

Written evidence from Batcheller Monkhouse (DEB 86)

The Digital Economy Bill, Electronic Communications Code

1. Batcheller Monkhouse

2. Batcheller Monkhouse is a firm of chartered surveyors and valuers, based in the South East but working across the whole of the UK, representing over 450 landowners with sites used by over 2,500 wireless telecom operators.
3. Batcheller Monkhouse provided evidence to the Law Commission from the position of its Principal having worked in the market since 1991. The Firm has acted for a wide range of landowners including Several Police and Fire Authorities, many local authorities, Hospital Trusts and a wide range of charitable and commercial landowners across the urban and rural landscapes. Batcheller Monkhouse was referred to in the 236-page report Ordered by the House of Commons to be printed on 27 February 2013 more than any other company.
4. We set out below our overview to the proposed changes and, in the Schedule, a few specific changes we have proposed.

5. Overview on the Proposed Changes

6. We are concerned that by pursuing a few of the proposed changes to the Code, the Government will greatly undermine the whole and its determination to “make it easier for communications providers to deploy and maintain their infrastructure” and to “allow future generations of technology to be quickly rolled out”.
7. By accepting to change its position in a few key areas, we believe the Government’s stated objectives can be met.
8. The Law Commission recommended the retention of market value, as doing anything else would generate an extremely difficult transition and result in more litigation.
9. Market value has been, and is, working. We hear a bit about unscrupulous land owners or their agents demanding ransom rents. Although I do not believe this is widespread, it is clear that on occasions it does occur. The way to deal with this is through the dispute resolution system and not the basis of valuation.
10. If the principle of market value is now withdrawn (as proposed), delays to deployment will lengthen as a transaction moves from cooperation and agreement between willing parties to confrontation and dispute with a party who is anything but willing.
11. The Government’s stated aim was that “the revised code needs to strike a balance between enabling code operators in the rollout and maintenance of the telecom services with the property and the human rights of landowners. A successful relationship between these two parties ensures the provision of a range of high quality telecom services across the UK”.
12. This aim cannot be met if the tried and tested method of the assessment of Consideration is changed.
13. We have found that since the announcement of the Government’s wish for the valuation to be based on compulsory purchase principles, anxiety amongst the operators of the impact of

this change has increased. Indeed, we as a firm have seen a dramatic increase in the number of negotiations being concluded at market values as a result of the operators' fear of the proposal and wish to conclude matters ahead of their introduction. This is precisely the fear forecasted by the Law Commission of introducing a new and complex valuation scheme.

14. Additionally, in speaking to the operators about the impact of the changes on rents for roof top sites it is clear that they fear that they will not get the access to the roof tops they need if such sites are only worth a fraction of market value. Because of this, operators are currently indicating to landlords that they will continue to offer market rents for roof top sites. They know that this is the level needed to turn an unwilling and potentially litigious building owner into a willing one. Why then introduce a scheme which is inequitable and one that will not be exercised in practice?
15. In summary, what is needed is the retention of a market value consideration in Paragraph 23 (with a better definition of market value) and back that up with a speedy and simple Dispute Resolution Scheme.

Schedule

16. We have set out below some specific comments on other aspects of the proposed changes. They relate to the following key areas:
 - a. The Operator can assign without the landowner being able to know who they are assigning to (Para 15)
 - b. The Operator can upgrade without the landowner being able to ask to approve Risk Assessments and Method Statements ("RAMS") etc (Para 16)
 - c. The Operator can share without the landowner being able to know who they are sharing with and without the landowner being able to seek the recovery of its costs in administering and supervising access (Para 16)
 - d. There appears to be an insufficient level of protection/ acknowledgement of those who run their business from the land (Para 22(5))
 - e. The provision for changing the method of Consideration away from Market Value will make the landowner an unwilling Party and could stop landowners promoting sites to Operators (Para 23)
 - f. The grounds for bringing an agreement to an end are too limited and the timescales too long (Para 30)
17. To illustrate the issue of access requests, over the last 6 months one client of ours (a Water Company) has confirmed that:
 - a. 1,500 Hours have been booked (and charged for) for accompanied access across the companies Essex and Suffolk regions
 - b. The Suffolk Area has had 354 No access requests (equivalent to 708pa or about two a day)
18. To further illustrate access issues at a site belonging to a Water Company, access is not easily available from the outside of a Water Tower via Cherry Pickers (due to risk of damage to pipes etc.), access is often taken through areas of treated water (i.e. within the Water Tower). In these cases, to protect site security, the operators' contractors need to be accompanied by NWG staff
19. As this is a demand on NWG's resources, NWG need to be able to:

