

IEA Briefing Paper

# COMMUNICATION BREAKDOWN

How reforming the  
Electronic Communications Code  
could speed up 5G roll-out

James Forder  
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# Communication Breakdown: How reforming the Electronic Communications Code could speed up 5G roll-out

*Dr James Forder,*

*Academic and Research Director, Institute of Economic Affairs*

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## Summary

- In order to achieve satisfactory mobile telephony coverage in Britain, telecommunications companies need to site their equipment on land belonging to others.
- The Electronic Communications Code regulates legal relationships between those companies, or others operating their equipment, and the landowners whose land is used or needed. The Code can be invoked to require landowners to accept the siting of equipment on their land, and to secure a judicial determination of the payments to be made to the landowner.
- Before 2017 agreements to site equipment tended to be consensual. That year a reform of the Code changed the basis of land valuation. This had the effect of reducing – often substantially – the payments to landowners. Since then, there has been much litigation, apparent ill-will, and consequential delays in reaching agreements, and hence in rolling out the most advanced telecommunications.
- The simple and obvious solution to the problem is to restore the valuation principles used before 2017, or draft another rule having similar effect. This could be done in the Product Security and Telecommunications Infrastructure Bill.
- The Government appears determined to prevent the operation of market forces in this way. Instead, it is seeking to change rules and procedures to strengthen the legal position of operators when they are seeking to compel landowners to allow the use of their land.
- Arguments for and against the Government's approach are considered. The Government's case appears weak. It is suggested that the question of the principles of valuation be reconsidered and market forces given freer rein.

## Introduction

The Electronic Communications Code regulates the siting of telecommunications infrastructure by its 'operators' on public and private land.<sup>1</sup> It controls the rights of the relevant operators to install, maintain and upgrade equipment, as well as such things as when landowners can be required to lop trees, etc. It also creates mechanisms by which operators can force landowners to accept the installation of equipment on their land, and – crucially – the payments which are then to be paid to landowners by the operators.

Since the reform of the Code in 2017 its operation has proven controversial, and landowners are often resistant to equipment being put on their land. This reluctance results in legal action and slows down the rollout of 5G network. As a result, further reforms to the Code have been proposed in the Product Security and Telecommunications Infrastructure Bill. However, these proposals do not address what appears to be a central issue. There are very substantial reasons to believe that the difficulties since 2017 arise from the reduction of payments to landowners that resulted from the reform to the Code. The practical way to speed up 5G rollout would be to revisit the question of payments and amend the PSTI Bill.

In what follows, I describe how the present position has been reached and consider various arguments that have been made on the desirability of allowing the price mechanism a greater role, or of adopting alternative approaches.

## The Electronic Communications Code: A brief history

The Electronic Communications Code was originally created in 1984 in the context of the privatisation of British Telecom. After amendment in 2003 in the light of new technology, it was found to have led to ambiguity and legal anomalies. In 2010, the Coalition Government published 'Britain's Superfast Broadband Future', setting the goal of the country having, 'the best superfast broadband network in Europe by 2015'.<sup>2</sup> The same document drew attention to difficulties in agreeing terms for telecoms networks to have access to land, and action was promised.

The matter was referred to the Law Commission, which first published a Consultation Document, setting out the issues and making preliminary suggestions as to how to resolve them. (The Law Commission (2012)). This attracted 130 formal responses. It produced a Report of more than 200 pages, making 74 numbered recommendations. (The Law Commission (2013)) After receiving further responses to its own consultation, the Government legislated through the Digital Economy Act, 2017 to reform the Code. These reforms were intended to address the inadequacies of the earlier version, and for the most part did so along the lines of the Law Commission recommendations.

However, one particular issue concerned not ambiguity and legal anomalies, but the calculation of the payment of landowners when they were required to allow their land to be used. On this, the recommendations of the Law Commission were not followed, and the effect of reform was to reduce, and in many cases, very substantially reduce those payments. This is to the detriment of landowners.

