

# Annex 2: Draft Explanatory Notes

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## Introduction

1. In February 2013, the Law Commission presented to Parliament its Report in relation to the Electronic Communications Code (the “Report”). The Law Commission’s recommendations as contained in the Report seek to modernise the terms of and improve the drafting of the “Telecommunications Code” contained in Schedule 2 to the Telecommunications Act 1984 (the “existing Code”). The existing Code (which was amended by the Communications Act 2003) makes provisions about the manner in which electronic communications apparatus can be installed and maintained on land. The draft Bill replaces the existing Code with a considerably revised version (the “Code”), which is intended to deliver to a substantial extent the recommendations set out in the Report, as well as additional Government policy. The new Code is set out in a new Schedule 3A to the Communications Act 2003 and replaces Schedule 2 to the Telecommunications Act 1984 which is consequentially repealed.

### Clause 1

2. *Clause 1* repeals the Telecommunications Code and introduces a new Schedule 3A to the Communications Act 2003, containing the Electronic Communications Code. *Clause 1, subsections (4) to (9)*, makes consequential amendments to section 106 of the Communications Act 2003 to recognise the replacement of the existing Code, substitutes a reference to the existing Code and replaces the term “conduit system”, which is not used in the new Code, with “system of infrastructure”. *Subsection (10)* introduces Schedule 2 to the draft Bill, which contains further consequential amendments.

### Clause 2

3. *Subsection (1) of clause 2* confers a regulation-making power on the Secretary of State to make consequential amendments connected to clause 1 or to the new Code, should they be needed. Under *subsection (2)*, this power can be used to amend any legislation, including primary legislation, passed until the end of the Parliamentary Session in which the Act is passed. Where the power is used to amend primary legislation, *subsection (5)* provides that the affirmative procedure will be required. Otherwise the negative procedure is applied, as provided for by subsection (6).
4. *Subsection (3)* confers a power on the Secretary of State to make regulations to amend the new Code to ensure that it is consistent with the law of Scotland and the law of Northern Ireland. This power enables the Secretary of State to ensure that the provisions of the Code are effective in the different legal systems of Scotland and Northern Ireland. This power will only be exercised

after discussion with the Scottish Government, or the Northern Ireland Executive as appropriate. As with the power to make consequential provision, as this power, if used, will amend primary legislation, the affirmative procedure will apply. Finally, *subsection (7)* ensures that the power in *subsection (1)* includes power to amend Welsh, Scottish and Northern Irish legislation.

### **Clause 3**

5. *Clause 3* makes provisions about commencement and extent. In accordance with *sub-section (1)*, the provisions will come into force on a day appointed by the Secretary of State by way of regulations (apart from *subsection (1)*, which will commence when the Bill is passed – see *subsection (3)*). *Sub-section (4)* gives the Secretary of State power to make, by way of regulation, transitional, transitory or savings provision in connection with the coming into force of the Bill. *Sub-sections (5) and (6)* deal with extent and provide that the Bill will extend to England and Wales, Scotland and Northern Ireland. *Sub-section (6)* provides that the power in section 411(6) of the Communications Act 2003 to extend the provisions of that Act to the Channel Islands and the Isle of Man is exercisable in relation to the amendments of that Act made by or under the Bill.

### **Schedule 1 – The Electronic Communications Code**

6. This Schedule sets out the Electronic Communications Code to be inserted as Schedule 3A to the Communications Act 2003.

#### ***Part 1 – Key Concepts***

7. Part 1 defines some important terms that are used throughout the Code and points to the location of the definition of other terms used in the Code. The creation of a list of rights to which the Code applies (“Code rights”) was a key recommendation (at paragraph 2.76) of the Report.
8. *Paragraph 2* defines “operators” as firstly, those who have been designated by Ofcom under section 106 of the Communications Act 2003 as being persons to whom the Code applies and secondly (in certain circumstances) the Secretary of State or a Northern Ireland department. The amendments made to section 106 of that Act by *clause 1* mean that operators may be providers of electronic communications networks or of infrastructure systems.
9. *Paragraph 3* lists the Code rights, a specified list of rights relevant to the installation and maintenance of apparatus on, over or under land. The rights reflect the recommendations in paragraph 2.78 of the Report, but the definitions of the rights have been expanded to ensure they are comprehensive enough to cover all relevant situations. The right to lop trees and cut back vegetation has been added to the list.

10. Rights can only be Code rights if they are conferred for “the statutory purposes”. *Paragraph 4* defines the statutory purposes as the purposes of the operation of the operator’s “network” or the provision of an “infrastructure system” (both of which terms are further defined in paragraphs 6 and 7).
11. Most of the Code rights relate to “electronic communications apparatus”. *Paragraph 5* defines this term in broad terms. This definition is derived from (but is not identical to) the recommendation in paragraph 2.79 of the Report. The definition includes buildings whose only function is to contain other apparatus.