- a. Recover their costs (i.e. charge) for access requests
- b. Dictate times when access can be granted (to suit NWG's other operational needs) and
- c. Control works when contractors are on site (to avoid conflict with other works taking place)

20. DETAILED REVIEW OF THE IMPLICATIONS OF THE NEW CODE

We offer the following suggestions by way of technical amendments:

Part	Para	Proposed Provision & Problem	Suggested Change
Schedule 1			
1	3	<p>There is a Code Right to interfere with or obstruct a means of access to or from the land</p> <p>This code right has very grave ramifications for Site Providers who need to protect access to sites for reasons of security, health & safety and protection of core business</p>	<p>Adding some kind of proviso that this code right can only be exercised with the consent of the Site Provider.</p>
2	10	<p>If a Code right is conferred on an operator by person "O" (and presumably "P"), there is no obligation on O/P to pass onto the successors in title of O/P's interest a copy of the agreement that O/P entered into with the operator.</p>	<p>If the successor in title is to be treated as a party to the agreement, there needs to be an obligation on O/P (who although unlikely to be the operator could be an operator) to pass over a copy of the agreement to the successor</p>
3	15	<p>Any agreement is void to the extent that it prevents or limits assignment or makes it conditional.</p> <p>Operators use the assignment provisions of an agreement as a means of sharing the site with other operators. EE for instance assigned many leases into the joint names of EE and Hutchison 3G.</p> <p>It is vital (for reasons including site security) that the Site Provider knows the identity and contact details of all operators who use and require access to their land. In this way, vital arrangements over access can be agreed</p>	<p>Further reasonable conditions relating to assignment ought to be permitted without voiding the clause in order for the Site Provider to be able to maintain a reasonable and proper level of security including:</p> <ul style="list-style-type: none"> • Obliging the operator to notify the Site Provider of the identity and contact details of the assignee prior to any assignment
3	16	<p>The Operator can upgrade apparatus or share use of the apparatus with another operator if:</p> <ul style="list-style-type: none"> • There is no more than a minimal adverse impact on the apparatus's appearance • Such works imposes no additional burden (incl. an adverse impact on enjoyment or causes additional loss, damage or expense) on the Site Provider <p>Any agreement is void to the extent that it prevents or limits upgrading or sharing or if it makes it conditional.</p>	<p>Further reasonable conditions relating to site sharing ought to be permitted without voiding the clause in order for the Site Provider to be able to maintain a reasonable and proper level of security including:</p> <ul style="list-style-type: none"> • Obliging the operator to notify the Site Provider of the identity and contact details of the site sharer prior to any site sharing starting • Obliging the operator to erect adequate signage around equipment/ compounds so that in the event of an emergency, the Site Providers have correct up to

