulation 5 requires a Code Operator to give written notice to the planning authority. It applies where the Code Operator intends to install apparatus (other than lines) in an area where it has not previously installed apparatus; or to install a cabinet, box, pillar, pedestal or similar apparatus for which planning permission is not required. There are exceptions concerning apparatus installed inside a building (or other permanent structure), temporary networks and apparatus attached to or supported by certain electricity poles or pylons. One month's notice, specifying details of the proposed installation, must be given.

¹³ Office of Telecommunications, *Guidelines on Assessing Funds for Liabilities under Regulation 16 of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003* (18 December 2003) available at <http://stakeholders.ofcom.org.uk/telecoms/policy/electronic-comm-code/funds-for-liabilities> (last visited 19 June 2012).

¹⁴ See Town and Country Planning Act 1990, Town and Country Planning (Scotland) Act 1997, and Planning (Northern Ireland) Order 1991, SR 1991 No 1220, NI 11. There are specific provisions as to the installation of electronic communications in planning legislation regarding "permitted development" or "general development", subject to exceptions: see Town and Country Planning (General Permitted Development) Order 1995, SI 1995 No 418, Parts 24 and 25; Town and Country Planning (General Permitted Development) (Scotland) Order 1992, SI 1992 No 223, Parts 20 and 21, and Planning (General Development) Order (Northern Ireland) 1993, SR 1993 No 278, part 17.

¹⁵ Designated under the National Parks and Access to the Countryside Act 1949, s 21(1).

- 9.18 Within one month, the planning authority may 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”.¹⁶
- 9.19 Written notice to the planning authority is also required, under regulation 7, for apparatus installation in proximity to certain listed buildings,¹⁷ unless it relates to a temporary network or emergency works (with a notification requirement).¹⁸ There is provision for objections by the planning authority within 56 days.
- 9.20 There are special requirements to give notice where the Code Operator intends to install apparatus in specific protected areas: regulation 8. These protected areas include National Parks, areas of outstanding natural beauty, certain nature reserves and sites of special scientific interest. The notice must be given to the planning authority or other designated public body. For instance, for an installation in a national nature reserve in England notice must be given to Natural England. Notice to the National Trust or the National Trust for Scotland may be required if it owns or holds any interest in land. Again, provision is made regarding objections by the body notified within 56 days; further notices and consultations may be required.
- 9.21 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. Environmental impact is assessed having regard in particular to visual impact on the landscape, effect on plant and animal life and impact on visual amenity of properties. In the case of a replacement line within a conduit, the requirement is that the installation of the line does not entail enlarging or changing the position of the conduit. Apparatus relating to a temporary network or emergency works (for which there is a notification requirement) is also excluded.¹⁹

Sharing and co-operating with others

- 9.22 Regulation 3(4) relates to sharing, and states that a Code Operator “where practicable, shall share the use of electronic communications apparatus”.
- 9.23 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. “Relevant undertakers”,

¹⁶ 2003 Regulations, reg 5(3).

¹⁷ That is, grade 1 listed under the Planning (Listed Buildings and Conservation Areas) Act 1990, s 1(1) or the Planning (Northern Ireland) Order 1991, SR 1991 No 1220, NI 11, art 42; or category A listed under the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, s 1(1).

¹⁸ 2003 Regulations, reg 7(3). Emergency works are defined in the Code, para 1(1).

¹⁹ 2003 Regulations, para 8(4).

such as those with statutory authority to carry on a railway or canal, or gas or electricity suppliers,²⁰ must also be consulted to avoid disruption to their services.

- 9.24 Regulation 14(1) applies where a Code Operator wishes to exercise code rights in an area for which an electricity supplier holds a transmission licence. The Code Operator must first use “best endeavours” to enter into an agreement with the electricity supplier. The agreement is to cover “the engineering principles to be adopted and the allocation and apportionment of costs” where either the operator or the supplier intends an installation in proximity to equipment already installed by the other. Under regulation 14(2) a Code Operator shall not install apparatus “which is of such a nature or in such a position as adversely to affect any plant of an electricity supplier which is already installed”.
- 9.25 Regulation 17 requires a Code Operator to co-operate with planning and highway (or in Scotland, road) authorities to produce guidelines on the manner in which Code Operators should conduct the installation (including positioning) of various items of apparatus. After the guidelines have come into effect, the Code Operator is to comply with them.

Installation requirements

- 9.26 Some provisions in the 2003 Regulations relate more specifically to the installation itself.
- 9.27 Regulation 3(3) applies to Code Operators installing apparatus and requires them to minimise (so far as reasonably practicable) the impact on the visual amenity of buildings (particularly listed buildings), potential hazards posed by the installation work or the apparatus itself, and interference with traffic. Under regulation 3(5) the installation is to comprise “the minimum practicable number of items ... consistent with the intended provision of electronic communications services and allowing for an estimate of growth in demand for such services”.
- 9.28 Where apparatus is installed underground, regulation 3(2) requires the Code Operator to ensure that the depth is sufficient not to interfere with the use of the land at the date of the installation (unless consent is given by the occupier and any person with a legal interest in the land).
- 9.29 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.

²⁰ “Relevant undertakers” are defined as in the 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).

- 9.30 As we mention briefly above,²¹ in November 2011 the Department for Culture, Media and Sport published a consultation paper examining proposals to permit a further derogation from the requirement to install lines underground.²² Broadly speaking, this would apply where sharing the conduits of another Code Operator (or, for instance, an electricity supplier) is not reasonably practicable or commercially viable and consultation with the local community has taken place in accordance with specified requirements. The consultation period closed on 21 February 2012 and the Department for Culture, Media and Sport, having considered the responses, is now formulating the final policy.
- 9.31 In conservation areas, there is a general requirement to install apparatus (including lines) underground under regulation 6. No proposal has been made by the Department for Culture, Media and Sport to change this requirement.
- 9.32 There are several exceptions.²³ Lines flown between certain electricity poles and pylons, or from poles installed before the designation as a conservation area are excepted. Other apparatus may be excepted if the overall environmental impact²⁴ of existing apparatus is not increased: replacement poles and lines and service lines flown from buildings or fixed to the outside of buildings may fall within this exception. Emergency works (subject to providing information to the planning authority) and apparatus required for a temporary network are also excepted. Finally, it is also possible for a Code Operator to give written notice to the planning authority to install apparatus overground. The procedure is similar to that under regulation 8.
- 9.33 The 2003 Regulations also include particular requirements regarding apparatus placed underground in certain highways, streets and roads. Regulation 9 requires apparatus to be installed in conduits unless it is not reasonably practicable to do so, and regulation 5(5) requires the installation of underground apparatus to be in the verge or footway rather than the carriageway unless it is not reasonably practicable to do so.
- 9.34 If a line is installed above ground, a request can be made by any person for it to be relocated, under regulation 4(3). However, it is not necessary to relocate the line if the Code Operator determines either that the request is unreasonable or that the person will not pay the costs of the relocation, and notifies the person of that determination within 56 days of receiving the request.²⁵
- 9.35 Where a Code Operator provides temporary electronic communications services at a public or private event or at a construction site then regulation 15 allows it to install lines and poles above ground subject to the condition that the planning authority is given a reasonable estimate of the date by which they will be removed, and that they are removed within a reasonable time after the end of the

²¹ See para 3.61, n 48.

²² 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 19 June 2012).

²³ 2003 Regulations, reg 6(1)(a) to (g) and 6(2).

²⁴ See the 2003 Regulations, reg 6(4) and para 9.21 above.