### ***Part 2 – Conferral of Code rights and their exercise***

12. As summarised in *paragraph 8*, Part 2 makes provision about how Code rights may be conferred and exercised, and who is bound by Code rights
13. *Paragraph 9* provides that a code right may be conferred only by the occupier of land and by an agreement between the occupier and operator. This reflects the position in paragraph 2(1) of the existing Code. *Paragraph 10* makes provision for who is bound by Code rights. The Code rights bind not only the occupier but also any other person with an interest in the land who has agreed to be bound by the Code rights; persons who are the successors in title to any person who is bound; and any person whose interest is created after the right is conferred and is derived from an interest that is bound. This reflects the recommendations in paragraphs 2.130 and 2.131 of the Report and the position in paragraph 2(4) of the existing Code. *Paragraph 10(3) and 10(6)* make provision for a successor in title to a Code right to be treated as if they were a party to the original agreement.
14. *Paragraph 11* provides that an agreement must be in writing and signed and must state for how long the Code rights are exercisable and the notice period required to terminate the rights. Any subsequent variations of the agreement must be in writing. This reflects the recommendation in paragraph 2.76 of the Report and the requirement in paragraph 2(1) of the existing Code that an agreement must be in writing. An agreement can contain one or more Code rights.
15. *Paragraph 12(1)* provides that Code rights may be exercised only according to the terms of the agreement, which gives effect to recommendation 2.131 of the Report. *Paragraph 12(2)* replicates the general effect of paragraph 4(1) of the existing Code. Its effect is that, where the operator exercises the rights agreed, in accordance with the agreement, that operator does so with the statutory protection of the Code and is as a result not vulnerable to common law claims in nuisance or trespass. *Paragraph 12(3)* provides that if a person with a freehold or leasehold interest in the land is not bound by the agreement under which the Code rights are granted, the operator does not have statutory

protection against that person. This encourages operators to obtain agreement from each person with an interest in the land (where it is necessary for the operator to have agreement from that person).

16. *Paragraph 13* provides that an operator who installs electronic communications apparatus with the agreement of the occupier of “land A”, may not obstruct or interfere with access (including emergency access) to or from “land B” without obtaining a Code right to do so from the occupier of “land B” (and from such other persons with an interest in land B as the operator may require). *Paragraphs 13(4) and (5)* provide that where “land B” is a street, road or tidal land (where special Code rights apply and which by their nature are generally accessible), the agreement of the occupier of “land B” is not required if access to “land B” from “land A” is obstructed by electronic apparatus on “land A”. *Paragraph 13* replicates the position in paragraph 3 of the existing Code, as recommended in the Report.

### ***Part 3 – Assignment of Code rights, and upgrading and sharing of apparatus***

17. As summarised in *paragraph 14*, Part 3 of the new Code makes provision about the assignment of Code rights, and the upgrading and sharing of apparatus.
18. *Paragraph 15* is new and gives effect to the recommendations at paragraph 3.24 to 3.27 of the Report. It provides that an operator may assign an agreement under which Code rights are conferred to another operator, enabling the second operator to ‘stand in the shoes’ of the first. An operator may assign only the entirety of the agreement and the Code rights it contains and may not separately assign the individual Code rights it confers. The other party to the agreement with the assigning operator is not able to prevent, limit or make subject to conditions (including payment conditions) an assignment permitted by paragraph 15. The operator who assigned the agreement (“first operator”) is not liable for a breach of the agreement by the operator to whom the agreement is assigned (“second operator”) after the date of assignment, provided that notice of assignment is given to the other party in accordance with paragraph 15. If, however, the first operator had agreed to guarantee the performance of the second operator, the guarantee will still apply.
19. *Paragraph 16* provides a power for an operator to upgrade or share apparatus, without the operator needing the agreement of the other party to the agreement, or having to pay in order to do so. Specific conditions must be met for this right to apply. If the conditions are not met, the operator must seek agreement for the right in the normal way under Part 2. To give effect to these rights *paragraph 16(6)* prevents the parties contracting out of the right or making it subject to conditions such as additional payment from the operator. *Paragraph 16* is new and gives effect to the recommendations at paragraph

3.51 of the Report but takes a less restrictive approach as to the nature of the equipment that may be upgraded or shared.

20. *Paragraph 17* has the same effect as paragraph 29 of the existing Code and gives effect to the recommendation at paragraph 3.54 of the Report. Its purpose is to facilitate sharing between:

one or more operators to whom the Code has been applied by Ofcom under section 106 of the Communications Act 2003;

(ii) other providers of electronic communications networks to whom the Code has not been applied by Ofcom; and

(iii) qualifying persons whom the Secretary of State may designate by regulations.

21. At least one of the parties to such an agreement must be an operator to whom Ofcom has applied the Code. The effect of *paragraph 17* is that the provisions of the Code may not be interpreted so as to restrict the operators' agreement to share apparatus with each other. *Paragraph 17* does not affect the interpretation of an agreement between an operator and a site provider.

#### ***Part 4 – Power of court to impose agreement***

22. As summarised in *paragraph 18*, Part 4 makes provision for the imposition of an agreement conferring Code rights by the court where such an agreement cannot be reached consensually under Part 2. The power of the court to impose agreements and the granting of compulsory access to land is an essential part of the existing Code (see paragraph 5 of the existing Code). The meaning of “the court” is set out in Part 16.

23. *Paragraph 19* sets out the circumstances in which the court can impose an agreement. It replicates much of paragraphs 5(1), 5(2) and 5(7) of the existing Code. *Paragraph 19(3)(b)* gives effect to recommendation 4.58 of the Report.

24. *Paragraph 20* sets out the test that the court must apply and the conditions that must be met for imposing an agreement. It gives effect to recommendation 4.43 of the report and replaces the test in paragraph 5(3) of the existing Code. The court must have regard to any prejudice to the site provider, and the public benefit likely to arise from any order imposing Code rights. *Paragraph 21* gives effect to recommendation 4.53 of the report. Like paragraph 5(7) of the existing Code, it provides that the court's order takes effect as an agreement.

25. *Paragraph 22* sets out key terms that the court must include, or consider including, in the court-imposed agreement. It gives effect to the recommendations in paragraphs 4.53, and 4.54 of the Report and contains

provisions corresponding to paragraphs 5(4) and 5(5) of the existing Code. *Paragraph 22(3)* reflects the requirement in paragraph 7(1)(a) of the existing Code that the court must determine consideration when it makes its order.