Although the matter of payments has proven very controversial, it is widely accepted that the 2017 reforms have not succeeded in speeding up the process of determining where equipment will be sited. Consequently, dissatisfied with the operation of the post-2017 regime, the Government initiated a further consultation and subsequently brought forward legislation in the form of the Product Security and Telecommunications Infrastructure Bill. This seeks in various ways to speed up legal processes by making it easier for operators to compel landowners to allow the use of their land. However, it includes no proposals for revising the approach to determining payments. Indeed, such a possibility was specifically excluded from the scope of the Government consultation.<sup>3</sup>

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<sup>1</sup> The 'operators' are telecommunications companies or other companies operating the equipment for them.

<sup>2</sup> Department for Business, Innovation and Skills (2010).

<sup>3</sup> Department for Digital, Culture, Media & Sport (2021)

It seems that, instead of seeking to establish rules allowing a return to the largely consensual processes that once existed, the Government has set its face against allowing the price mechanism to operate. Rather than apply that system, the Government seems to wish to change the rules to empower the telecommunications companies to compel compliance from the landowners.

### **‘Compensation’ and ‘Consideration’**

In the language used by the Law Commission, ‘Compensation’ paid to landowners is a recompense payment which reflects the loss of value in their land as a result of the siting of equipment on it.<sup>4</sup> ‘Consideration’ is a payment in addition to compensation. It reflects the ownership rights over the land being used including the right of the landowner to benefit financially from ownership of the land.

The Law Commission noted that in the case of certain other utilities, consideration is not paid, but that in the case of electricity ‘something akin to consideration is payable’.<sup>5</sup> It should also be recognised, of course, that the practices relating to other utilities substantially took shape when they were under public ownership, and indeed in a period of much less respect for market forces than the present. Arguably, they should be revisited, but it is certainly difficult to see telecommunications companies in the same light as the utility companies of the 1940s, for instance. The telecommunications companies are commercial organisations run for the profit of their shareholders, not public companies, controlled by the state on the presumption that this would best serve the public interest.

In any case, the Law Commission also reported that the Code Operators from whom they had heard, did not object to the principle of payment consideration, and in their final report – The Law Commission (2013) – came to the clear conclusion that consideration should be paid, noting that the prevailing problem was lack of clarity about the amount of consideration, not the principle of paying it.<sup>6</sup>

Although the matter of the calculation of compensation is itself intricate (as is the legal matter of exactly to whom such payments are made), in the debate over payments to landowners that has developed, it is the calculation of consideration that is the source of most controversy, and that is what is addressed in what follows here.

### **The Law Commission on the calculation of consideration**

In its Consultation document prior to its 2013 Report, the Law Commission identified four principles by which prices might be set.<sup>7</sup> Three were described as principles well understood by valuers,<sup>8</sup> and were:

1. **‘Ransom or profit share’**. This is the price that, in the absence of regulation, would be paid to a landowner who was in possession of a unique piece of land, use of which was essential to the telecoms operator. Such a landowner would be in a position, in effect, to demand a possibly substantial share of the profits that would be earned by the telecoms company from the use of the land. The landowner would be exercising monopoly power.
2. **‘Market value’**. This is the price that would be paid in a more or less competitive market where, as the Law Commission put it, the telecoms company could ‘shop around’ between different landowners with equally suitable land in circumstances where the landowners do not reach a collusive agreement amongst themselves. In that case, no individual landowner can extract a ‘ransom’ price.

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<sup>4</sup> The question of the meaning of these terms was discussed in similar ways in The Law Commission (2012) and in The Law Commission (2013)

<sup>5</sup> The Law Commission (2012) para 6.42. The point about ‘something akin’ is merely that the legislation does not follow the path of the precise terminology of The Law Commission (2012)

<sup>6</sup> The Law Commission (2012) para 6.57.

<sup>7</sup> As they noted, there is an infinite number of possibilities. The selected were approaches to the problem which the Commission believed were familiar to valuers.

<sup>8</sup> The Law Commission (2012) para 6.12

Presumably for the sake of brevity the Law Commission account did not note that there would need to be a variety of telecoms companies as well, so that the landowners could 'shop around'. If that were not the case, it would be the telecoms company that could extract a kind of 'ransom price' by driving the price well below what it would be willing to pay if competing with other companies. Nevertheless, the intent of the Law Commission's description is clear, if only because of the comparison with their third case.