	<p>It is vital (for reasons including site security) that the Site Provider knows the identity and contact details of all operators who use and require access to the land. In this way, vital arrangements over access can be agreed.</p> <p>It is also vital (for reasons including the prevention of damage to property) that the Site Provider knows what work is to take place on its land and how that work is to be undertaken.</p>	<p>date information on who to contact.</p> <ul style="list-style-type: none"> • Obliging the operator to indemnify the Site Provider against any additional costs or damage that it might incur following the occurrence of site sharing (such as the ability to recover reasonable and proper costs in relation to say business rates, electricity and compliance with the owner's access policy) <p>These requirements are needed because the consideration and compensation provisions are agreed at the beginning of an agreement, assuming what is known at that time (such as there being one operator tenant). As time goes on, the workings of Para 16 could mean that many more sharers may start accessing the site giving rise to further costs and burdens on the Site Provider</p> <p>Further reasonable conditions relating to the upgrading of apparatus ought to be permitted without voiding the clause in order for the Site Provider to be able to protect its property including:</p> <ul style="list-style-type: none"> • Obliging the operator to disclose to the Site Provider all details relating to the apparatus being installed (such as the frequency and power output of the apparatus) so that the Site Provider can ensure that no interference with existing apparatus on the site is likely to take place • Obliging to operator to notify the Site Provider of any change in the orientation of antennae as this might create an electromagnetic field hazard to others who use or need to go onto Rooftops. If the location or orientation of an antennae is changed on say a roof, a previously safe portion of the roof could become a "no go area" • Obliging to operator to provide Risk Assessments and Method Statements ("RAMS") for approval by the Site Provider <p>These requirements are essential bearing in mind that many Site Providers have their own telecom apparatus on the same site (i.e. Police, Security forces and Utility companies) and information is required to prevent or remedy any potential interference</p>
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4	20(5)	<p>The court may not make an order under Para 19 if it thinks that the relevant person intends to redevelop all or part of the land.</p> <p>We believe that redevelopment ought to be defined.</p> <p>The suggested definition is based on the meaning set out in s55 of Part III of the Town & Country Planning Act 1990 but extended to include “maintenance, improvement or other alteration of any building” as such works may be required by say water companies wanting to improve buildings for their own operations</p>	<p>The intention to redevelop should be extended to include the carrying out of:</p> <ul style="list-style-type: none"> • Building (including the demolition of buildings; rebuilding; structural alterations of or additions to buildings; and other operations normally undertaken by a person carrying on business as a builder), • Engineering or • mining or • other operations in, on, over or under land, or • the making of any material change in the use of any buildings or other land or • maintenance, improvement or other alteration of any building
4	22	<p>The terms of an agreement imposed under Para 19 must include the payment of Consideration (as provided by Para 23). The agreement must also include terms the Court thinks appropriate for ensuring that the least possible loss and damage is caused. Although this might imply that Compensation might be provided for, it is not expressly mentioned in this paragraph</p> <p>For instance, should damage be caused there is no requirement that the terms of the agreement must also include the payment of Compensation</p>	The terms of an agreement imposed under Para 19 must include the payment of Compensation (as provided by Para 24)
4	22(5)	<p>The terms of an agreement imposed under Para 19 must include terms appropriate for ensuring that the least possible loss and damage is caused to persons who occupy, own or are from time to time on that land.</p> <p>These provisions may not protect adequately those who use the land for their business.</p>	The terms of an agreement imposed under Para 19 must provide for the protection of persons who use or run their business from the land
4	23	As stated above, Market Value must remain as a method of assessing Consideration	We have suggested a redraft of Para 23 as set out below”
5	30	<p>A Site Provider may bring a Code agreement to an end only if 18 months’ notice is served after the point when the Code right ceased to be exercisable.</p> <p>Under the current code, a Para 21 notice can be served immediately after the point</p>	<p>The grounds for bringing a Code agreement to an end should be extended to include the carrying out of:</p> <ul style="list-style-type: none"> • Building (including the demolition of buildings; rebuilding; structural alterations of or additions to buildings; and other operations

		<p>when the Code right ceased to be exercisable, such as at the end of an agreement.</p> <p>The grounds for bringing a Code agreement to an end include the occasion when the Site Provider intends to redevelop all or part of the land or neighbouring land.</p> <p>This provision will stop any Site Provider making available any of their sites for fear that they will not be able to establish the redevelopment ground or because the time taken to regain control of their land is too long</p> <p>We believe that redevelopment ought to be defined.</p> <p>The suggested definition is based on the meaning set out in s55 of Part III of the Town & Country Planning Act 1990 but extended to include “maintenance, improvement or other alteration of any building” as such works may be required by say water companies wanting to improve buildings for their own operations</p>	<p>normally undertaken by a person carrying on business as a builder),</p> <ul style="list-style-type: none"> • Engineering or • mining or • other operations in, on, over or under land, or • the making of any material change in the use of any buildings or other land or • maintenance, improvement or other alteration of any building <p>Additionally, there may be grounds when it is not appropriate to bring an agreement to an end but to alter it.</p> <p>As provided by Part 10 of the new Code (which deals with Undertakers carrying out emergency and non emergency works) there ought to be provisions enabling say the Site Provider of a roof to carry out emergency and non emergency works on the roof at a cost to be borne by the Undertaker</p>
5	34(2)	This paragraph refers only to Consideration when both parties may additionally or alternatively agree to the payment of Compensation	any reference to “Consideration” should be changed to “Compensation and Consideration”
6	36(6) (c)	The 3 rd Condition to be met where a Site Provider has a right to require removal would be difficult for the Site Provider to prove	There should be an obligation on the operator to prove that the apparatus will be used within say 28 days of the Site Provider exercising its right to require removal
6	36(7)	The 4 th Condition suggests that the Site Provider knows who is occupying its land	<p>For this reason, Site Providers should not be prevented under Part 3 of the Code to require that the identity and contact details of Assignees and Sharers are notified to the Site Provider.</p> <p>The provision under Para 37(1) suggests that a Site Provider needs to serve a notice on every code operator to establish who is on its land. It would be much simpler if the Site Provider is told from the outset</p>
10		Part 10 deals with Undertaker’s Works affecting Electronic Communications Apparatus	The provisions of this part of the Code are being considered very carefully
10	65 & 66	<p>Any expenses incurred by the Operator in having to comply with an Undertaker carrying out non emergency works must be borne by the Undertaker</p> <p>Under the current Code there is freedom of contract to agree who does or does not pay for such works</p> <p>Under a new Code agreement, it is</p>	<p>The expenses referred to in Paras 65 and 66 ought to be borne by the Operator and not the Undertaker.</p> <p>Alternatively, each party should bear their own costs or losses.</p>