26. *Paragraph 23* corresponds to paragraph 7(1)(a) of the existing Code, with some marked differences to give effect to recommendation 5.83 of the Report. It makes provision for how consideration is assessed for the rights that the court has ordered and provides for this to be the market value. The market value is to be assessed on the basis of the value of the rights to the operator. This means that the valuation is not to be made on the basis of a “no scheme” valuation principle, such as is applied in the context of compulsory purchase of land (see for example *Bocardo SA v Star Energy* [2010] UKSC 35). When calculating the market value, the court must base its calculations on two assumptions. The first is that there is more than one site available to the operator, to ensure that a market valuation is applied even if in fact the land has unique features, which could otherwise inflate its value above a market valuation. The second is that the rights in paragraphs 15 and 16 (assignment of Code rights and the upgrading and sharing of apparatus) are not included in the value of the code right.
27. *Paragraph 24* is new and provides for the Secretary of State, by secondary legislation, to amend the basis for calculating consideration so as to move from ordinary market valuation principles to “no scheme” valuation principles. The regulations also enable *paragraph 23(4)* to be omitted, for consistency with a no scheme basis. The Secretary of State may make such regulations only after consultation and in accordance with the affirmative Parliamentary procedure (see the amendments to section 402 of the Communications Act 2003 in Schedule 2 to the draft Bill). While the Law Commission did provisionally propose a “no-scheme” valuation basis in its consultation document (see Consultation paper no. 205 at paragraph 6.73), *paragraph 24* makes provision for matters that go beyond the final recommendation of the Report.
28. *Paragraph 25* corresponds to paragraphs 7(1)(b) and 7(4) of the existing Code and provides for the court to order an operator to pay compensation to a person who will suffer loss or damage as a result of the imposition of the Code right on ordinary compensatory principles. The amount of compensation may be determined by the court, by agreement between the operator and other person or by arbitration if the court so directs. *Paragraph 25(6)* refers to paragraph 81, which sets out further provisions about compensation.
29. *Paragraph 26* provides that an operator may apply for interim Code rights. This is a new right not provided for in the existing Code. It gives effect to the recommendations in paragraph 9.67 of the Report. It enables Code rights to be granted on an interim basis pending agreement or the court determining a final agreement. Rights may be granted on an interim basis either (a) where the

parties agree to the making of the order and the terms of the interim agreement (which may be the case, for example where the only issue not agreed between them is the consideration to be paid); or (b) when the Court considers that there is a good arguable case that the interim Code right will be made permanent by the court at a final hearing. If the right is not made permanent at a final hearing, the interim right ends and the apparatus must be removed by the operator in accordance with Part 6.

30. *Paragraph 27* provides for the court to be able to grant temporary Code rights on application by the operator. It gives effect to paragraph 6.134 of the Report and is more detailed than, but nevertheless corresponds to, the provision in paragraph 6 of the existing Code. This right is different from an interim Code right in that it arises where there is existing apparatus on the land, the operator has no right to keep it installed and the operator requires temporary Code rights in order to maintain the apparatus and the network service. The temporary Code rights will continue until either the operator has secured permanent Code rights or the person with interest in the land has secured the rights to enforce removal of the apparatus. When assessing whether new permanent Code rights should be granted, the court must disregard the fact that the apparatus is already on the land.

#### ***Part 5 – Termination and modification of agreements***

31. Part 5 is new and makes provision about the termination and modification of agreements.
32. *Paragraph 29* gives effect to the recommendations in paragraphs 6.83 and 6.85 of the Report and seeks to remove the ambiguity referred to in the Report as to whether an agreement was subject to the existing Code, or (in England and Wales) the Landlord and Tenant Act 1954, or both. It applies to agreements under Part 2 of the Code but does not apply to leases where the main objective was not to grant Code rights and to which Part 2 of the Landlord and Tenant Act 1954 or the Business Tenancies (Northern Ireland) Order 1996 applies (in the case of the 1954 Act irrespective of whether an agreement under section 38A of that Act has been made). *Paragraphs 29(2) to 29(4)* provide for a clear mechanism for determining whether a lease is subject to the termination and security of tenure provisions of the 1954 Act or the 1996 Order or of the draft Code.
33. *Paragraph 29(5)* defines an agreement to which the provisions of Part 5 apply as a “Code agreement”, to distinguish it from an agreement which is subject to the termination and continuity provisions of Part 2 of the Landlord and Tenant Act 1954. Most agreements to which Part 2 of the Code applies will be “Code agreements” within paragraph 29(5) of the Code. However a lease that grants Code rights but whose primary purpose is not to grant Code rights (see

*paragraph 29(2)*) will be (so far as it relates to Code rights) an agreement within Part 2 of the Code, but Part 5 of the Code will not apply to it.