3. 'Market value on compulsory purchase principles'. Land which is acquired by compulsory purchase is valued according to the Land Compensation Act 1961, s5, and the case law that has developed around it. The Law Commission summarised the position, saying 'The case law makes it clear that account cannot be taken of any purported enhancement or diminution in the value of the land which is entirely attributable to the scheme underlying the acquisition'. (6.20) Under this approach, the telecoms operators are able to acquire use of the land for what it would be worth in circumstances where the telecoms operators did not want it.

This approach to valuation is sometimes known as the 'Pointe Gourde principle', or in discussion of the Electronic Communications Code, the 'no scheme' approach.

A fourth option was added as a possibility.<sup>9</sup>

4. 'Uplift on compensation'

This arrangement would augment compensation by a fixed percentage, or some other appropriate formula. The extent of uplift could obviously be set to achieve any general level of overall payment.

There could of course be a further option, which would be to leave the matter unregulated. The Consultation Document rejected this substantially for the reason that Code Operators were producing a 'public benefit' (para 6.59-6.60). This view is questionable since it turns on the identification of 'public benefit' arising from private activity. The Law Commission's reasoning amounted to noting that the Government had announced an objective of improving the broadband network, and saying that the service delivered could facilitate the 'creation of jobs and growth'.<sup>10</sup>

One might respond that it is a very dangerous approach merely to say that if the Government has an objective, it is appropriate to overrule the rights of property owners. And jobs and growth might be created and increased by a very wide range of private activities. *Any* investment in a particular area might have both of those effects. The case for unregulated free market determination of rents therefore appears much stronger than the Law Commission appreciated. That option, however, is not pursued here.

## **The Law Commission's preliminary and final recommendations on pricing**

In the Consultation Document, the Law Commission noted that as far as they knew at that time, Code Operators did not tend to object to the payment of consideration per se, but were concerned about the level of it, and the lack of a clear definition of it in the Code. (6.43). And they said, 'The main problem with consideration under the Code is the lack of certainty'. (6.57) That was damaging substantially because it gave the parties no secure starting point for negotiations.

A priority was therefore to set a clear basis for calculating payments. The Commission considered the four options.

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<sup>9</sup> The Law Commission (2012) para 6.61.

<sup>10</sup> The Law Commission (2012) para 6.59 note 46

The 'ransom' option was rejected for the same sort of reasons as the idea of leaving the matter unregulated – that the pursuit of public benefit should not be confronted with monopoly pricing.<sup>11</sup>

The case for 'Market Value' rental was rejected in the Consultation Document for two reasons. One was that information was lacking to assess such prices because there were – the Document reported – too few cases of comparable transactions. And they said 'There is also an argument that this method of assessing consideration is too onerous to Code Operators' because it resulted in an 'artificially high price' being paid.

The second of these should again be questioned on general principles. Precisely the idea of the definition of 'market value' is that it is the price that would be agreed between buyers and sellers in the absence of monopoly power. It is hard to see how that could be 'artificial'. As to the point that there was too little data to make the assessments – see below.

The reasons for rejecting the 'uplift on compensation' option are not clear, but perhaps the implication is that it made consideration entirely unrelated to any concept of market value. So, in a simple version of the approach, a near-valueless piece of land which happened to have damaging work done on it could receive a greater 'uplift' than the owner of a valuable piece of land on which nearly harmless work was done. That would seem to be contrary to the idea of the 'uplift' being an approach to the measurement of consideration.<sup>12</sup>

The approach of assessing value on the basis of compulsory purchase principles was then the approach favoured in the Consultation document.

### **The adoption of 'Market value' in the Law Commission's final Report**

The striking, notable fact, however, is that when they come to produce their response to the Government's enquiry, The Law Commission changed its mind, dropped the 'Market Value on Compulsory Purchase principles' and adopted the 'Market Value' approach as its recommendation to the Government. The Introduction and Summary to the Report stated the conclusion, saying,

'In the Consultation Paper we provisionally proposed to introduce more clarity on the vexed issue of price by departing from the market value basis of consideration under the Code; but in this Report we have recommended that the revised Code should maintain that market value basis. We have recommended that the unclear wording of the 2003 Code be replaced with terms that reflect established valuation practice; and consultees have convinced us that there is enough by way of available evidence of comparable transactions to make this workable.' (para 1.24)

In the full discussion in Chapter 5 of the Report, the Commission elaborated on its reasons. First, it explained why it had taken the view it had in the Consultation document. The reasons were that the definition of consideration in the Code was unclear; and that a market value assessment was unworkable because of a lack of comparator transactions. It noted that it had been aware of concerns that the payments being made were too high.