²⁵ We consider the right, set out in para 17 of the Code, of a landowner or occupier to object to certain overhead lines (and other apparatus) at paras 3.62 to 3.63 above.

event or construction. There are also provisions for situations where electronic communications services are provided to deal with an emergency or by an emergency organisation.

Maintenance, records and inspection

- 9.36 Under regulation 10(1) Code Operators must inspect and maintain their apparatus to ensure that it will not cause personal injury or property damage, unless it is installed underground or inside a building or other permanent structure.²⁶ If a report is received that any of its apparatus is in a dangerous state, a Code Operator must investigate, and if necessary make the apparatus safe: regulation 10(2).
- 9.37 Regulation 11²⁷ imposes requirements to keep and permit inspection of records of apparatus installed in or under certain highways, streets and roads in Scotland and Wales. In relation to England and Northern Ireland, similar duties are imposed by separate legislation.²⁸
- 9.38 Where apparatus is installed in or under certain highways, streets and roads, regulation 13 requires Code Operators to provide trained staff to indicate its location on site, at the reasonable request of a relevant undertaker²⁹ or highway or roads authority.
- 9.39 We ask consultees for their views on the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. Is any amendment required?**

²⁶ See also regulation 10(3) regarding provision of information.

²⁷ See also regulation 12 regarding retention and inspection of records created before the 2003 Regulations came into force.

²⁸ New Roads and Street Works Act 1991, s 79 and Street Works (Records) (England) Regulations 2002; Street Works (Northern Ireland) Order 1995, SR 1995 No 3210, NI 19, art 39. See also Street Works (Records) (Wales) Regulations 2005, SI 2005 No 1812, W 142.

²⁹ See para 9.23 above.

PART 10

LIST OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS

INTRODUCTION

- 10.1 In this Part, we set out our provisional proposals and consultation questions on which we are inviting the views of consultees. We would be grateful for comments not only on the issues specifically listed below, but also on any other points raised in this Consultation Paper. As noted at paragraph 1.34 above, it would be helpful if consultees would comment on the likely costs and benefits of any changes provisionally proposed when responding. The Department for Culture, Media and Sport may contact consultees at a later date for further information.
- 10.2 It would be helpful if, when responding, consultees could indicate either the paragraph of this list to which their response relates, or the paragraph of this Consultation Paper in which the issue was raised.

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: GENERAL

- 10.3 We provisionally propose that code rights should include rights for Code Operators:
- (1) to execute any works on land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus;
 - (2) to keep electronic communications apparatus installed on, under or over that land; and
 - (3) to enter land to inspect any apparatus.

Do consultees agree?

[paragraph 3.16]

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

[paragraph 3.17]

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

Do consultees agree?

[paragraph 3.18]

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

[paragraph 3.19]

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

[paragraph 3.27]

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

[paragraph 3.40]

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

- (1) Where the landowner can be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code, should it be possible for the tribunal to make the order sought without also weighing the public benefit of the order against the prejudice to the landowner?
- (2) Should it be possible to dispense with the landowner's agreement in any circumstances where he or she cannot be adequately compensated by the sum that the Code Operator could be asked to pay under a revised code?
- (3) How should a revised code express the weighing of prejudice to the landowner against benefit to the public? Does the Access Principle require amendment and, if so, how?

[paragraph 3.53]

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

[paragraph 3.59]

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

[paragraph 3.67]

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

[paragraph 3.68]

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

[paragraph 3.69]

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

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

[paragraph 3.74]

10.15 We ask consultees:

- (1) whether Code Operators should benefit from an ancillary right to upgrade their apparatus; and
- (2) whether any additional payment should be made by a Code Operator when it upgrades its apparatus.

[paragraph 3.78]

10.16 We ask consultees:

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

[paragraph 3.83]

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

[paragraph 3.88]

10.18 We ask consultees:

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

[paragraph 3.92]

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

[paragraph 3.94]

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

[paragraph 3.100]

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

[paragraph 3.101]

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

[paragraph 3.102]

10.23 We ask consultees:

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

[paragraph 3.106]

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

[paragraph 3.107]

THE RIGHTS AND OBLIGATIONS OF CODE OPERATORS: SPECIAL CONTEXTS

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

Do consultees agree?

[paragraph 4.11]

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

[paragraph 4.20]

- 10.27 We seek consultees' views on the following questions.

- (1) Should there be a special regime for tidal waters and lands or should tidal waters and lands be subject to the General Regime?
- (2) If there is to be a special regime for tidal waters and lands, what rights and protections should it provide, and why?
- (3) Should tidal waters and lands held by Crown interests be treated differently from other tidal waters and lands?

[paragraph 4.21]

- 10.28 We ask consultees:

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

[paragraph 4.30]

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

Do consultees agree?

[paragraph 4.34]

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

Do consultees agree?

[paragraph 4.40]

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

Do consultees agree?

[paragraph 4.43]

ALTERATIONS AND SECURITY

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

Do consultees agree?

[paragraph 5.11]

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

[paragraph 5.12]

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

Do consultees agree?

[paragraph 5.13]

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

[paragraph 5.18]

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

Do consultees agree?

[paragraph 5.47]

10.37 We provisionally propose that a revised code should not restrict the rights of planning authorities to enforce the removal of electronic communications apparatus that has been installed unlawfully.

Do consultees agree?

[paragraph 5.48]

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

[paragraph 5.49]

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

[paragraph 5.50]

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

Do consultees agree?

[paragraph 5.51]

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

[paragraph 5.56]

FINANCIAL AWARDS UNDER THE CODE

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

Do consultees agree?

[paragraph 6.35]

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

[paragraph 6.36]

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

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

[paragraph 6.73]

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

[paragraph 6.74]

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

Do consultees agree?

[paragraph 6.78]

- 10.47 We provisionally propose that, where an order is made requiring alteration of a Code Operator's apparatus, the appropriate body should be entitled to consider whether any portion of the payment originally made to the person seeking the alteration in relation to the original installation of that apparatus should be repaid.

Do consultees agree?

[paragraph 6.83]

TOWARDS A BETTER PROCEDURE

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

Do consultees agree?

[paragraph 7.26]

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

- (1) the Lands Chamber of the Upper Tribunal (with power to transfer appropriate cases to the Property Chamber of the First-tier Tribunal or vice versa);
- (2) a procedure similar to that contained in section 10 of the Party Wall etc Act 1996; and
- (3) any other form of adjudication.

[paragraph 7.27]

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

Do consultees agree?

[paragraph 7.31]

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

[paragraph 7.32]

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

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

[paragraph 7.37]

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

[paragraph 7.38]

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

Do consultees agree?

[paragraph 7.52]

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

[paragraph 7.53]

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

[paragraph 7.54]

10.57 We ask consultees to tell us their views on standardised forms of agreement and terms, and to indicate whether a revised code might contain provisions to facilitate the standardisation of terms.

[paragraph 7.60]

INTERACTION WITH OTHER REGIMES

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

Do consultees agree?

[paragraph 8.22]

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

Do consultees agree?

[paragraph 8.33]

THE ELECTRONIC COMMUNICATIONS CODE (CONDITIONS AND RESTRICTIONS) REGULATIONS 2003

10.60 We ask consultees to tell us:

- (1) whether they are aware of circumstances where the funds set aside under regulation 16 have been called upon;
- (2) what impact regulation 16 has on Code Operators and on Ofcom;
- (3) if a regime is required to cover potential liabilities arising from a Code Operator's street works; and
- (4) if the answer to (3) is yes, what form should it take?