		proposed that Site Providers are only able to recover actual losses as a result of the Operator installing apparatus on the land. If the Undertaker (perhaps some years after the agreement was entered into) wants to carry out non emergency works and has to seek, and bear the cost of, the removal or alteration to an Operators Apparatus the Undertaker will be out of pocket	
10	64	Sub Para (2) appears, under Para 64(2)(a), to put more emphasis on the undertaker carrying out works to electronic communications apparatus to the operator's requirements rather than the other way around, as under Para 64(2)(b). In practice Undertakers would be very reluctant to touch an operator's equipment as their staff wouldn't have the appropriate training or be aware of any risks associated with it. Most undertakers would therefore always want the operator to make any modifications or alterations themselves.	Can greater emphasis be put on the need for the operator themselves to undertake the works to electronic communications apparatus
10	65	Under Para 65(2) there is a provision that the undertaker must pay the operator the amount of any loss or damage sustained. Provided that the Undertakers works are justified, the Undertaker should not be required to pay losses or damages unless the Undertaker has been unreasonable by not following the procedures set out under Paras 63 and 64	the undertaker should not be required to pay the operator an amount for any loss or damage sustained unless the undertaker has not followed the procedures set out under Paras 63 and 64
10	67	As Paras 65 & 66 above but for emergency works	The expenses referred to in Paras 67 ought to be borne by the Operator and not the Undertaker. Alternatively, each party should bear their own costs or losses.
10	68	An undertaker (or its agent) is guilty of an offence if the procedures for carrying out works are not followed It seems that this provision to criminalise breaches in protocol is excessive.	Steps requiring Undertakers to use reasonable endeavours to follow the procedures should be adequate protection for the operator
13	78	Although sub para (9) provides for the payment of compensation, further provisions under Para 80 would also be appropriate	There ought to be reference in this paragraph that "Paragraph 80 makes further provision about compensation in the case of an order under paragraph 78"

REDRAFT OF PARAGRAPH 23

How is consideration to be determined under paragraph 22?

23 (1) The amount of consideration payable by an operator to a relevant person under an agreement imposed by an order under paragraph 19 must be an amount or amounts representing the market value of the interests and rights granted by the relevant person's

agreement to confer or be bound by the code right (as the case may be) taking into account all the terms of that agreement save as provided below and assessed at the date the market value is assessed

(2) For this purpose the market value of the interests and rights granted by the agreement to confer or be bound by a code right is the amount that, at the date the market value is assessed, a willing buyer would pay a willing seller for those interests and rights—

- (a) in a transaction at arm's length,
- (b) on the basis that the buyer and seller were each acting prudently and with full knowledge of the transaction and without being under compulsion.

(3) The market value shall take into account all relevant factors affecting value including, as appropriate:

- (a) the land subject to the agreement for the apparatus
- (b) the route of any services, (on, over or under the subject land) to the apparatus with restrictions on use of the land to protect it
- (c) other facilities associated with the apparatus interfering with the use and enjoyment of the land
- (d) rights of access for the operator and its agents over the land associated with the apparatus and its use
- (e) the protection required by the operator for any lines of sight for the apparatus
- (f) the terms of agreement including those as to rent review, and
- (g) to the extent that compensation is not paid for them
 - (i) any detriment to other land of the relevant person
 - (ii) any detriment to the relevant person's business and other current activity
 - (iii) any detriment to other uses of land owned or occupied by the relevant person.

(4) The market value shall be assessed—

- (a) regarding the use for which the interests and rights are granted by the agreement, and
- (b) on the assumption that paragraphs 15 and 16 (assignment of code rights and upgrading and sharing of apparatus) do not apply to the code right or any electronic communications apparatus to which the code right could apply.

(5) The terms of the agreement may provide for consideration to be payable—

- (a) as a lump sum or periodically,
- (b) on the occurrence of a specified event or events, or
- (c) in such other form or at such other time or times as the court may direct.

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