However, it summarised the arguments that had been made in favour of the 'market value' basis, and therefore in opposition to the 'no scheme' suggestion of the Consultation document. These were:

1. Fairness to landowners. Discussing the submissions it had received, the Commission commented 'we accept that a landowner's right to profit from his or her land should not be restricted without a very good reason in the public interest'. (para 5.44)
2. There was a well-established market. The Commission specifically noted that the Consultation document had been in error in doubting this. It said, 'Contrary to what we had heard before publication of the Consultation Paper, many consultees asserted that the market

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<sup>11</sup> The Law Commission's case here would be stronger than in their discussion of leaving the matter unregulated. To *stipulate* that landowners were to be paid the ransom price gives them much more than allowing them to negotiate in a free market.

<sup>12</sup> The option is considered and rejected in The Law Commission (2012) paras 6.70-6.71.

currently works well'. (para 5.46) The Commission quoted a number of sources of evidence on this point and said, unambiguously, 'As a result of the evidence offered to us we are satisfied that there is no lack of comparators in the cell site and mast site market'. (para 5.50).

3. The unwillingness of landowners to cooperate. The Commission reported evidence to the effect that a reduction in payments to landowners would be costly in terms of their willingness to have equipment sited on their land.
4. Economic Impact. The Commission noted they had received representations to the effect that a move to 'no scheme' valuation approach would damagingly reduce rural incomes and capital values for the landowners concerned.

Summing up the position, the Commission said their provisional recommendation for a 'no-scheme' valuation basis had been based on the evidence then available, and continued,

'But consultation responses have told a very different story... There is a functioning market in this context and it would be inappropriate to stifle it'. (para 5.75)

And, rejecting the case for changing to the 'no-scheme' valuation basis, the Commission continued,

'the evidence with which we have been presented is such that we take consultees' concerns very seriously. We conclude that the risks of economic damage, to individuals, businesses, the public purse and the electronic communications industry itself far outweighs the potential benefit to that industry, on the basis of the evidence we have.' (para 5.76)

They therefore recommended the 'market value' approach be retained. To resolve the lack of clarity about the law, it specifically recommended the valuation basis of the Code be a modified version of the concept of market value in the 'Red Book' of the Royal Institution of Chartered Surveyors. The modifications reflected specific aspects of such things as the need to upgrade equipment on site and, importantly, that the valuation was to be based on the assumption that the site in question was not unique, so that there would be no question of assessing a ransom price. (para 5.83)

## **The Nordicity Report**

Subsequently to the report of the Law Commission, the Department for Culture Media and Sport commissioned Nordicity, a consultancy, to address the matter of the economic impact of different valuation approaches. Its headline conclusion was that – according to its estimations – the difference between the outcomes if the Law Commission's approach were adopted and those resulting from much lower prices, would have a 15-year present value of £723.7m and create 3,300 new jobs over the same 15 year period.<sup>13</sup> Considering the period of time taken for this benefits to accrue, they are extremely small – about 220 jobs per year, nationwide, for example. Even these outcomes arose from changing the prices of rental for masts and cables, rather than merely the more controversial aspect of just masts.

In reaching this conclusion, they observed that the costs of renting land are a small proportion of the cost of operating telecommunications equipment. Because of that, even the lowest pricing scheme – in effect paying no consideration at all – would lead to a cost saving of a little less than 1% as compared to the Law Commission's proposal.

As is the nature of such studies, Nordicity were forced to make many assumptions which would be hard to defend closely, but which are in the category of 'best guesses'. There are three that warrant comment. In each case, it appears that Nordicity's approach may now overstate the benefits of lower land valuations.

The first is the idea that all of the cost saving to operators would be passed on to consumers. That would be the outcome in a fully competitive market or, presumably, one which is optimally regulated.