[paragraph 9.14]

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

[paragraph 9.39]

APPENDIX A

THE ACQUISITION OF RIGHTS BY OTHER SERVICE PROVIDERS

BACKGROUND

- A.1 This Appendix supplements the earlier Parts of this Consultation Paper, in which references were made to the procedure through which companies that provide electricity, gas and water can acquire rights over land and the amount payable for them. It considers the law as it applies in England and Wales.

Wayleaves and easements

- A.2 Rights capable of being acquired by electricity, gas and water providers pursuant to statutory powers typically take two forms, known as “statutory easements” and “statutory wayleaves”. These terms are not always a precise or helpful means of categorisation.
- A.3 The term “statutory easement” is used generally as short-hand for a non-ownership right created through compulsory purchase legislation.¹ However, taking electricity as an example, Schedule 3 to the Electricity Act 1989 grants to the Secretary of State the ability to authorise “licence holders” (that is, electricity companies) to acquire compulsorily land or rights over land.² Rights (rather than ownership) acquired in this way are known as “statutory easements” (rather than true easements, since they are rights that could not exist at common law as easements because there is generally no dominant tenement³). The Schedule goes on to set out the provisions for procedure and compensation by reference to the compulsory purchase legislation:

... the Acquisition of Land Act 1981 shall apply to a compulsory purchase by a licence holder of land or rights in England and Wales; and Schedule 3 to that Act shall apply in the case of a compulsory acquisition by a licence holder of a right by the creation of a new right.⁴

- A.4 The precise nature and characteristics of the “new right” that can be created by virtue of paragraph 1 of Schedule 3 to the Electricity Act 1989 are not stipulated in the legislation. It appears that it can exist in perpetuity and is not limited to existing for any particular purpose (in contrast to the statutory wayleaves discussed below).⁵

¹ Specifically, the Acquisition of Land Act 1981, which applies to a compulsory acquisition under the provisions of the Land Compensation Act 1961; and the Compulsory Purchase Act 1965.

² Electricity Act 1989, sch 3, para 1.

³ See para 3.10 above.

⁴ See Electricity Act 1989, sch 3, para 5; and see Water Industry Act 1991, s 155(4); Gas Act 1986, sch 3, para 4.

⁵ B Denyer-Green, *Compulsory Purchase and Compensation* (9th ed 2009) p 510.

A.5 A “statutory wayleave” may be hard to distinguish in practice from a statutory easement.⁶ It arises from a specific statutory provision. Again, taking electricity as an example, having addressed compulsory acquisition powers in Schedule 3, Schedule 4 enables licence holders to acquire a “necessary wayleave” in order to install lines on, under or over land, and provides a definition:

“the necessary wayleave” means consent for the licence holder to install and keep installed the electric line on, under or over the land and to have access to the land for the purpose of inspecting, maintaining, adjusting, repairing, altering, replacing or removing the electric line.⁷

A.6 Conceptually, therefore, a wayleave is a consent for a particular purpose rather than a property right. Obviously the practical distinction is hard to perceive. But Schedule 4 to the Electricity Act 1989 goes on to make specific provision for compensation for the grant of a wayleave; and in practice a wayleave is identified for this purpose as a right acquired by the Schedule 4 procedure rather than the Schedule 3 procedure.

A.7 The equivalent right for water providers is described in the Water Industry Act 1991 as a power:

(a) to lay a relevant pipe (whether above or below the surface) in any land which is not in, under or over a street and to keep that pipe there;

(b) to inspect, maintain, adjust, repair or alter any relevant pipe which is in any such land;

(c) to carry out any works requisite for, or incidental to, the purposes of any works falling within paragraph (a) or (b) above.⁸

A.8 Sometimes, as is the case in the Electricity Act 1989, the legislation will refer specifically to the granting of a “wayleave”; in other cases, such as the powers of water undertakers outlined above, the legislation does not use that term.⁹

A.9 Electricity, gas and water undertakers are able to acquire statutory easements; but only electricity and water undertakers possess powers to acquire rights in another way. The reasons for this are unclear.

PROCEDURE AND TESTS USED FOR THE GRANTING OF RIGHTS

A.10 We summarise here the key procedural aspects of the legislation that governs the acquisition of rights by electricity, gas and water undertakers, including the tests that govern whether rights should be granted.

⁶ N Hutchinson and J Rowan Robinson “Utility Wayleaves: a compensation lottery” (2002) 20(2) *Journal of Property Investment and Finance* 159, 161.

⁷ Electricity Act 1989, sch 4, para 6(1).

⁸ Water Industry Act 1991, s 159(1).

⁹ Water Industry Act 1991, s 159 (power to lay pipes in other land).

Statutory easements

A.11 As outlined at paragraph A.3 above, the statutory regimes for water, gas and electricity all apply the Acquisition of Land Act 1981 to the creation of statutory easements. This means that the standard compulsory purchase procedure in the 1981 Act applies to the creation of statutory easements by electricity, gas and water undertakers. That procedure involves the following steps:

- (1) preparation of order;
- (2) notice to owners, lessees and occupiers of the making of the order;
- (3) public advertisement of making of the order;
- (4) submission of the order for authorisation to the Secretary of State;
- (5) opportunity for objection;
- (6) right to be heard in support of objections;
- (7) notice to owners, lessees and occupiers of confirmation of the order; and
- (8) public notice of confirmation of the order.¹⁰

A.12 The procedures are complicated, time-consuming and lengthy. Where an undertaker has an alternative option to acquire the right it needs, it is likely to use it. For example, for electricity undertakers:

Obtaining permanent rights through a compulsory purchase order requires a more complicated procedure than the one appropriate to ... wayleaves and is therefore only applied in situations where the ... wayleave procedure cannot be employed.¹¹

A.13 A circular issued by the Office of the Deputy Prime Minister notes that “a compulsory purchase order should only be made where there is a compelling case in the public interest”.¹² Although this is not an express statutory requirement, the need for a substantial public interest in overriding a landowner’s rights is well-established in case law.¹³ Failure to meet this requirement or comply with the relevant procedural rules may result in the decision of a Minister to approve a compulsory purchase order being quashed by the High Court.¹⁴

¹⁰ Acquisition of Land Act 1981, ss 10 to 15.

¹¹ C Hamer and G O’Brien, *Electricity Wayleaves, Easements and Consents* (2007) pp 109 and 110.

¹² Office of the Deputy Prime Minister, *Circular: 06/04: Compulsory Purchase and the Criche Down Rules* (October 2004) para 17, available at <http://www.communities.gov.uk/documents/planningandbuilding/pdf/1918885.pdf> (last visited 19 June 2012).

¹³ 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].

¹⁴ As with any other exercise of executive power, the decision of the Minister must also comply with general principles of administrative law (as to which see P P Craig, *Administrative Law* (6th ed 2008) part 2).

