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AP Wireless' response to DCMS consultation on 'Ensuring tenants' access to gigabit-capable connections

Introduction

1. As a major investor in digital communications infrastructure, AP Wireless ('APW') welcomes the opportunity to respond to the consultation and supports the ability of tenants to access high quality electronic communication services.
2. The Digital Economy Act 2017 which brought into force a new Electronic Communications Code ('ECC') is less than a year old. As with any new piece of legislation, there is a period of uncertainty while stakeholders and landlords try to navigate unchartered territory. Any further amendments should be minimal so as to avoid further de-stabling of the market. If the powers already exist then further amendments should be avoided and other tools to ensure that the ECC is correctly applied should be investigated.
3. Since the DCMS consultation was announced the Upper Lands Tribunal passed judgement in Cornerstone Telecommunications Infrastructure Limited v The University of London. That case confirmed that access to carry out a survey prior to building network infrastructure is a Code Right capable of being imposed under the ECC.
4. We would also highlight the significance of paragraph 97 of the ECC which obliges the Upper Lands Tribunal to decide any application for Code Rights within 6 months. It is therefore not wholly correct to state that the time line to obtain Code Rights is 7 – 12 months.
5. In composing this response, we have also been able to review the response put together by RICS. We would also draw a distinction between 'service agreements' and a 'network agreement'.
6. Both network and service agreements provide coverage but the network agreement is also for the benefit of the operator's wider network. Furthermore the works involved in providing a service agreement are likely to be far lesser than those required for a network agreement. Given the prejudice caused to a landlord in a court allowing access for the installation of network apparatus, we would suggest that any proposals to amend the ECC only relate to service agreements. This would not prejudice the operators since the right to impose an agreement on an unresponsive landlord already exists in the ECC and can be obtained through recourse to the Upper Lands Tribunal.
7. We understand that there are over 70 cases at the Upper Lands Tribunal, we would question whether landlords are failing to respond outright. By their very nature a case at the Lands Tribunal is suggestive of a disagreement as opposed to a simple failure to respond. If this is the case then we do not see how further powers to allow access where landlords fail to respond will meet the desired objective. The end result of any increased powers to the operators may simply be to increase the number of cases in front of the Upper Lands Tribunal as landlords do respond but in a negative manner.

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About AP Wireless

8. We are the leading phone mast lease investment firm in the world. We focus on the acquisition and management of ground, tower, rooftop and in-building mobile phone mast leases and infrastructure.
9. The APW UK senior management team collects approximately 90 years of experience in the acquisition, estate management and development of digital communications infrastructure.
10. APW develops partnerships with existing mobile phone mast landlords, providing them with a lump-sum payment in exchange for the right to receive the future rent associated with the mobile phone mast on their property. AP Wireless seeks to add as many ECC beneficiaries to each site as possible, ensuring that all sites are managed to their greatest potential.
11. In 2010, AP Wireless began investing in mobile phone mast leases and has since expanded operations to 35 locations around the world. The company's investment portfolio is comprised of thousands of leases in 14 countries across Europe, Asia, Australia, and North and South America.
12. In the UK alone, we have invested over £100 million on the behalf of our US-based equity investors Associated Partners LP and KKR & Co. LP.

Would the placing of an obligation on landlords in the manner proposed encourage more landlords to respond to requests sent by operators?

13. To answer this question in the positive, one would have to assume that landlords currently feel able to ignore requests made by operators. The number of cases at the Upper Lands Tribunal would seem to suggest that the operators feel comfortable in pursuing landlords through courts to compel them to enter into an agreement. It is therefore not clear to us how inserting additional powers into the ECC along with the inclusion of a different dispute process under the guise of a different court would encourage more landlords to respond. It may be that this proposal will simply add yet another area of complexity to a piece of legislation that all parties are already struggling with.

To what extent would placing an obligation on landlords complement or undermine the facilitation within the Electronic Communications Code of negotiated agreements between landlords and operators?

14. The UK has enjoyed fairly successful roll out of mobile connectivity for three decades. This was largely due to both parties reaching consensual agreements. The ECC pre December 2017 was less than ideal and because of that both land owners and operators felt the need to avoid going to court and this meant that they had little choice but to negotiate.
15. Since the introduction of the revised ECC in December last year, the market has stagnated and stalled. While we know that the operators would argue that this is due to landlords not understanding the valuation mechanisms in the ECC, we believe it is simply that landlords do not wish to engage with operators who are offering nominal sums but expecting unfettered rights and statutory protection which sterilizes their land. This may not be the case of service

agreements but it is certainly the case of network agreements.

16. Landlords are telling us that they do not wish to deal with the operators. This reaction is not solely due to the levels of consideration being offered but as a reaction against what landlords feel are heavy handed tactics by certain operators relying on statutory powers. It is difficult to see how increasing one sides bargaining power by further enhancing their statutory rights will change this position.