34. *Paragraph 30* gives effect to the recommendation in paragraph 6.96 of the Report. It provides that Code agreements continue in effect after the date of termination. This ensures that there is continuity of rights, and of network provision, pending determination of an application by the operator for new permanent rights or of an application by a “site provider” for the right to remove the apparatus. *Paragraph 30(1)* defines a site provider. The continuity provisions of paragraph 30 do not apply where the relevant Code right is an interim or temporary right arising from orders under paragraph 26 or 27.
35. *Paragraphs 31 and 32* make provision for how a site provider who is party to a Code agreement may bring the Code agreement to an end. They give effect to the recommendations in paragraphs 6.102 - 6.104, 6.110 and 6.113 of the Report. The site provider must provide a notice to the operator. The notice must set out a proposed date, no earlier than 18 months away, on which the terms of the Code agreement are to end. The notice must also set out one of the required grounds for termination. Those grounds are that the operator has substantially breached its obligations; that the operator has persistently delayed payments; that the site provider intends to redevelop the land and could not reasonably do that without ending the Code agreement; or that the test in paragraph 20 (for conferral of new Code rights) is not met. *Paragraph 86* makes further provision about the form of the notice. The effect of the notice is to end the Code agreement unless the parties agree otherwise; or the operator gives, within 3 months, a counter-notice proposing that the old agreement continue or proposing new terms, and then applies to the court for an order within a further 3 months. If the court considers any of the required grounds to have been made out by the site provider, it must order the agreement to come to an end; if not it must make an order pursuant to *paragraph 34*.
36. *Paragraph 33* makes provision so that where a Code agreement comes to an end; an operator may by notice seek new or modified terms of agreement. It gives effect to the recommendation in paragraphs 6.116 and 6.117 of the Report. The notice must set out the proposed, modified or new terms of the agreement, the change in Code rights to be conferred and the proposed date on which the changes should take effect. The proposed date must be at least 6 months after the date of the notice and must be after the date on which the existing Code agreement ends. If operator and site provider have not reached agreement within 6 months of the notice, either party may apply to the court, which may then make any of the orders in *paragraph 34*.
37. *Paragraphs 34 and 35* set out the orders the court may make on an application made by the operator or site provider under paragraphs 32 or 33 and give

effect to the recommendations in paragraphs 6.114, and 6.118 - 6.119 of the Report. The court can order that the right or rights may (or may not) continue to be exercised, the period for which rights may be exercised and whether any of the other terms of the agreement, including terms as to consideration, should remain the same or be modified. The court may order that a new Code right or rights be exercised, that a new agreement be entered into and, if agreement on terms of the new agreement is not reached, it can specify the terms. When specifying the terms, the court must include terms as to payment which should be determined on the basis set out in paragraph 23, terms designed to minimise loss and damage, the period of the agreement and any compensation for loss and damage (which can include expenses, diminution in value and reinstatement costs as set out in paragraph 81). Under *sub-paragraphs (13) and (14)*, the court can also order payment of the difference between the new rate of consideration and the consideration actually paid for the period between the old agreement ending and the new agreement being imposed. In deciding all of these terms, the court must also have regard to all the circumstances and the other matters set out in *sub-paragraph (12)*. Under *paragraph 35* (which gives effect to the recommendation in paragraph 6.108 of the Report) the parties can agree (or apply to the court to determine) the level of interim payment to be made pending final determination of the applications in accordance with paragraph 34. Any payment under *paragraph 35* will therefore be a factor to take into account under *paragraph 34(13) and (14)*

### ***Part 6 – Rights to require removal of electronic communications apparatus***

38. *Paragraph 36* introduces Part 6 of the Code, which makes provision to enable a person with an interest in land (a “landowner”) to require removal of apparatus. Paragraphs 21 and 22 of the existing Code contain provisions that correspond to some extent to this part, but the provisions in Part 6 of the Code are much more detailed.
39. In order to have the right to remove apparatus a landowner must meet one or more of the five conditions set out in *paragraph 37*. The first is that the landowner has never been bound by a Code right relating to the apparatus; the second is that the Code right has ended. These two conditions, however, are not met if the land remains occupied by another person who has conferred Code rights (and not done so in breach of any covenant to the landowner). The third condition is that the apparatus is not being used and is not likely to be used for the operator’s network; the fourth is that: (a) the operator has ceased to be an Ofcom designated Code operator; (b) Ofcom has not authorised the retention of the apparatus on the land; and (c) no other person has a Code right to keep the apparatus there. The fifth condition is that a transport or street work right under which the apparatus was installed no longer applies and there is no other person with a Code right to keep the apparatus there.

40. *Paragraph 38* makes provision enabling landowners to establish whether operators have apparatus on their land pursuant to a Code right by serving a notice. If the operator does not disclose the information within 3 months the operator may seek a court order to remove the apparatus. If it is later established that there is in fact a Code right that relates to the apparatus, then the operator must bear the costs of the landowner in seeking to enforce removal.
41. *Paragraph 39*, which largely corresponds to paragraphs 4(2), 21(1) and 21(2) of the existing Code, makes provision for enforcing the removal of apparatus - thereby giving effect to the recommendations in paragraphs 6.128 and 6.133 of the Report. A landowner may give a notice requiring removal and restoration of the land to its original condition. If agreement is not reached with the operator within 28 days concerning such removal and restoration, the landowner may seek a court order requiring removal of the apparatus by the operator or permitting removal or sale by the landowner.
42. *Paragraph 40* sets out the orders a court may then make to effect removal, including the power to order the operator to pay compensation for the period during which the apparatus was on the land after the right to remove arose (*paragraph 40(3)*). If the operator does not comply with an order to remove, the court may permit the landowner to remove the apparatus. *Paragraph 40* gives effect to the recommendation in paragraph 6.133 of the Report and has provisions corresponding to paragraphs 21(7) and 21(8) of the existing Code.

#### ***Part 7 – Conferral of transport land rights and their exercise***

43. Part 7 of the Code applies to transport land and gives the operator certain rights in relation to such land, which may be exercised without agreement or a court order. Part 7 replaces paragraphs 12 – 14 of the existing Code concerning linear obstacles. In line with the Law Commission's recommendations, the provisions of the existing Code have been largely replicated in Part 7 of the Code, with changes to make provisions in relation to land that ceases to be transport land and to apply the new public interest test (see recommendations in paragraphs 7.68-7.71 of the Report).
44. *Paragraph 41* sets out the scope of Part 7. *Paragraph 42* defines the transport land to which Part 7 applies as land used wholly or mainly by, or in connection with, a railway, canal or tramway and defines transport undertaker as the person carrying on the railway, canal or tramway.
45. *Paragraph 43* provides that the operator can exercise the transport land rights for the statutory purposes, allowing the operator to exercise the rights without agreement or a court order, subject to the remaining provisions of Part 7.