Other statutory avenues to rights

Water

- A.14 The Water Industry Act 1991 confers on water undertakers the right to lay pipes over private land and to inspect, maintain, adjust, repair or alter any such pipe which is already in land.¹⁵ This right can only be exercised after “reasonable notice” has been given to the landowner.¹⁶ The water undertaker is not required to request the permission of the landowner to commence the works. Nor is there a right to object to the works.
- A.15 However, section 181 of the 1991 Act imposes a duty on the Water Services Regulation Authority (“the Authority”) to investigate any complaint issued to it with respect to the exercise of section 159 powers by a water undertaker. The water undertaker is under a duty to comply with the Authority’s investigation and, if the Authority is satisfied that the undertaker:
- (1) failed to adequately consult the complainant, before and in the course of exercising the section 159 powers; or
 - (2) by acting unreasonably in the manner in which those powers were exercised, caused the complainant to sustain loss or damage or to be subjected to inconvenience,

the Authority may direct the undertaker to pay to the complainant an amount not exceeding £5,000.¹⁷

- A.16 A water undertaker’s power to lay pipes is therefore wide; there is no test to be considered before a pipe is installed, although there is a financial sanction that can be applied if the undertaker has not adequately consulted or has unreasonably exercised its powers in a way that causes loss damage or inconvenience to the objector.
- A.17 In addition, section 182 of the 1991 Act requires the water undertaker to submit to the Secretary of State a Code of Practice with respect to its exercise of the section 159 powers. The Authority is able to take into account a contravention of the Code of Practice when considering a direction under section 181, and in determining the amount, if any, to be paid by the undertaker to the objector.

Electricity

- A.18 The Electricity Act 1989 makes provision for electricity undertakers to apply to the Secretary of State for the grant of a wayleave where this cannot be secured by agreement with the landowner.¹⁸ The Electricity Act 1989 sets out the following procedure for this.

¹⁵ Water Industry Act 1991, s 159(1).

¹⁶ Above, s 159(4). For the laying of a new pipe, the period is three months; for the alteration of an existing pipe, the period is 42 days: section 159(5)(a) and (b).

¹⁷ Water Industry Act 1991, s 181(4).

¹⁸ The description of the wayleave that can be granted under the 1989 Act is outlined above: see para A.5.

- (1) The electricity supplier must be satisfied that it is necessary or expedient to install and keep installed an electric line through or over land.
- (2) The owner or occupier of the land must be given notice requesting the grant of a wayleave in appropriate terms within a specified period (with a minimum requirement of 21 days).
- (3) Where the owner or occupier fails to grant the wayleave or grants it subject to terms unacceptable to the electricity supplier, the supplier may apply to the Secretary of State to grant the necessary wayleave “on such terms and conditions as he thinks fit”.
- (4) The Secretary of State will afford the owner and occupier an opportunity of being heard by a person appointed by the Secretary of State.¹⁹ The purpose of the hearing is to hear evidence as to:
 - (a) why it is necessary or expedient for the electric line to cross the particular land in question; and
 - (b) what the effects are of the electric line on the use and enjoyment of the land in question.
- (5) If granted, the wayleave will run for whatever period is stipulated in it.²⁰

A.19 There is no timescale for the arranging of a hearing once an objection has been raised (the 21-day deadline for communicating the date of the hearing only applies once that date has been fixed). It is, apparently, “very rare” for a hearing to be fixed immediately;²¹ the Department for Energy and Climate Change (“DECC”) will wait for written confirmation that negotiations have been unsuccessful before making the arrangements in order to keep costs down.²²

A.20 DECC guidance indicates that the overall process from the making of a request for a hearing to the notification to the parties of the Secretary of State’s decision will usually take a minimum of 12 months.²³

A.21 In the case of electricity undertakers, therefore, the wayleave procedure carries with it some uncertainty, particularly over the time taken to acquire a wayleave. However, it does set out a test: the electricity undertaker must be satisfied that it is “necessary or expedient to install and keep installed an electric line through or over land”.

¹⁹ The procedure for the hearing is governed by the Electricity (Compulsory Wayleaves) (Hearing Procedure) Rules 1967, SI 1967 No 450, which must be read in conjunction with the written guidance of the Department of Energy and Climate Change *Guidance for Applicants and Landowners and/or Occupiers* (July 2010) <https://www.og.decc.gov.uk/EIP/pages/files/file23024.pdf> (last visited 19 June 2012).

²⁰ See the Electricity Act 1989, sch 4, para 6(3).

²¹ C Hamer and G O’Brien, *Electricity Wayleaves, Easements and Consents* (2007) p 89.

²² See Department of Energy and Climate Change, *Guidance for Applicants and Landowners and/or Occupiers* (July 2010) para 4.1 and following, available at <https://www.og.decc.gov.uk/EIP/pages/files/file23024.pdf> (last visited 19 June 2012).

²³ Above, para 5.3.

THE AMOUNT PAYABLE FOR THE RIGHTS

Statutory easements

- A.22 As noted above, the legislation governing electricity, gas and water undertakers applies generally the Acquisition of Land Act 1981 to the creation of a new right that we refer to as a “statutory easement”.²⁴ This Act governs the procedure of the compulsory purchase and, in turn, applies the provisions of the Land Compensation Act 1961.
- A.23 The 1961 Act contains the majority of the compensation provisions, including the land compensation rules.²⁵ The legislation governing the undertaker also applies adapted provisions of the Compulsory Purchase Act 1965 to the compulsory purchase.²⁶ This Act deals mainly with specific compensation issues, such as severance²⁷ and injurious affection.²⁸
- A.24 The prevailing view of commentators is that the financial award payable following the acquisition of a new right by an electricity, gas or water undertaker pursuant to compulsory purchase legislation is assessed on the basis of diminution in value of the land. This reasoning appears to be based upon the fact that the relevant legislation²⁹ adapts section 7 of the Compulsory Purchase Act 1965 to read as follows (with emphasis added):

In assessing the compensation to be paid by the acquiring authority under this Act regard shall be had not only to *the extent (if any) to which the value of the land over which the right is to be acquired is depreciated by the acquisition of the right but also to the damage (if any) to be sustained by the owner of the land by reason of its severance from other land of his, or injuriously affecting that other land* by the exercise of the powers conferred by this or the special Act.

In contrast, the standard (non-adapted) version of section 7 reads as follows (with emphasis added):

In assessing the compensation to be paid by the acquiring authority under this Act regard shall be had not only to *the value of the land to be purchased by the acquiring authority, but also to the damage, if any, to be sustained by the owner of the land by reason of the severing of the land purchased from the other land of the owner, or*

²⁴ See para A.3 above.

²⁵ Land Compensation Act 1961, s 5.

²⁶ Electricity Act 1989, sch 3, paras 6 to 14; Gas Act 1986, sch 3, paras 5 to 13; Water Industry Act 1991, sch 9.

²⁷ Severance occurs where a piece of land is parcelled into two parts: land X and land Y. Pre-compulsory acquisition, the use of land X contributes to the value of land Y. If land X is then compulsorily acquired then land Y will lose value. Severance can be seen as one element of injurious affection.

²⁸ Injurious affection is where (to use the example in the footnote above) the value of land Y depreciates because of the effect of the compulsory purchase and proposed use of land X by the acquiring authority.

²⁹ Electricity Act 1989, sch 3, para 8; Gas Act 1986, sch 3, para 7; Water Industry Act 1991, sch 9, para 3.

otherwise injuriously affecting that other land by the exercise of the powers conferred by this or the special Act.

- A.25 The consequences of this adaptation of section 7 is explained in the following terms by Barry Denyer-Green, in the context of a discussion of the measure of compensation for statutory easements acquired by gas undertakers:

The measure of compensation for the acquisition of a new right in land, such as a pipeline easement, is set out in a substituted section 7 of the 1965 Act This substituted section alters the original section 7 in the 1965 Act in one important way: the compensation of the right granted is not its open market value. The compensation is the depreciation in value of the land through which the new right is acquired. However, the substituted section does preserve the right to claim for injurious affection and severance in respect of any retained land.³⁰

- A.26 Compensation is also available for disturbance.³¹

- A.27 The legislative schemes governing the acquisition of statutory easements are broadly identical for electricity, gas and water. Therefore, the heads of compensation available for statutory easements acquired using compulsory purchase legislation are as follows:

- (1) compensation for depreciation in the value of the land over which the right is exercised;
- (2) compensation for severance and/or injurious affection of the retained land;³² and
- (3) compensation for disturbance.