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<sup>13</sup> Nordicity (2013) Exhibit 43, note 2. The results concerned the pricing of masts, overground and underground cables, whereas what has later been principally at issue is that of mast. That point would affect details, but in the Nordicity study, masts were shown to represent the bulk of the costs of the operators.

Telecommunications is hardly the first of those, and the general danger of regulatory failure cannot be doubted. Furthermore, the Law Commission had reported that in their consultation *none* of the operators had said to them that lower land valuations would be passed on in lower prices.<sup>14</sup> So this is not a public benefit that operators thought it appropriate to mention. On this point, then, Nordicity's approach was to assume the absolute maximum of benefit from deviating from the Law Commission's approach. The true benefit to consumers, and hence any increase in take-up of services economic growth and job creation, is therefore presumably over-stated by Nordicity's approach.

The next two crucial steps in their research were to estimate the effect on take-up of the assumed price cut; and then the effect on economic activity of that increase take-up. In both cases, Nordicity relied on surveys of quantitative studies of these questions. Their assessment of what these studies found seems very reasonable, but the difficulty is that none of them is dated after 2011, and so all the studies are old.<sup>15</sup> This matters because broadband take-up has increased so much in the last ten or twelve years. The question is whether the effects of a 1% variation in price will have as large an effect on take-up when take-up is already high as it did when it was much lower.

The equivalent question about the next point could be even more important. The issue is whether the macroeconomic benefits of increased take-up remain the same as take-up increases. One would presume, for example, that the firms with most to gain would be amongst the early-adopters. When the *average* benefits of increased take-up are calculated from data about the period of early-adoption, it will then give an over-estimate. It is conceivable that 'network' effects increase the benefits of joining as the number of members increases. That could be a powerful effect where what is under discussion is being connected to the internet. But where the question is merely that of the speed of an individual's connection, it seem unlikely that the fact that an increasing number of others have faster connections makes much difference to a new-joiner. The likelihood is, then, that here again Nordicity's approach gives what would – ten years after their study – be an overestimate of the benefits of lower land valuations.

## The Government's various responses

The Government initially, if tentatively, accepted the Law Commission's view. Referring to its recommendation, noting the findings of Nordicity (2013), which it had commissioned, the Government consultation document on what eventually became the 2017 legislation said,

'the Government decided to proceed with a twin approach: to adopt the Law Commission's recommended approach for reforming the way consideration is assessed, and further to include in the revised Code a mechanism for moving to a "no scheme" valuation... should Government find that such an approach is justified by a clear evidence base'.<sup>16</sup>

However, in presenting its response to the consultation, the Government changed its position. There, it said,

'the nature of digital communications has changed significantly since the Code was established as part of the Telecommunications Act 1984. Given the priority that this Government attaches to digital communications and long-term investment in UK infrastructure, and the ever more vital role that digital communications play in economic growth, productivity gains, and social interaction, we consider that reform must now go further'.<sup>17</sup>

That going further was to say that 'fair value' for the use of land,

'should not, as a matter of principle, include a share of the economic value created by very high public demand for services that the operator provides'.<sup>18</sup>

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<sup>14</sup> The Law Commission (2013) para 5.63.

<sup>15</sup> Some of them were of course well up to date at the time of the Nordicity study (2013), but the question is about the relevance of the findings to policy in 2022.

<sup>16</sup> Department for Culture Media & Sport (2015) para 45.

<sup>17</sup> Department for Culture Media & Sport (2016) pp. 14-15.

<sup>18</sup> Department for Culture Media & Sport (2016) pp. 14-15.

The Government therefore changed its position, as the Law Commission had, but in the opposite direction. It did not seem to have done so on the basis of a clear evidence base, but rather to have decided that property owners' rights ought to be dismissed.

The extraordinary character of this attitude was well-highlighted by the Centre for Economics and Business Research (2021). It pointed out that telecommunications infrastructure uses a large amount of electricity, the cost of which appears to be of particular concern for 5G networks.<sup>19</sup> It would be possible for the Government to mandate that this electricity be supplied at less than its normal price. It could then reason that, since public demand for telecommunications is high, it would be in principle wrong for electricity providers to benefit from satisfying it.<sup>20</sup> Why not? (The same would apply to the firms' workers, and the suppliers of all other inputs to the process). As CEBR said, 'It is not clear why reductions in land valuation meet a public interest test, but reductions in electricity costs do not'. (p. 20)

The Government's 'principle' seems to fly in the face of the normal presumptions of the free society, and it did not explain its reasoning.