46. *Paragraph 44* sets out the transport land rights that can be exercised under Part 7. The rights allow the operator to cross transport land with a line and to install and keep other apparatus in connection with that line. There are associated rights to enter land, inspect, maintain, adjust, alter, repair, upgrade and operate the apparatus and to carry out associated works. *Sub-paragraphs (2)-(3)* provide that the line must not cross the transport land by a route exceeding the shortest route by 400 metres on a horizontal plane. *Sub-paragraph (4)* provides that none of the transport land rights allow the operator to install a line or other apparatus that interferes with the traffic on the railway, canal or tramway.
47. *Paragraphs 45 -46* set out the requirements that must be complied with in order for the operator to carry out non-emergency works in the exercise of the transport land rights. Under *paragraph 46*, the operator may only carry out the proposed works after the transport undertaker has been given 28 days' notice; subject to the objection procedure under paragraph 46, where, within that 28 day notice period, the transport undertaker may give notice objecting to the works. If an objection notice is given, either the operator or the transport undertaker has 28 days to give notice that the matter be referred to arbitration. Where the transport undertaker has objected, the operator may only carry out the proposed works if 28 days passes without an arbitration notice having been given. If an arbitration notice is given, the works may only be carried out in accordance with an award given on arbitration.
48. *Paragraph 47* sets out the requirements that must be complied with in order for the operator to carry out emergency works (defined in sub-paragraph (9)) in the exercise the transport land rights. The operator must give notice of the emergency works as soon as reasonably practicable after starting the works. The transport undertaker may give notice requiring the operator to pay compensation for loss or damage it has suffered as a result of the emergency works. The parties have 28 days to agree the amount to be paid; failing which either party may give notice to refer the dispute to arbitration.
49. *Paragraph 48* sets out the process for dealing with the arbitration of a dispute relating to an objection to proposed non-emergency works or about the compensation payable as a result of emergency works. The arbitrator has various powers to require information from and impose other requirements on the parties. In relation to proposed non-emergency works, the arbitrator has power to make an award requiring modifications to the works or to specify terms on which such works may be carried out, as well as to award compensation and consideration. In relation to emergency works, the arbitrator has power to award compensation. In determining the award, the arbitrator must have regard to the public interest in there being access to a choice of high quality electronic communications services.

50. *Paragraph 49* allows a transport undertaker to give notice requiring an operator to alter the line or other apparatus installed by the exercise of a transport land right, on the grounds that it will interfere with the carrying on of the railway, canal or tramway or things done for connected purposes. The operator must comply with this notice, unless it gives counter notice, in which case the transport undertaker may apply to the court for an order requiring the operator to alter the apparatus. The court must not make an order unless it is satisfied that the grounds on which the notice is issued are met. In line with the Law Commission recommendation at paragraph 7.71 of the Report, in determining whether to make an order, the court must have regard to the public interest in there being access to a choice of high quality electronic communications services.
51. *Paragraph 50* is an addition to the Code made in line with the Law Commission recommendation at paragraph 7.69 of the Report. It provides that where land ceases to be transport land, the operator may continue to exercise the transport land rights in accordance with Part 7 in relation to apparatus already on the land and in relation to substantially similar replacements. This is subject to the ability of the occupier of the land to give 12 months' notice to terminate such rights.
52. *Paragraph 51* provides that an operator will be guilty of an offence by commencing works in contravention of the provisions of Part 7. An operator who is guilty of an offence will be liable on conviction to a fine not exceeding level 3 on the standard scale (currently £1,000).
- Part 8 – Conferral of street work rights and their exercise**
53. Part 8 of the Code applies to streets in England and Wales and roads in Northern Ireland and Scotland, and gives the operator certain rights in relation to such streets and roads, which may be exercised without agreement or a court order. In line with the Law Commission's recommendations, Part 8 largely replicates paragraph 9 of the existing Code, with changes to make provision in relation to land that ceases to be a street or road (see paragraphs 7.88-7.89 of the Report).
54. *Paragraph 52* sets out the scope of Part 8. *Paragraph 53* defines the streets in England and Wales and the roads in Scotland and Northern Ireland to which Part 8 applies.
55. *Paragraph 54* provides that the operator can exercise the street work rights for the statutory purposes, allowing the operator to exercise the rights without agreement or a court order, subject to the remaining provisions of Part 8.
56. *Paragraph 55* sets out the rights that can be exercised under Part 8. The street work rights allow the operator to install and keep apparatus in, on, under

or along or across a street or road. There are associated rights to enter land, inspect, maintain, adjust, alter, repair, upgrade and operate the apparatus and to carry out associated works.

57. *Paragraph 56*, as for transport land, is an addition to the Code made in line with the Law Commission's recommendation at paragraph 7.89 of the Report. It provides that, where land ceases to be a street or road, the operator may continue to exercise the street work rights in accordance with Part 8 in relation to apparatus already on the land and in relation to substantially similar replacements. This is subject to the ability of the occupier of the land to give 12 months' notice to terminate such rights.

### ***Part 9 - Conferral of tidal water rights and their exercise***

58. Part 9 of the Code applies to tidal water and lands and gives the operator certain rights in relation to tidal water and lands ("tidal water rights") that may be exercised without agreement (in most cases) or a court order. In line with the Law Commission's recommendations, Part 9 largely replicates paragraph 11 of the existing Code, with changes to make provision in relation to agreements over Crown tidal water and land (see paragraphs 7.129-7.130 of the Report).

59. *Paragraph 57* sets out the scope of Part 9. *Paragraph 58* sets out what is to be included in the meaning of tidal water and land.

60. *Paragraph 59* provides that the operator can exercise the tidal water rights for the statutory purposes, allowing the operator to exercise the rights without (in most cases) agreement or a court order, subject to the remaining provisions of Part 9.