- A.28 Any dispute over compensation is dealt with by the Lands Chamber of the Upper Tribunal, as is the case with other compulsory purchase compensation disputes.³³

Wayleaves and other statutory rights

- A.29 As noted above,³⁴ electricity and water undertakers also benefit from additional statutory powers to acquire wayleaves (in the case of electricity undertakers) and a right to lay pipes (in the case of water undertakers).

³⁰ B Denyer-Green, *Compulsory Purchase and Compensation* (9th ed 2009) pp 517 to 518.

³¹ By virtue of Electricity Act 1989, sch 3, para 14; Gas Act 1981, sch 3, para 13; Water Industry Act 1991, sch 9, para 1. See B Denyer-Green, *Compulsory Purchase and Compensation* (9th ed 2009) p 518. "Disturbance" in this context means "disturbance from possession of land", and is discussed in more detail in G Roots, *The Law of Compulsory Purchase* (2nd ed 2011) division E, ch 6.

³² It is difficult to draw the line between compensation for depreciation in the value of the land and compensation for severance/injurious affection.

³³ Land Compensation Act 1961, s 1.

³⁴ See paras A.5 to A.7 above.

Electricity

A.30 The compensation provisions for statutory wayleaves acquired through the Electricity Act 1989 are contained in paragraph 7 of Schedule 4, which reads as follows:

(1) Where a wayleave is granted to a licence holder under paragraph 6 above —

(a) the occupier of the land; and

(b) where the occupier is not also the owner of the land, the owner,

may recover from the licence holder compensation in respect of the grant.

(2) Where in the exercise of any right conferred by such a wayleave any damage is caused to land or to moveables, any person interested in the land or moveables may recover from the licence holder compensation in respect of that damage; and where in consequence of the exercise of such a right a person is disturbed in his enjoyment of any land or moveables he may recover from the licence holder compensation in respect of that disturbance.

(3) Compensation under this paragraph may be recovered as a lump sum or by periodical payments or partly in one way and partly in the other.

(4) Any question of disputed compensation under this paragraph shall be determined by the Tribunal; and section 4 of the Land Compensation Act 1961³⁵ or sections 9 and 11 of the Land Compensation (Scotland) Act 1963 shall apply to any such determination.

A.31 This provision was interpreted by the Lands Tribunal³⁶ and Court of Appeal³⁷ in *Welford v EDF Energy Networks (LPN) Plc*; the Lands Tribunal summarised the provisions in the following terms:

Under paragraph 7(1) the owner is entitled to compensation in respect of the grant. These words are apposite in our view to cover compensation both for the value of the wayleaves and compensation for any consequential reduction in value of the claimants' land. The Member in *Macleod*³⁸ treated the provision as operating in this way, and we think that he was right to do so. Disturbance is specifically provided for in subparagraph (2), and, although what it relates to is disturbance in the enjoyment of land that has not been acquired, there is no difficulty in applying this provision in accordance with the

³⁵ This section makes provision for costs to be awarded in the Upper Tribunal (Lands Chamber).

³⁶ [2006] 3 EGLR 165, LCA/30/2004.

³⁷ [2007] EWCA Civ 293, [2007] 2 P & CR 15.

³⁸ *Macleod v Central Electricity Generating Board* [1997] RVR 94.

principles established under the law relating to compensation for the compulsory purchase of land. We are thus concerned with the three standard elements of compensation.³⁹

A.32 The three standard elements of compensation referred to in the judgment correspond roughly with the measure of compensation seen in the context of the acquisition of a right using powers of compulsory purchase, but with one main difference. Compensation reflecting the value of the right is awarded on top of compensation reflecting the diminution in value of the land over which the right is exercised.⁴⁰ Therefore, to summarise, for electricity wayleaves compensation is awarded under the following heads:

- (1) compensation reflecting the value of the wayleave;⁴¹
- (2) compensation for consequential reduction in the value of the retained land – presumably this is equivalent to injurious affection – and for damage caused to land or moveables;⁴² and
- (3) compensation for disturbance.⁴³

A.33 Any dispute as to compensation is to be determined by the Lands Chamber of the Upper Tribunal.⁴⁴

Water

A.34 The equivalent financial provisions when a water undertaker exercises its power to lay pipes are more complex and are contained in Schedule 12 to the Water Industry Act 1991. The relevant provision is paragraph 2 of Schedule 12, which provides that:

(1) If the value of any interest in any relevant land is depreciated by virtue of the exercise, by any relevant undertaker, of any power to carry out pipe-laying works on private land, the person entitled to that interest shall be entitled to compensation from the undertaker of an amount equal to the amount of the depreciation.

(2) Where the person entitled to an interest in any relevant land sustains loss or damage which—

(a) is attributable to the exercise by any relevant undertaker of any power to carry out pipe-laying works on private land;

³⁹ [2006] 3 EGLR 165, LCA/30/2004 at [44].

⁴⁰ In *Welford v EDF Energy Networks (LPN) Plc*, £2,360 was awarded to represent the value of the wayleaves.

⁴¹ We identify this measure as “consideration” in this Consultation Paper; see para 6.11 and following above.

⁴² Compensation is payable in respect of all the loss (that is not too remote) that flows from the grant. See *MacLeod v National Grid Co Plc* [1998] 2 EGLR 217.

⁴³ See G Roots, *The Law of Compulsory Purchase* (2nd ed 2009) p 639 and B Denyer-Green, *Compulsory Purchase and Compensation* (9th ed 2009) pp 523 to 524.

⁴⁴ Electricity Act 1989, sch 4, para 7(4).

(b) does not consist in depreciation of the value of that interest; and

(c) is loss or damage for which he would have been entitled to compensation by way of compensation for disturbance, if his interest in that land had been compulsorily acquired under section 155 of this Act,

he shall be entitled to compensation from the undertaker in respect of that loss or damage, in addition to compensation under subparagraph (1) above.

(3) Where any damage to, or injurious affection of, any land which is not relevant land is attributable to the exercise by any relevant undertaker, of any power to carry out pipe-laying works on private land, the undertaker shall pay compensation in respect of that damage or injurious affection to every person entitled to an interest in that land.

[...]

(5) In this paragraph “relevant land”, in relation to any exercise of a power to carry out pipe-laying works on private land, means the land where the power is exercised or land held with that land.

[...]

A.35 When assessing the amount of compensation to be awarded under paragraph 2, the Lands Chamber must apply the rules set out in section 5 of the Land Compensation Act 1961, subject to any necessary modifications.⁴⁵

A.36 According to Guy Roots QC, compensation is therefore payable under the following heads:

- (1) compensation for depreciation in the value of an interest in the land over which the power has been exercised and/or for depreciation in the value of any land held with that land;
- (2) compensation for disturbance; and
- (3) compensation for injurious affection or damage to land other than the land over which the power has been exercised.⁴⁶

A.37 Any dispute as to compensation is to be determined by the Lands Chamber of the Upper Tribunal.⁴⁷

⁴⁵ Water Industry Act 1991, sch 12, para 3(2).