### The 2021 proposal for further reform

In fact, the result was that landowners became very reluctant to have equipment sited on their land, and became uncooperative with the process. Landowner objections to the arrangements have been well-documented, for example, by Protect and Connect,<sup>21</sup> by Jackman and King (2020), and Department for Digital, Culture, Media & Sport (2021) para 3.12, and the data presented in Centre for Economics and Business Research (2021) pp. 11-15.

In January 2021, accepting that the reforms of only four years before had failed, the Government began a consultation on further reform. The Government Consultation Document raised a whole collection of problems. Some of them may indeed arise from genuine legislative glitches. For example, the Consultation Document observed that the Courts have no powers to impose a right to upgrade equipment if the Code agreement was in place before 2017. Some, though, are fairly obviously the consequence of landowners being reluctant to see equipment sited on their land, or operators realising this, accepting they would have to impose an agreement. The document described for example, a 'lack of willingness to negotiate in meaningful ways' (para 2.10); and 'non-responsive or unidentifiable occupiers'. Since problems seem to have been very much rarer before the reform of the Code in 2017, the natural conclusion is that this has happened because of the change in the valuation regime.

The Consultation Document raised a number of ideas to address this problem, but on the matter of pricing the Government's consultation document said, in bold,

**'We do not intend to revisit the valuation framework contained in the Electronic Communications Code'** (para 2.13) and, again with the emphasis in the original,

'We do not think that disagreements about financial terms are the **only** reason that negotiations are not progressive as smoothly as they could be.' (para 2.14)

The Government, then, acknowledged that the valuation regime was one problem. But they apparently presumed that useful reform could ignore it. Others disagreed, but the Law Society's response was particularly to the point. Responding to the Government's consultation, it said,

'we are concerned that the Government's proposals focus more on treating the symptoms of the problems encountered rather than examining their root causes' (p. 2)

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<sup>19</sup> <https://tinyurl.com/2p8ept52>

<sup>20</sup> Centre for Economics and Business Research (2021) p. 20.

<sup>21</sup> <https://www.protectandconnect.co.uk>

And of those root causes, they said the 2017 reforms,

'instead of achieving "an appropriate balance" [between landowners and Operators] have, in practical terms, tilted the balance of rights too heavily in favour of operators... The implied presumption in favour of operators has resulted in site providers being on an unequal footing when challenging decisions, with many reacting with obstruction, unwillingness to cooperate and litigation' (p. 2)

It should not be difficult to see that the Law Society may well have been exactly right. The Government's approach is to treat symptoms. The outstanding problem is that landowners do not *want* to cooperate on the terms they are being offered.

On the other hand, it is difficult to understand the Government's position. One perhaps suspects that in the background to some of these arguments lies the idea that 'levelling up' requires or will be facilitated by rapid rollout of 5G networks. Indeed, it is easy to sympathise with that view. Improved communications networks, particularly in rural areas, may have great potential to 'level up'. If rollout is actually slowed, as it appears to have been, that argument fails. But more notably, precisely the point of 'levelling up' is that the lives of some can be made better *without* others being worse. To take from the landowners so that others can have very slightly cheaper communications conceivably might be a kind of 'levelling' – though that case is yet to be made. But if it were, it would substantially be levelling *down*.

### **Some proposed solutions**

The Government's ways of addressing the issue, contained in the Product Security and Telecommunications Infrastructure Bill, run to more than 20 pages of new and amended rules. They cover amendments to the Landlord and Tenant Act; provisions for handling unresponsive occupiers; the arrangements to be in place while applications are made; mechanisms of alternative dispute resolution; powers for the Secretary of State to make regulations imposing time limits on proceedings; the rights of network providers relating to infrastructure, etc etc.