61. *Paragraph 60* sets out what rights can be exercised under Part 9. The tidal water rights allow the operator to install and keep other apparatus on, under or over tidal water or lands, and there are associated rights to enter land, inspect, maintain, adjust, alter, repair, upgrade and operate the apparatus and to carry out associated works.

62. *Paragraph 61* requires the agreement of the Crown under paragraph 100 before the tidal water rights can be exercised on Crown tidal water or lands. In line with the Law Commission's recommendation at paragraph 7.130 of the Report, any consideration payable for the right under such an agreement will only be enforceable so as to require the payment of the market value, which is now defined at paragraph 23.

### ***Part 10 – Undertaker's works affecting electronic communications apparatus***

63. Part 10 of the Code deals with undertaker's works affecting apparatus and, in line with the Law Commission's recommendation (see paragraph 7.151 of the Report), replicates paragraph 23 of the existing Code.
64. *Paragraph 62* sets out the scope of Part 10. *Paragraph 63* sets out the key definitions of "undertaker" and "undertaker's works" for Part 10. The Part will apply to other Code operators, as well those who, under statute, carry on a railway, canal, tramway, road transport, water transport, inland navigation, dock, harbour, pier or lighthouse undertaking.
65. *Paragraphs 64* and *65* set out the requirements that must be complied with for the undertaker to carry out non-emergency undertaker's works that interfere with a network. Under *paragraph 64*, the undertaker may only carry out the proposed works after the operator has been given 10 days' notice, subject to any counter-notice given by the operator under *paragraph 65*.
66. Under *paragraph 65*, within that 10 day notice period, the operator may give counter-notice stating that the undertaker is required to alter apparatus (as a result of the proposed works) under the supervision and to the satisfaction of the operator, or that the operator intends to make such an alteration. Where counter-notice is given, the undertaker may go ahead with the works in accordance with the notice, or may go ahead independently where the operator unreasonably fails to provide supervision or where the operator fails to carry out the works within a reasonable time.
67. *Paragraph 66* requires the undertaker who carries out non-emergency works to pay the operator for any loss or damage sustained as a result of such works and for expenses incurred by the operator in supervising the works. This amount is recoverable in any court of competent jurisdiction.
68. *Paragraph 67* provides that an operator can alter apparatus in connection with non-emergency undertaker's works where it has given counter-notice that it intends to do so. In such a case, the undertaker must pay the operator any expenses associated with the alteration and the amount of any loss or damage incurred as a result of the alteration. This amount is recoverable in any court of competent jurisdiction.
69. *Paragraph 68* sets out the requirements that must be complied with for the undertaker to alter apparatus in carrying out emergency undertaker's works (defined in sub-paragraph (7)). The undertaker must give notice of the emergency works as soon as is practicable after beginning the works. The undertaker must complete the works to the satisfaction of the operator and must pay the operator any expenses incurred in supervising the work and the amount of any loss or damages sustained as a result of the alteration. These amounts are recoverable in any court of competent jurisdiction.

70. *Paragraph 69* provides that an undertaker, or an agent of an undertaker, will be guilty of an offence by commencing works in contravention of the provisions of Part 10. An undertaker or agent who is guilty of an offence will be liable on conviction to a fine not exceeding level 3 on the standard scale (currently £1,000), or level 4 (currently £2,500) if the service provided by the operator's network is interrupted.

### ***Part 11 – Overhead apparatus***

71. Part 11 of the Code deals with overhead apparatus and replicates paragraphs 10 and 18 of the existing Code. This is in keeping with Law Commission recommendations at paragraphs 8.16 and 8.50 of the Report.

72. *Paragraph 71* provides that an operator may install overhead lines that pass above third party land (on which no apparatus is installed) without the need for the agreement (under Part 2) of the person whose land is overflowed, provided the apparatus to which the lines are attached is on land in relation to which the operator does have a right to install such apparatus. The lines must be at least three metres above the ground, must not pass within two metres of any building and may not interfere with the carrying on of any business carried out on that land. This replicates the power in paragraph 10 of the existing Code.

73. *Paragraph 72* provides that operators must attach notices to any apparatus, the whole or part of which is three metres or more above the ground. This includes lines and other apparatus. The operator must attach a notice (within three days, beginning with the day after installation) to every major item of apparatus, or the nearest existing major item of apparatus to which the new apparatus is connected, if no new major apparatus has been installed. This notice must be legible, secure and provide the name and address of the operator to which an objector can send notice of objection under Part 12. It is a criminal offence for an operator to breach these requirements, punishable on summary conviction by a fine not exceeding level 2 on the standard scale (currently £500). This paragraph replicates paragraph 18 of the existing Code.

### ***Part 12 – Rights to object to certain apparatus***

74. Part 12 of the Code details the rights that particular persons have to object to certain types of apparatus and the time periods within which those objections may be made. The rights do not apply to persons whose agreement is required under Part 2, since those persons' rights can be considered in the context of negotiating the Code agreement. The rights in this Part apply to persons who may be affected by the installation of apparatus but whose agreement is not required for the installation of such apparatus. The nature of the right to object depends on how soon the objection is made after installation

of the apparatus. This Part is in line with the Law Commission's recommendations at paragraphs 8.37 – 8.40 of the Report.