⁴⁶ See G Roots, *The Law of Compulsory Purchase* (2nd ed 2011) p 621. We refer to the measure under heads 1 to 3 as “compensation” in this Consultation Paper; see paras 6.7 to 6.10 above and contrast n 41 above; there is no element of consideration here.

⁴⁷ Water Industry Act 1991, sch 12, para 3(1).

APPENDIX B

OTHER JURISDICTIONS

INTRODUCTION

- B.1 In this Appendix, we discuss the tests used for compulsory acquisition of rights to install apparatus for electronic communications providers in three other jurisdictions: Australia, Canada and Sweden. Each test is the product of its own particular legal and societal background, and so it is not possible to argue that any particular one represents the “best” model, or should (or could) be transplanted into our own jurisdiction. However, these regimes provide an interesting comparison with the Code: all use a procedure based on weighing the public interest against private interests to determine whether a right is to be granted, and all use this procedure only as a last resort when commercial negotiations have failed.

AUSTRALIA

Background

- B.2 Australia’s federal structure is reflected in its electronic communications legislation and in the tests used for the acquisition of rights by electronic communications providers (known in Australia as “carriers”) to install facilities on private land. The legislative framework¹ makes a basic distinction between low-impact facilities, which are subject only to Commonwealth law (which governs the whole nation), and non-low-impact facilities, which are subject to the local planning and other regulations of the particular state or territory. Different tests therefore apply to these different types of facility, and it is easier for carriers to install the former than the latter.
- B.3 The background to the current system is the ongoing rollout by the Australian government of a new superfast National Broadband Network (NBN), to replace the existing underperforming copper network dominated by Australia’s telecommunications incumbent, Telstra. The aim is to connect 93% of Australian homes, schools and businesses to the fibre network, with speeds of up to 1 gigabit per second. In the interests of speeding up the project, amendments were recently made to the Telecommunications (Low-Impact Facilities) Determination 1997 to make it even easier for carriers to install such facilities.²

¹ The framework is found in the Telecommunications Act 1997 and in secondary legislation made under it: the Telecommunications (Low-Impact Facilities) Determination 1997, and the Telecommunications Code of Practice 1997. See also Australian Communications Industry Forum (now Communications Alliance), *Industry Code ACIF C564:2004, Deployment Of Mobile Phone Network Infrastructure* (4th ed 2005), available at <http://commsalliance.com.au/Documents/all/codes/c564> (last visited 19 June 2012). This is an industry code of practice registered under Part 6 of the Telecommunications Act 1997, which imposes supplementary requirements such as additional consultation requirements for low-impact facilities.

² Amendments in 2011 extended the definition of low-impact facilities to cover some types of infrastructure likely to be important to the rollout of the NBN, such as certain types of optical fibre: see the Telecommunications (Low-impact Facilities) Determination 1997 (Amendment No 1 of 2011), available at <http://www.comlaw.gov.au/Details/F2011L02696> (last visited 19 June 2012).

Low-impact facilities

B.4 Low-impact facilities are those which are relatively unobtrusive and cause little disruption to landowners, occupiers and the surrounding environment. They include:

Some radiocommunications facilities, underground and above-ground housing, underground and some aerial cables, public payphones, emergency and co-located facilities.³

B.5 Regarding the acquisition of rights to install low-impact facilities, there is evidence to suggest that carriers prefer to come to commercial agreements with landowners or occupiers rather than using the statutory procedure.⁴ However, the legislation sets out formal steps for the acquisition of rights where the landowner or occupier objects to the installation.⁵

B.6 The carrier must first notify the landowner and (if a different person) the occupier of the land of the carrier's plans to install the low-impact facility. If the carrier receives an objection and is unable to come to an agreement with the objector, the carrier must respond in writing within 25 days. The carrier is not required to change the activity in a way that:

- (1) is not economically feasible; or
- (2) is not technically practicable; or
- (3) is likely to have a greater adverse effect on the environment than engaging in the activity as originally proposed; or
- (4) is inconsistent with a recognised industry standard or practice relevant to the activity.

B.7 On receipt of the carrier's written response, the objector can then refer the dispute to the Telecommunications Industry Ombudsman, provided that this is done within 5 days of receipt of the carrier's written response to the objection (otherwise the carrier can go ahead with the installation). The Ombudsman can then either refuse or uphold the installation, and can place conditions upon the carrier's activities.

³ Australian Government Department of Broadband, Communications and the Digital Economy website – see http://www.dbcde.gov.au/policy_and_legislation/carrier_powers_and_immunities (last visited 19 June 2012).

⁴ See the example of negotiations for an access deed in the Shire of Hornsby Executive Manager's Report No CC31/05 of 8 June 2005: "It should be noted that in most instances a carrier will attempt to negotiate a suitable commercial arrangement in respect of access to and occupation of land with an owner prior to exercising its statutory powers of access": <http://www2.hornsby.nsw.gov.au/ebp/ebp2005.nsf/21097a8176941d6e4a2564600016add3/7e272ff0921cee95ca256ff000205695?OpenDocument> (last visited 19 June 2012).

⁵ See cl 17 of sch 3 to the Telecommunications Act 1997, applying the procedure in ch 4, part 5 of the Telecommunications Code of Practice 1997.

Non-low-impact facilities

- B.8 Non-low-impact facilities are governed by the local laws of the individual state or territory. For example, in Victoria a Code of Practice specific to telecommunications facilities has been produced. This Code lists principles for the design, siting, construction and operation of such facilities, and sets out requirements which must be met for installation without a Victorian planning permit.⁶
- B.9 A carrier which is not able to secure all the necessary approvals under local law for the installation can apply to the Australian Communications and Media Authority under the Telecommunications Act 1997 for a facility installation permit.⁷ If the application passes the initial assessment, the Authority will initiate a public inquiry as well as carrying out consultation with specified bodies.⁸ The decision is made in accordance with the criteria set out in the 1997 Act. For instance, the carrier must have made reasonable efforts to negotiate in good faith the required approvals from proprietors and administrative authorities. There are also requirements relating to the network: progress on installation of the rest of the infrastructure, the national significance of the network and the importance of the proposed facilities to it. The advantages of the installation must be weighed against potential environmental degradation; and in some circumstances, community consultation is required. It appears that this procedure is not often used.⁹

CANADA

Background

- B.10 Like Australia, Canada is a federal nation, and legislative and executive functions are split between the federal Government and the individual provinces. However, telecommunications falls exclusively under federal control, and is governed by one main statute: the Telecommunications Act 1993.
- B.11 The Canadian Radio-Television and Telecommunications Commission (CRTC) is an independent federal body charged with the regulation and supervision of the Canadian broadcasting and, since 1976, telecommunication systems. It fulfils a similar function to Ofcom in the UK. Part of the CRTC's role is to adjudicate on telecommunications matters.
- B.12 Sections 42 to 46 of the Telecommunications Act deal with "construction and expropriation powers" of telecommunications carriers.

⁶ Victorian Department of Sustainability and Environment, *A Code of Practice for Telecommunications Facilities in Victoria* (July 2004), available at http://www.dpcd.vic.gov.au/__data/assets/pdf_file/0004/41827/Telecommunications__reissue_2004.pdf (last visited 19 June 2012).

⁷ Telecommunications Act 1997, sch 3, div 6.

⁸ Australian Communications and Media Authority, *Guide to Applying for a Facility Installation Permit* (June 2007) available at http://www.acma.gov.au/webwr/telcomm/infrastructure/facility_installation_permit_guide.pdf (last visited 19 June 2012).