The general intent of the provisions is evidently to move practical power further in the direction of the operators so as to overcome the landowners' resistance to the payment rules. Some seem to want to go further. For example, Jackman and King (2020) wrote that,

'A list of 'trusted practice' land agents that work to the intentions of the new Code should be established and promoted to landowners, alongside an awareness campaign that highlights the risk of lower imposed valuations by a tribunal and other litigation costs if no agreement is reached with a Code Operator'. (page 6, point 3)

What is required, it seems, is something akin to what is sometimes called a 're-education' programme or 'correctional education', for the landowners.

Serious alternatives involve better use of the price mechanism. A viable possibility may well be to simply allow market forces to operate in setting prices for the siting of masts. There are probably few cases where landowners have much monopoly power, since other pieces of land are always available. But in any case, that problem can be avoided along the lines of the recommendation of the Law Commission. That was to apply the principles of the RICS '*Red Book*' with additional provisions to ensure against assessments at ransom prices. Apart from being very likely to eliminate the problems of lack of co-operation by landowners that have appeared since 2017, it would also give them fair value for the use of their property. As the Centre for Economics and Business Research (2021) p. 21 said, an economic surplus is generated by the supply of services. The operators take some of that surplus, but if a reasonable share of it is paid to the landowners, they would be happy to enter into agreements to allow the siting of equipment on their land.

## Conclusion

There appears to be no dispute whatsoever about the importance of effective, technologically sophisticated communications, and the desirability of a rapid roll-out. Indeed two campaigning groups, Protect and Connect,<sup>22</sup> advocating higher payments, and Speed up Britain,<sup>23</sup> generally supporting legislation to speed up agreements and legal processes under the payments regime of 2017, could be said to be vying with each other (and the Government) to be the most powerful advocates of that view.

The pre-2017 Code was deficient because it contained ambiguities and led to legal uncertainties. It was not deficient because it mispriced land. The change in land valuation was introduced by the Government late in the day, and contrary to the considered option of the Law Commission, and apparently on the basis that a cost reduction of 1%, of which an unknown portion would be passed to consumers as price reduction, was worth the difficulties that would ensure.

Nor does it seem to be in dispute that rollout has been slowed by the reluctance of landowners to allow their land to be used for the siting of equipment. The exact reasons for this slowdown are matters of speculation. Landowners appear angry at the low valuations, and resistant to agreement. Delay may simply be a negotiating tactic. For those who already have agreements, the old rents continue to be payable until new ones are settled, creating a clear incentive for prolonging any process. That may also lead to artificial disputes over what would otherwise be easily resolved matters such as the calculation of compensation. All these difficulties could be very substantially resolved by a reversion to payment levels similar to those of the old arrangements.

The very fact that further reform was initiated only four years after the substantial changes in 2017 is itself a sign that something has gone wrong. The Government appears to have acknowledged the land valuations are an aspect of the problem, but has declared that as a 'matter of principle' land owners – and, specifically, only landowners – should not benefit from their role in supplying an important public benefit. Instead, telecommunications companies should be allowed to make them lower payments.

But there is dispute over what should be done to repair the damage, and achieve the fast rollout that is agreed to be so important. One view – the approach of Speed up Britain, Jackman and King (2020), and hitherto, the Government – is to change the rules, and particularly the rules about the process of adjudication of disputes, to make it harder for landowners to pursue their case. Of course, in terms of the particular objective of seeing agreements to site equipment reached more quickly, that might work. Indeed, taken far enough, it is almost sure to work.

But as the Law Society said, it would be treating symptoms. It is also denying landowners the right to benefit from their ownership, and may well be a clear instance of 'levelling down'.

Instead, there is a simple and obvious solution to the problem, which is to allow market forces much freer rein. An approach along the lines of that proposed by the Law Commission would anchor valuations to free market prices, whilst securing them against 'ransom' pricing. That is the principled approach, since it gives landowners, like all others who contribute resources in the deployment of telecommunications infrastructure, a fair return on their property. It would bring the interests of landowners into alignment with policy objectives. That will impose a certain expense on operators, but on the other hand, they are taking rights over other people's land. Conceivably, there may be a small impact on prices paid by consumers, but those are the costs of supplying the service the consumers are buying.

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<sup>22</sup> <https://www.protectandconnect.co.uk>

<sup>23</sup> <https://www.speedupbritain.com>

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