75. *Paragraph 74* sets out which people are eligible to object, which apparatus they are able to object to, and the process of objecting.
76. *Paragraph 74(1)* provides that a person may object if they are an occupier of or have an interest in tidal water or lands and are not a person who is bound by a Code right enabling the operator to keep the apparatus installed on, under or over the tidal water or land. The right to object does not apply to a person with the benefit of a Crown interest (see paragraph 61 of the Code as to the exercise of a tidal water right in relation to Crown land).
77. *Paragraph 74(3) and (4)* concern the right to object where an operator keeps a line installed over land pursuant to the right in paragraph 71. In that case a person has the right to object if they are an occupier of or have an interest in land over which such a line has been installed and they are not a person who is bound by a Code right enabling the operator to keep the apparatus installed over the land.
78. *Paragraph 74(5) and (6)* concerns the right to object where apparatus is kept on or over land for the purpose of an operator's network and that apparatus is at a height of three metres or more above the ground. In that case a person who is the occupier of, or has an interest in, neighbouring land has a right to object if the nearness of that neighbouring land to the land on or over which the apparatus is kept is capable of prejudicing either the enjoyment of the neighbouring land or any interest in that land.
79. *Paragraph 74(7)* provides that there is no right to object if the new apparatus installed is not substantially different from apparatus that it is replacing and is not in a significantly different position.
80. *Paragraph 75* provides that the right to object is exercised by giving notice to the operator. The content of the right and the procedure for exercising it depend on whether notice of objection is given within 12 months of installation, or after that period.
81. *Paragraph 76* provides for the procedure that applies if objection is made within 12 months of installation. Within two to four months of having given such a notice the objector may apply to the court to have the objection upheld. The court must uphold the objection if both of two conditions are met. The first condition is that the apparatus materially prejudices the person's enjoyment of, or interest in, the land. The second is that the court must be satisfied that there are possible alterations to the apparatus which (a) will not substantially increase the cost of or diminish the quality of the service provided to users of the network, (b) will not give another person a right to object just as good as

the first objector's, and (c) will not involve the operator in substantial "additional expenditure". It is not the cost of altering the apparatus that is taken into account in assessing additional expenditure, but rather the difference in cost between the original installation and the additional cost of the proposed altered installation if the latter had been installed from the outset. Similarly if the court considers that the apparatus has been unnecessarily installed, expenditure incurred in removing it is not to be taken into account. If these conditions are met, the court can require the apparatus to be changed or moved, and (in either case) can prevent further objections being made against an installation authorised by the court.

82. *Paragraph 77* provides for the procedure that applies if the notice is given later than 12 months after installation. Within two to four months of having given such a notice, the objector may apply to the court to have the objection upheld. The court may uphold the objection only if it is satisfied that the alteration is necessary to enable the objector to carry to an improvement to the land and the alteration will not substantially interfere with the operator's network service. *Sub-paragraph (7)* provides that the objector must, unless the court orders otherwise, pay the operator's costs of the alteration.

83. *Paragraph 78* sets out limitations on the court's powers where the court is considering making an order under paragraph 76 (directing the alteration of any apparatus or authorising the installation of any apparatus) or under paragraph 77 (directing the alteration of any apparatus). The court must not make an order unless the operator has the necessary Code rights to effect the alteration or unless the court imposes such Code rights as are necessary to effect the alteration. The court also has the power under this paragraph to require the objector to bring matters to the notice of other interested persons.

### **Part 13 – Rights to lop trees**

84. Part 13 of the Code allows operators in applicable circumstances to lop trees or other vegetation that overhangs a street in England and Wales or Northern Ireland or a road in Scotland. Part 13 replicates paragraph 19 of the existing Code, but extends provision to include the lopping or cutting back of vegetation other than trees.

85. Under *paragraph 79*, the operator may require the tree to be lopped or vegetation to be cut back where it overhangs the street. If no objection is made by the site provider within 28 days of the operator giving notice of that requirement, the operator may itself cause the tree to be lopped or the vegetation to be cut back. If the owner of the tree or other vegetation objects the matter is decided by the court. The operator must reimburse that person for any expenses associated with the lopping or cutting back, or for any loss or damage caused. This right applies to trees that are protected by a tree

preservation order and trees in conservation areas but, by virtue of paragraph 95(1), is subject to the provisions of any relevant tree preservation legislation. Such legislation provides certain exceptions for statutory undertakers including operators.

#### ***Part 14 - Compensation under the Code***

86. Part 14 contains general provision about compensation.

87. *Paragraph 81* makes provision about compensation for the purposes of the powers of the court to order compensation; in relation to agreements imposed under Part 4 and in relation to the removal of apparatus under Part 6.

*Paragraph 81(2)* enables the court to order compensation for reasonable legal and valuation costs incurred by a landowner. *Paragraphs 81(3) to 81(6)* make provision for the inclusion of statutory principles for assessing compensation for diminution in value of land. *Paragraph 81(7)* provides that there cannot be double compensation for the same loss.

88. *Paragraph 82* makes general provision for the continued application of established statutory rules for the assessment of rights to compensation for injurious affection to neighbouring land where rights under Parts 2 to 9 are exercised.

89. *Paragraph 83* provides that no other rights to compensation arise in relation to the lawful exercise of Code rights.

#### ***Part 15 – Notices under the Code***

90. Part 15 makes provision about requirements for the form of notices given under the Code and about procedures for giving notices. Part 15 broadly retains the effect of paragraph 24 of the existing Code, but is updated to reflect the Law Commission's recommendations at paragraphs 9.122 - 9.124 of its Report.

91. *Paragraph 85* makes requirements for the form of notices given by operators under the Code. An example of where an operator might give a notice can be found at *paragraph 19(2)*.

92. *Paragraph 86* makes requirements for the form of notices given by a person other than an operator.

93. *Paragraph 87* requires Ofcom to prescribe the form of a notice to be given under each provision of the Code that requires a notice to be given.

94. *Paragraph 88* makes requirements about the procedures for giving notice.