⁹ Australian Communications Industry Forum (now Communications Alliance), *Industry Code ACIF C564:2004, Deployment Of Mobile Phone Network Infrastructure* (4th ed 2005) p ii (commenting that "this process involves onerous obligations and is little used").

Public land and highways

- B.13 Section 43(3) of the Telecommunications Act gives carriers the power to enter onto and break up the highway or other public land for the purposes of constructing, maintaining or operating transmission lines – the conditions are that they must have the permission of the municipality or public authority¹⁰ and must not unduly interfere with the public use and enjoyment of the highway or other public place. If they cannot gain the required permission on terms acceptable to them, they can apply to the CRTC, which may grant the permission “having due regard to the use and enjoyment of the highway or other public place by others”.
- B.14 Section 43(5) gives carriers similar rights in relation to entering supporting structures for transmission lines which are constructed on the highway or other public place.
- B.15 Section 42 allows the CRTC, in the exercise of its powers under the Telecommunications Act or any special Act, to make an order requiring or permitting any telecommunications facilities to be provided, constructed, installed, altered, moved, operated, used, repaired or maintained, or any property to be acquired or any system or method to be adopted, by any person interested in or affected by the order. The order can also make provision for “just and expedient” compensation. However, section 42 only covers areas which are already within the CRTC’s jurisdiction.¹¹

Private land

- B.16 Regarding private land, we understand that it is usual for carriers to come to a commercial agreement with landowners; the enforceability of such an agreement will be subject to provincial law. Where this is not possible, carriers may also be able to use expropriation powers.
- B.17 Section 46(1) of the Telecommunications Act allows a carrier to use Part 1 of the Expropriation Act 1985 if the carrier needs to acquire any land or an interest in land without the consent of the owner for the purpose of providing telecommunications services to the public. The application to use the Expropriation Act must be approved by the CRTC and the carrier must then advise the Minister of Public Works and Government Services. The procedure for expropriation involves notification to the affected parties, the opportunity for objections, and the opportunity for a public hearing if an objection is made.

¹⁰ Section 43(4).

¹¹ For example, in *Edmonton (City) v 360Networks Canada Ltd*, the Canadian Federal Court of Appeal said that section 42 could allow a carrier to perform ongoing maintenance works which were “inextricably connected with the construction of” the transmission lines it had installed pursuant to section 43(3): see 2007 FCA 106 at [43], available at <http://decisions.fca-caf.gc.ca/en/2007/2007fca106/2007fca106.html> (last visited 19 June 2012).

SWEDEN

Background

- B.18 Sweden has a very particular way of dealing with rights in land, which we must discuss first. In Sweden, all procedures to do with land are dealt with by one State organisation, *Lantmäteriet*. *Lantmäteriet* combines a number of different functions which in most other legal systems are separate. It deals with:
- (1) cadastral services: this essentially means real property formation and sub-division, including new property formation, changes to existing boundaries, and creation of easements and other similar interests;
 - (2) land registration; and
 - (3) land and geographic information, such as mapping.¹²
- B.19 The integration of these functions means that an entire process involving land can be dealt with by just one of the “cadastral surveyors” employed by *Lantmäteriet*. For example, a new easement can be created, registered and the official map updated using the services of the same surveyor.¹³
- B.20 Another important point to note is that “the majority of all cadastral procedures are ... carried out in full agreement with the involved parties”.¹⁴ Therefore, when an electronic communications operator gains a right over land through cadastral procedures this will normally be with the consent of the landowner.

The Utility Easements Act 1973

- B.21 In Sweden, electronic communications operators almost always come to an agreement with landowners to install apparatus through negotiation. Furthermore, in Stockholm and surrounding municipalities there is only one main provider, Stokab, of infrastructure in which companies can purchase space – this network is seen as a public utility and we are told that obtaining the agreement of landowners is not usually a problem for Stokab.
- B.22 However, where an electronic communications operator wishes to gain a right over land without the consent of the landowner, it is possible to use the Utility Easements Act 1973. Before the Act was passed, operators had to use traditional easements, contracts with landowners, or traditional expropriation to secure rights. None of these proved a satisfactory method.¹⁵

¹² *Lantmäteriet* website: http://www.lantmateriet.se/templates/LMV_Entrance.aspx?id=276 (last visited 19 June 2012).

¹³ T Andersson, L Jansson and A Oscarsson, “A new way to provide strategic competence at *Lantmäteriet* (National Land Survey of Sweden)”, Shaping the Change, XXIII Fig Congress, Munich, Germany, 8 to 13 October 2006, p 1. Available at https://www.fig.net/pub/fig2006/papers/ts05/ts05_01_andersson_etal_0417.pdf (last visited 19 June 2012).

¹⁴ T Andersson, L Jansson and A Oscarsson, “A new way to provide strategic competence at *Lantmäteriet* (National Land Survey of Sweden)”, Shaping the Change, XXIII Fig Congress, Munich, Germany, 8 to 13 October 2006, p 4.

¹⁵ A Victorin, “Expropriation for telecom and other infrastructure: the Swedish Experience” (2004) 47 *Scandinavian Studies in Law* 513, 516.

- B.23 The Act contains a regime for the creation of a special kind of easement known as a utility easement. It employs a simplified version of the usual expropriation procedure to allow the formation of a “personal easement”¹⁶ for utilities operators which, once created, confers a right upon the holder to use a space within a property unit for a utility or other device. Utility easements are created using the normal cadastral procedures.¹⁷ Section 2 of the Act states that it covers electronic communications networks and things included in those networks.
- B.24 Section 6 of the Act sets out the general conditions for the granting of a utility easement. It is a broad test:
- 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.
- B.25 Section 10 provides that “a utility easement may not be granted if inconvenience of any importance occurs to a public interest”, unless the grant is “predominantly beneficial from a public viewpoint”.
- B.26 Further sections apply more detailed conditions to cover a number of specific situations. For example, section 8 provides that where the area is covered by a detailed development plan, a utility easement may not be granted at variance with the plan, unless the deviation is minor.

¹⁶ 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.

¹⁷ Utility Easements Act 1973, s 1. An English translation of the Act is available at http://www.kth.se/polopoly_fs/1.163309!/Menu/general/column-content/attachment/Utility_Easements_Act.pdf (last visited 19 June 2012).

APPENDIX C

ADJUDICATION PROVISIONS IN THE CODE

- C.1 Below is a list of the provisions in the Code which specify a forum for adjudication both of substantive questions and of matters relating to consideration and/or compensation.¹

Paragraph 4(4): Effect of rights and compensation: Lands Chamber

- C.2 Where, on a right being conferred or varied in accordance with paragraph 2² there is a diminution in value of an interest in the land which results from the fact that the security of tenure provisions in paragraph 21³ will apply to any attempt by the owner of the interest to remove the apparatus upon resuming occupation, the Code Operator shall pay compensation equal to the value of the diminution to the person who is the owner of the interest at the time of the grant or variation of the right. Any question as to a person's entitlement to compensation or as to the amount of compensation can be referred to the Lands Chamber.⁴

Paragraph 5(2) and paragraph 7(1)(a) and (b), (2), (3) and (4): Power to dispense with the need for an agreement and the court to fix financial terms where an agreement is dispensed with: County court with some scope for arbitration or another forum

- C.3 Where a Code Operator requires an agreement under paragraphs 2 or 3 to the placing of apparatus on land or the obstruction of access to land and that agreement is not forthcoming, the operator can apply to the county court⁵ for an order granting the operator the necessary right.⁶
- C.4 Paragraph 7 specifies the sums payable by the operator to the landowner where the court makes an order granting the operator a right under paragraph 5. These terms are to be included in the order made.
- C.5 The order can provide for questions arising in consequence of the order (such as on compensation) to be referred to arbitration or to be determined in another manner specified in the order.⁷

¹ See para 6.5 and following above.

