

To:- scrutiny@parliament.uk.

27th October 2016



Written evidence. The Digital Economy Bill, Electronic Communications Code

1. Hub are a firm of design and property consultants with a specialist telecoms department whose clients are largely “blue light” operators including the London Metropolitan Police, South Wales Police, North Wales Police. Buckinghamshire and Milton Keynes and Royal Berkshire Fire Authorities. We have two senior staff with over 30 year’s experience working with both Operators and landlords in the mobile telecoms industry.
2. Hub supports the Government’s stated objective to reform the Code *“to make it fit for purpose as a framework that supports the roll-out of modern telecommunications technology”*. However we believe that for this to succeed, the landowners must not be penalised if they agree to be bound by the “New Code”.
3. The Government has stated that the consultation process (to which Hub contributed by submitting written representations on behalf on various blue light organisations and in meeting recently with the Department for Culture Media & Sport “DCMS”), *‘has identified opportunities for Government to make more radical changes to the Code. However after evaluation of these opportunities it was concluded that they would create unacceptable interference with property rights, result in significant costs relating to legal challenges, and risk the roll-out and continuation of telecommunications services.’*
4. Despite this the Government have completely ignored the advice given to them and as a result the full impact of the New Code upon the future of site acquisition and future upgrades has not been considered. Some revisions such as the automatic right to upgrade, share and assign and the fixed 18 month termination notice period, drive a wedge between landowners and Operators that could result in the future of new site acquisition only proceeding via the new court process with Code Operators becoming Pariahs as far as landowners are concerned.

Landowners Incentives to Offer their Land Willingly

5. The primary driver for landowners to agree terms with Operators has been and still is, financial. although the promise of better mobile coverage is also an incentive

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6. The Government has stated that the New Code should result in Operators saving £50 million. This delivers the clear message that landowners will not in future see the financial benefits that has incentivised them to offer their land to date. It should however be noted that existing rentals do not reflect the value of the site to Operators, rents have never been based on this, operators have simply never built in areas where it is uneconomic. Even if rentals were reduced to Zero in these areas the Operators would still fail to provide coverage.
7. The New Code will bring a shift in emphasis that is contained within the existing Code of cooperation and agreement, with terms openly negotiated between landowner and Operators to a regime that will invite confrontation and lack of cooperation from landowners. This could require the increasing intervention of courts to implement agreements or amend rights. In Hub's opinion the New Code does not provide any incentive to a landowner to willingly agree to be bound by the New Code.
8. This could have the effect of forcing all future site acquisition through the courts, increasing costs and slowing down the acquisition process, precisely the opposite to what the Government intended or is required. There is a clear anticipation that landowners will not wish to be bound by the New Code. For this reason we believe that future roll-out and continuation of telecommunications services will see a radical change but not in the direction that the Government is intending.
9. This totally undermines the Government's stated aim that *"the revised Code needs to strike a balance between enabling Code Operators in the roll-out and maintenance of their 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"*

Termination

10. It has been an industry standard for the last 20 years for agreements under the current Code to allow for termination upon 12 months written notice. Some landowners especially in towns and cities already view 12 months as bringing an unacceptable delay to their redevelopment programs. By extending this notice period to a minimum of 18 months, many landowners and developers will find it hard to be persuaded to voluntarily offer their sites to Operators thus reducing the pool of available sites even

further and triggering the “compulsory acquisition” of the site by the Operator via the courts.

11. Assuming that the courts support the Operator then apparatus could be installed on land or a building where the owner is likely to be uncooperative or “hostile”, leaving the Operators, especially in urban environments where apparatus is installed on secure rooftops, at risk of network disruption due to their inability to gain timely access their apparatus for fault repair or maintenance purposes.
12. The requirement for the 18 months notification period clearly arises due to the difficulty in identifying, acquiring and obtaining planning consents for alternative sites within towns and cities. Amendments to the planning regime should help reduce delays in this contentious area for some sites but not, it is submitted, for the greater majority of “forced site moves” in urban environments. The apparent lack of available alternative sites has always been an issue and it is not assisted by some local government councils refusing to allow the locating of telecommunications apparatus on their buildings.
13. We submit that if Government were to pass legislation that compelled local government to open their property portfolios to the Code Operators, then this would not only reduce the timescales taken to acquire alternative sites, but would also provide a valuable source of new sites that would allow growing networks to be deployed quickly, cheaply and efficiently, providing resilience that otherwise could be lacking. The use of template legal agreements and service terms would further reduce delays and simplify rollout.
14. The Code Operators would then not require the 18 month notice period for termination in the event of redevelopment and this critical stumbling block as far as property developers are concerned, could be reduced to the existing 12 month notice period, thus preventing landowners from refusing to cooperate with Code Operators.