**Part 16 – Enforcement and dispute resolution**

95. Part 16 concerns the forum in which Code disputes are to be adjudicated. The Law Commission recommended that (in England and Wales) the Lands Chamber of the Upper Tribunal should adjudicate Code disputes. So that the necessary technical and administrative arrangements for changing the forum of disputes can be considered in more detail, Part 16 gives the Secretary of State the power to make regulations to confer jurisdiction on the First-tier Tribunal and Upper Tribunal (in England and Wales), the Lands Tribunal for Scotland, and the Lands Tribunal for Northern Ireland. In relation to England and Wales, the First-tier Tribunal and the Upper Tribunal are unified tribunals; therefore Part 16 refers to the tribunals rather than specific chambers within the tribunals. It is for the Lord Chancellor or the Senior President of Tribunals, with the concurrence of the other, to make provision for the allocation of the functions between the various chambers of the First-tier Tribunal and Upper Tribunal (see Section 7(9) of the Tribunals, Courts and Enforcement Act 2007).
96. *Paragraph 90* makes provision as to which court or tribunal can enforce an agreement under the Code or a right conferred by the Code. A court or tribunal that has imposed an agreement will be able to enforce it. In addition, a court or tribunal with the power to impose an agreement under the Code will be able to enforce any agreement or right under or conferred by the Code (not just an agreement that the court or tribunal has imposed). This paragraph also provides that any court of competent jurisdiction will be able to enforce an agreement or right under the Code. So, for example, the High Court of England and Wales may be able to enforce (for example, by way of injunction in applicable circumstances) a Code right as part of its jurisdiction to deal with actions relating to contract. The question as to whether a particular court is the right one in which to bring such a claim will be determined under applicable court rules (see for example Part 7 of the Civil Procedure Rules in England and Wales).
97. *Paragraph 91* means that, in the absence of regulations made under paragraph 92, references in the Code to “the court” means the county court (in relation to England and Wales and Northern Ireland) or the sheriff (in Scotland).
98. *Paragraph 92* gives the Secretary of State the power to make regulations to confer jurisdiction on the First-tier Tribunal and Upper Tribunal (in England and Wales), the Lands Tribunal for Scotland, and the Lands Tribunal for Northern Ireland.
99. *Paragraph 92(2)* means that jurisdiction can be conferred on the tribunals as well as or instead of the court. Where jurisdiction is conferred on more than one body, *paragraph 92(3)* permits the Secretary of State to make regulations

setting out in which court or tribunal proceedings are to be commenced and enabling that court or tribunal to transfer proceedings to another court or tribunal. For example, in relation to England and Wales it will be possible for jurisdiction to adjudicate Code disputes to be conferred on the First-Tier Tribunal, the Upper Tribunal and the county court. *Paragraph 92(3)* gives the Secretary of State the power to make regulations to provide, for example, that proceedings relating to Code disputes must be commenced in the Upper Tribunal but that the Upper Tribunal may transfer proceedings to the First-tier Tribunal or the county court (see Chapter 9 of the Law Commission report).

100. *Paragraph 93* refers to regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations 2011. Regulation 3 applies to certain applications to install facilities. Where regulation 3 applies to an application under the Code, there is a six-month time limit for determining the application. This replicates paragraph 24A of the existing Code.

101. *Paragraph 94* makes provision in relation to appeals in Northern Ireland, and replicates paragraph 25 of the existing Code.

#### ***Part 17 – Supplementary provisions***

102. Part 17 contains a number of supplementary provisions, including definitions of terms used elsewhere in the Code.

103. *Paragraph 95* provides that the new Code does not authorise the contravention of any enactment passed or made before the new Code comes into force unless such an enactment makes provision to the contrary. So for example, nothing in the Code authorises anything that would be in breach of existing planning legislation.

104. *Paragraph 96(1)* provides that the Code does not restrict the terms of any agreement (i.e. an agreement under Part 2) to which the operator is a party. In other words the parties are free to agree what they wish. This is however subject to *paragraph 96(2)*, the “no-contracting out” provision. Its effect is that any agreement to which the operator is a party cannot disapply the minimum obligations and rights set out in Parts 3-6 of the Code, in paragraph 61(2)-(5) and in paragraph 95. Without such provision an operator might otherwise be required by a site provider to forgo its rights under the Code as a condition of being granted the Code right.

105. Under general land law, a movable object that is attached to the land may become part of the land (and consequently become the property of the owner of the land) if it has become a fixture. *Paragraph 97* prevents this from happening by providing that property rights in apparatus are unaffected by that apparatus becoming attached to land. This provision was contained in the

existing Code but clearer wording has been used in accordance with the recommendation in paragraph 2.80 of the Report.

106. *Paragraph 98* replicates paragraph 15 of the existing Code. Its effect is that an operator must have the agreement of the authority with control of a relevant conduit to install apparatus in that conduit (i.e. such rights cannot be ordered by the court under Part 4).
107. *Paragraph 99* obliges Ofcom to publish a code of practice on the operation of the Code and suggested (but not mandatory) standard terms for use in Code agreements. These may be updated from time to time. Ofcom is required to consult with operators and anyone else it thinks appropriate before it first publishes the code of practice and suggested standard terms. This implements the recommendations in paragraphs 9.132 and 9.140 of the Report.
108. *Paragraph 100* provides that Crown land (meaning, primarily, land owned or leased by the Government) is subject to the Code in the same way as any other land. It also sets out who has the authority to enter into agreements or grant Code rights over various different categories of Crown land.
109. *Paragraph 101* sets out the meaning of “occupier” for the purposes of the Code.
110. *Paragraph 102* makes provision in relation to arbitration in Scotland.
111. *Paragraph 103* defines other terms used within the Code.

## **Schedule 2 – Consequential Amendments**

112. This Schedule makes amendments that are consequential on the introduction of the Code.