² See para 3.41 and following above.

³ See para 5.19 and following above.

⁴ The Lands Chamber of the Upper Tribunal; the Scottish and Northern Irish equivalents are the Lands Tribunal for Scotland and the Lands Tribunal for Northern Ireland.

⁵ In Scotland, the sheriff court.

⁶ The Code, para 5(2) and see para 3.41 and following and paras 3.56 to 3.57 above.

⁷ The Code, para 7(4)(b).

Paragraph 6(2): Acquisition of rights in respect of apparatus already installed: County court

- C.6 Where a Code Operator already has apparatus installed on, over or under land in respect of which proceedings under paragraphs 5⁸ or 21⁹ are pending, the court can confer on the operator such temporary rights as seem reasonably necessary for securing that the service provided by the operator's system is maintained and the apparatus properly adjusted and kept in repair.

Paragraphs 8(2) and (3): Notices and applications by potential subscribers: County court

- C.7 Where a potential subscriber to the Code Operator's network has given a notice to the operator under paragraph 8(1), requiring the operator to give a notice or make an application under paragraph 5 so that the operator can obtain a right to extend the network and so provide services to the potential subscriber, the operator can apply to the court under paragraph 8(2) to have the potential subscriber's notice set aside.
- C.8 If the potential subscriber has given a notice to the Code Operator under paragraph 8(1) and does not receive a response within 28 days, paragraph 8(3) provides that the subscriber can make a paragraph 5 application to the court on the operator's behalf.¹⁰

Paragraph 12(6) and (8) and paragraph 13: Linear obstacles: Arbitration

- C.9 These provisions relate to linear obstacles (railways, canals or tramways):¹¹ this is the only circumstance in which some disputes are specifically referred to arbitration. Paragraph 12(6) provides for arbitration where a person with control of a railway, canal or tramway objects to works which an operator intends to perform which will affect the linear obstacle.
- C.10 Paragraph 12(8) provides for compensation to be paid to the person with control of a railway, canal or tramway owing to loss or damage caused by emergency works performed by the operator. If there is any dispute as to the amount of the compensation, the matter can be referred to arbitration under paragraph 13.¹²
- C.11 Paragraph 13 sets out the details of how arbitration is to take place and the sums that may be awarded. The arbitrator can either be chosen by the parties or, in default of agreement, appointed by the President of the Institution of Civil Engineers. The arbitrator can scrutinise and require amendments to be made to the operator's plans for the proposed works and can order consideration for the right to carry out the works and/or compensation under paragraph 12(8) to be paid to the person with control of the relevant land.¹³

⁸ See para 3.41 and following above.

⁹ See para 5.19 and following above.

¹⁰ See para 3.98 above.

¹¹ See para 4.22 and following above.

¹² See paras 4.26 to 4.27 above.

¹³ See paras 6.75 to 6.77 above.

Paragraph 14(3): Alteration of apparatus crossing a linear obstacle: County court

- C.12 Where a person with control of a railway, canal or tramway wants the operator to alter apparatus installed on, under or over that land, and the operator refuses, the person with control of the land can apply to the court for an order requiring that the alteration be performed.¹⁴

Paragraph 16(1): Compensation for injurious affection to neighbouring land etc: Lands Chamber

- C.13 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 operator must pay such compensation as would be due under that section.¹⁵ In default of agreement, an application can be made to the Lands Chamber to determine whether a person is entitled to compensation or its amount.

Paragraph 17(5) and (10): Objections to overhead apparatus: County court

- C.14 Paragraph 17 deals with situations where an operator has installed apparatus which is at a height of three metres or more above the ground and an owner or occupier of nearby land wishes to object to it. The owner or occupier can apply to court within certain prescribed timescales to have the objection upheld.
- C.15 Under paragraph 17(10), the court can dispense with the need for a person's consent to alteration of the apparatus in the same way as under paragraph 5.¹⁶

Paragraph 19(2) and (5): Tree lopping: County court

- C.16 Paragraph 19 concerns the lopping of trees which overhang the street and obstruct, or may obstruct, an operator's apparatus. Paragraph 19(2) provides that if the occupier of land on which the relevant tree is growing objects within 28 days to a notice given by the operator requiring the occupier to lop the tree, the lopping can only proceed if the operator obtains an order from the court.¹⁷
- C.17 Paragraph 19(5) provides for compensation to be paid by the operator to any person who has sustained loss or damage in consequence of the lopping or who has incurred expenses in complying with the operator's notice, if that person applies to the court.¹⁸

¹⁴ See paras 5.14 to 5.18 above.

¹⁵ See paras 6.25(4) and 6.31 to 6.32 above.

¹⁶ See paras 3.62 to 3.63 above.

¹⁷ See para 3.70 above.

¹⁸ See paras 6.25(7) and 6.81 above.

Paragraph 20(4) and (5): Power to require alteration of apparatus: County court

- C.18 Paragraph 20 allows anyone with an interest in the land on which a Code Operator's apparatus is installed to give notice to the operator requiring alteration of the apparatus.¹⁹ It must be shown that the alteration is necessary to enable the person giving notice to carry out a proposed improvement of the land.
- C.19 The operator has 28 days in which to issue a counter-notice opposing the landowner's request. The landowner can then apply to the court for an order requiring that the proposed alteration be carried out.
- C.20 Under paragraph 20(5), if the court is not satisfied that the operator has all the permissions necessary to make the alteration, it can dispense with the need for the required consents using the same procedures as under paragraph 5.

Paragraph 21(6), (7), (8) and (10): Restriction on right to require the removal of apparatus: County court or, for 21(8), any court of competent jurisdiction

- C.21 Paragraph 21 provides that where for any reason a person is entitled to require the removal of apparatus from land in which that person has an interest (whether the entitlement arises under the Code or otherwise), the removal cannot be enforced except in accordance with the provisions contained in the paragraph.
- C.22 The person seeking removal must issue a notice to the operator requiring removal. If the operator issues a counter-notice within 28 days, the landowner can only enforce removal through a court order. Where a person is entitled to enforce the removal of any apparatus, that person can apply to the court for authority to remove it himself or herself.²⁰
- C.23 Under paragraph 21(8), where a person removes apparatus, that person can apply to "any court of competent jurisdiction" for compensation from the operator for the expenses incurred in undertaking the removal of the apparatus.

Paragraph 23(5)(b) and (6)(b): Undertaker's works: Any court of competent jurisdiction

- C.24 Paragraph 23 concerns relevant undertakers. A relevant undertaker is an entity authorised by or under any Act that carries on the undertaking of a railway, tramway, road transport, water transport, canal, inland navigation, dock, harbour, pier or lighthouse, or who is another Code Operator or any other entity who has paragraph 23 applied to it by or under any other statute.²¹
- C.25 Where a relevant undertaker is proposing to execute any undertaker's works which involve or are likely to involve a temporary or permanent alteration of any apparatus kept installed on, under or over any land for the purposes of the operator's network, paragraphs 23(5)(b) and (6)(b) allow the operator to recover in "any court of competent jurisdiction" any expenses incurred by the operator either in doing the work itself or supervising the work.

¹⁹ See para 5.2 and following above.

²⁰ The Code, para 21(7). See paras 5.28 to 5.31 above.

²¹ See para 4.35 and following above.