15. Suggested Amendment

The requirement for a minimum notice period of 18 months required to bring a Code agreement to an end [Para 30 (3) (a)] should be removed to allow the landowner and Code Operator to negotiate the notice period openly – an “Agreed Period” so as to reflect the

ability of the Operator to acquire alternative sites in the area and to reflect the landowners own business and operations.

(3) The date specified under sub-paragraph (2) (b) must fall—

(a) after the end of the ~~(period of 18 months)~~ AGREED PERIOD beginning with the day on which the notice is given,

Landowners/Occupiers Business and Operational Needs.

16. The new Code provides for the leases automatically continuing and only being brought to an end by the landowner/occupier on one of four grounds these being:

- a. Substantial breaches
- b. Persistent delays in making payments
- c. if the test under para 20 is no longer met and
- d. The site provider intends to redevelop

17. Whilst the New Code takes into consideration the **Operators** business and technical needs when a landowner seeks to determine an agreement [Part 5 Termination and Modification of Agreements Para (13)], it does not take into consideration the **landowners** technical needs, only (b) the use of the land, (c) any duties imposed on the landowner or occupier (*sic site provider*) by an enactment and (d) financial considerations.

18. Suggested Amendment

We submit that there is a clear statutory requirement lacking in the New Code for the landowners/occupiers business (as opposed to duties), operations and technical needs to be taken into consideration. Certain categories of landowners should not have their own operations compromised by a Code Operator nor their ability to upgrade and modernise their own operational equipment. This includes owners of secure and Blue Light sites and hospitals together with maintainers of communications infrastructure such as Network Rail or TFL.

Upgrades

19. Hub believe that automatic rights to upgrade are the Achilles heel of this New Code. The thrust of the New Code is that upgrades must be permitted in order to allow the Operators to provide a modern, fit for purpose data and communications network.

20. Hub are extremely concerned that the key concept of granting automatic rights to upgrade equipment has been included without any statutory requirement for the Operator to inform the landowner in advance or to consult with them. This could have catastrophic results for some existing landowners.
21. We are concerned that the Code places an implied reliance upon the Operators to identify in advance where potential exists for technical interference. How would they know what systems the landowner is operating on the same building? Some frequencies used by security personnel will not be disclosed for security reasons. In short, Code Operators cannot be expected to, and would not be able to, identify that risk.

Health and Safety

22. Potentially the New Code could place the landowner in conflict with the Health and Safety Executive. Employers are required to ensure that risks are reduced to as low as reasonably practicable (ALARP). Part 3 [Para 16 (5) (a) and (b)] states that no agreement under Part 2 of the New Code can prevent or limit upgrading or sharing of Apparatus or **make upgrading subject to conditions to be met by the Operator**. This would exclude the condition that the Operator should inform the Operator of upgrades and seek to prevent technical interference IN ADVANCE.
23. Radio frequencies and the power at which they are transmitted, can introduce risk to various related technologies including safety critical and operational radio, signalling and communications systems. Potentially also, equipment used in hospitals.
24. The inability of some existing site providers to control upgrades will, we submit, inevitably leave them with no alternative but to terminate their agreements with the Code Operators unless additional provisions are added that mitigate risks associated with upgrading.
25. **Example.** Hub worked with Airwave the incumbent emergency services network provider to provide coverage to Network Rail (NR) sites. This introduced new Tetra frequencies onto their infrastructure and a risk of interference with NR's signalling and safety critical radio systems - switching a red light green or preventing a green light from switching to red. The consequences are potentially catastrophic.

26. Over 12 months, Hub and Airwave prepared a safety case in which rigorous testing, checking and even physical drive tests were undertaken (when no other trains were running) in order to ensure that risk was reduced to ALARP.
27. The safety case identified the potential for interference and so restrictions were placed upon the locating of Airwave antennas in proximity to Network Rail signalling equipment. Any upgrades in power output or additional frequencies require prior approval. It was identified that the interference could otherwise occur.
28. The existing conditions contained in Schedule 3A Para 16 do not allow for prior notification of upgrades. Therefore the Operator will upgrade and the first that the landowner or occupier could know about this is when technical interference is caused. That is too late. The damage is already done. The train crash has already happened.
29. In Hubs experience, if there is one thing that some of the mobile phone Operators have consistently demonstrated over the past decade, it is that they seek every opportunity to save money wherever possible, some even going to the extent that they take a calculated commercial risk of breaching conditions of their leases, say by sharing sites where leases exclude such rights or by adding equipment beyond specified limits.
30. There is no guarantee that Code Operators will voluntarily enter into what can be costly and time-consuming technical analysis or practical demonstrations –assuming that they can identify that risk in advance (consider police covert radio systems) -when their primary concern appears to be saving time and money.
31. The Government are clearly persuaded that the Code requires revising perhaps to prevent repetition of such breaches. We submit that the Government should have paid more heed as to why the landowner restricted these rights in the first instance. For many landowners, health and safety, security and operational reasons are the triggers.