Do you consider that the use of the courts for the purposes of granting entry to operators where they have been unable to contact a landlord is reasonable? If not, why not

17. We do not feel that using the court is appropriate for the purposes of granting entry. Court action should always be a last resort. Notwithstanding this, one of the reasons for our answer stems from the fact that this right already exists. In your report at 5.4 you cite that no operator has chosen to make use of the existing powers where a landlord has failed to respond. With respect, this does not seem to us to be a reason to change legislation. The operators may refer to delays of 7 – 12 months but as referred to in (7) above this is not the case with the tribunal under an obligation to reach a decision within 6 months. If a landlord fails to respond then the operator can still take the matter to tribunal. There are also numerous cases at the Upper Lands Tribunal which would seem to be contrary to the statement made by the operators that they don't feel able to utilize their powers.
18. Any application to court should take into account the prejudice caused to the landlord and the benefit to the public in making an order compelling the landlord to allow the installation of apparatus. To us, this seems a sensible balance and one which should not be circumvented easily. Those operators seeking to install a fixed line to serve a tenant and whose works are not significant will arguably be granted an order by the Upper Lands Tribunal. Where the works are for a network agreement and require the installation of significant apparatus, there needs to be a level of scrutiny over the request which is why the Upper Lands Tribunal was chosen as the correct forum.

Do you agree that two months is an appropriate amount of time to pass before a landlord is considered absent and an operator can seek entry via the courts? If not, what how much time would be appropriate?

19. The ECC currently allows for an operator to take a matter to the Upper Lands Tribunal if the landlord doesn't respond to their statutory paragraph 20 notice within 28 days. Two months therefore doesn't seem to be unduly onerous. Our concern would be, what safeguards would there be at the magistrates court which mirror those in the ECC and how does this fit with the other provisions of the ECC. Would operators simply use this as a method of circumventing the landlord safeguards/compensation provisions in the ECC.

What evidence should an operator be reasonably expected to provide to the courts of their need to enter a property and their inability to contact a landlord?

20. At a very basic level the operator should produce:

- details of the landlord's title and tenant's title – we would suggest that only tenants under a long lease (99/999 years) should be able to make a service agreement request. This would place the legislation on a footing with the landlord's right of first refusal in the Landlord and Tenant Act 1987
- Letters and statutory notices issued to the landlord and any third party with an interest in the building such as a mortgagee
- Plans showing the works and contact with any other tenant or management company who the works could impact upon and either their consent or failure to respond. If the works are minimal and only through the common parts then it is unlikely that this will have an onerous impact on the operators.
- We would also suggest producing a planning search showing that there are no planning applications. The existing ECC provides that an operator cannot impose an agreement where the land owner has an intention to develop, we see no reason why this safeguard should be dispensed with under the proposals.

Is there a need to define what constitutes a request by a tenant for a communications service?

21. Yes. Clearly the definition of Operators contained in ECC at paragraph 3 is extensive. It covers those looking to install a single fibre connection to a tenant and those who are looking to install significant apparatus on a property or a piece of land for the benefit of the wider network. In the case of the latter, it is likely that, once installed, there will need to be additional access visits, upgrades or repairs. Those provisions should not be captured in a magistrates award but after proper and careful consideration from the Upper Lands Tribunal. We would suggest that extension of this right to all operators through a magistrates court, without significant safeguards, may be contrary to Article 1 of the ECHR.
22. Where a tenant does make a request the request should then be followed up by an independent third party to show that there is not sufficient digital connectivity.
23. The next step should be for that independent third party to engage with an operator to provide the required coverage/connectivity.
24. The operator should then make attempts to contact the landlord and any third parties with an interest in the property/building before making any application to court.

Do you agree the temporary access granted by the court should be valid until such time as a negotiated agreement underpinned by the Code, is signed between an operator and landlord?

25. The ECC already provides for temporary and interim rights which would include temporary access. In accordance with decisions made in the Upper Lands Tribunal, we would suggest that any temporary access rights should only be available for a limited period. By linking the temporary access to the date on which a negotiated agreement is signed effectively creates a situation where the temporary rights could extend indefinitely especially given the statutory protection granted to apparatus. There would need to be amendments to make sure that this statutory protection did not attach to apparatus installed under a magistrates order.
26. If temporary access was to remain until a negotiated agreement was completed then the ECC

would need amending to ensure that a landlord who has an agreement for access imposed upon them could force a full agreement through the Upper Lands Tribunal. As currently worded, the ECC does not provide for a mechanism for the landlord to impose an agreement on the operator.

Would temporary access granted by the court provide an incentive for landlords to re-engage?

27. It may be that where access is granted by a court that landlords will re-engage but we would question whether the ECC provides for the landlord to be able to do this with any degree of certainty or control (26) above.

Do you forsee any issues with operator/landlord negotiations which take place after the installation has taken place?

28. In the past mobile operators installed apparatus under quasi licenses or Early Access Agreements. The intention was that these agreements would be converted into full agreements/leases in the future. Unfortunately, landlords found that once the apparatus was installed, there was no desire from the operators to convert the EEA to a full agreement/lease. This situation would need to be avoided.
29. It is difficult to see how, without any bargaining power, a landlord could negotiate any provisions to protect their property when the apparatus is already installed or access taken. It is always easier to negotiate on anything where both parties have something to gain from reaching agreement. If one party has already got what they want then the other will struggle to get agreement on anything they need leading to a very one sided arrangement or no arrangement whatsoever.