Suggested Amendment

- 32. The rights to upgrade must be made subject to a statutory requirement for the Code Operator to inform the landowner in advance of any intention to upgrade a site and to mitigate any risks associated with the introduction of that upgrade.**

Where an Operator intends to upgrading apparatus, where the landowner/occupier owns or operates its own radio systems or equipment that could be affected by technical interference, the Operator must-

- 1. seek the landowners prior written consent to upgrades within 28 days of receiving notice and*
- 2. where the potential for interference is identified, to enter into discussions with the landowners technology teams to ensure that technical interference and any safety or operational issues are reduced to ALARP so that no unacceptable interference is caused and*
- 3. pay the landowners/occupiers costs incurred*

In the event that the interference cannot be safely excluded, the upgrade must not be implemented

Security- Sharing, Subletting and Assignment

33. Land owned or occupied by existing Blue Light and safety critical infrastructure providers would ordinarily be ideal for the locating of the Code Operators apparatus, as most offer 24/7 access and enhanced levels of security that Code Operators and certainly EE as the new Emergency Services Network provider, will require.
34. The provisions of the New Code could result in Code Operators being excluded from these sites and many site owners may be forced to seek the early determination of existing agreements as in addition to issues relating to upgrading, the New Code will prevent the landowner from maintaining security.
35. There is no requirement for the Operator to inform a landowner if the apparatus is being shared, sublet or assigned to a third party.
36. There is no requirement for the Code Operator to comply with the landowner's access, security or vetting protocols.
37. Blue light and security landowners/occupiers also needs to know exactly who has and what apparatus is installed on their site at all times and to be able to restrict who has access and certain times in order to maintain site security and operations. Many have to be escorted on site and agree to be searched.

Management costs

38. One fundamental issue that appears to have been underestimated in the legislation's drafting is the cost to the landowner associated in managing the numerous visits to sites by the multitude of contractors acting for the Operators. The location of many of these sites, be it on the roof or an office block, police station, drill tower or police mast, when taken together with other users of the site, requires careful management. Much of the work is at height. Health and Safety has to be considered and risk assessments and method statements submitted by contractors have to be checked.
39. Sites are now being upgraded regularly. The numbers and frequency of fault rectification visits continues to increase year on year as equipment becomes more complex. The cost saving exercises of the Operators, for instance in replacing expensive air cooling units with forced air fan units, has resulted in numerous additional site visits due to equipment overheating.
40. It may be of interest for the committee and the Minister to have some facts and figures presented in support of the landowners. One of our clients has a portfolio of 11 sites. Over 12 months from 2014 to 15 they received over 140 access requests from the Operators various contractors.
41. During 2015 to 16, when the number of sites reduced to just 9, but 150 access requests were received.
- In addition, breach notices had to be issued and managed. All this incurred cost and took staff away from their primary work.
42. Public authorities such as fire and ambulance trusts have historically justified the locating of apparatus on their sites against perceived health and safety fears. The financial benefits received effectively subsidised public funding and helped deliver vital public services.
43. However the New Code will make it harder for them to:-

1. secure vacant possession if intending simply to sell the land or building upon which the apparatus is located
 2. achieve full market value as the protection afforded to the Code Operators by the New Code (effectively a sitting tenant) will devalue that land or building
 3. rationalise estates or redeveloping sites within timescales
 4. discharge their public duty to obtain maximum value for land as required of public authorities as the compensation regime will be linked to compulsory purchase order valuation regimes.
44. Public authorities could quite rightly find themselves under severe public criticism for effectively subsidising privately owned mobile phone Operators whose shareholders and customers will be benefiting financially at the taxpayers expense. They will be given no option but to terminate the agreements in accordance with the provisions of Part 5 [Para 13] (c) and (d).

Fragmentation of the Emergency Services Network

45. Should existing landlords be forced to seek the removal of Operators for the reasons above, existing mature networks in towns and cities, where coverage is required the most, could become fragmented.
46. This could pose a threat to the Emergency Services Network in terms of access, upgrading, maintenance and most crucially, coverage.
47. We submit therefore that the New Code as drafted inevitably places the landowner/occupier in direct conflict with the Code Operator and unless modified, will fail in its primary objectives.