CENTRAL ASSOCIATION OF AGRICULTURAL VALUERS

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Secretary and Adviser

Tenant Connectivity consultation
Digital Infrastructure Directorate
Department for Digital, Culture, Media and Sport
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By email: tenantconnectivity@culture.gov.uk

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Dear Sirs,

Ensuring Tenants' Access to Gigabit-capable Connections
CAAV Consultation Response

I write on behalf of the Central Association of Agricultural Valuers in response to the consultation on ensuring tenants' access to gigabit-capable connections.

Introduction

The Central Association of Agricultural Valuers (CAAV) represents, briefs and qualifies some 2800 professionals who advise and act on the very varied matters affecting rural and agricultural businesses and property throughout the United Kingdom. Instructed by a wide range of clients, including farmers, owners, lenders, public authorities, conservation bodies, utility providers, government agencies and others, this work requires an understanding of practical issues.

The CAAV does not exist to lobby on behalf of any particular interest but rather, knowing its members will be called on to act or advise both Government and private interests under developing policies, aims to ensure that they are designed in as practical a way as possible, taking account of circumstances.

Our particular interest in this consultation arises from our close involvement as a professional body throughout the process of reform of the Electronic Communications Code (the Code) and our continuing engagement in supporting CAAV members (whether advising site providers or operators) and with Government and industry bodies over the larger issues. Our main focus in this is on the issues to be considered in the interaction between electronic communications apparatus and property, whether bare land or a

building, or other businesses. The new Electronic Communications Code now governs much of that with its provisions for agreements for apparatus to be on land and for the associated Code rights and powers.

Our responses to the consultation are set out in two parts:

- a general response to the overall consultation
- specific answers to the consultation questions as posed.

Overview

We have several concerns about the approach taken in the consultation:

- that it proposes a single answer to a range of diverse circumstances without appearing apt to all of them
- that it sits ill with the general principle of the Code (and all its predecessors over last two centuries) that apparatus is installed by agreement, albeit with recourse to a Tribunal to determine the fair terms for an agreement where one has to be imposed. We note that this principle is indeed affirmed at the consultation paper's paragraph 3.11.

The essential background is that a tenant has a defined and time-limited interest in a property, in some cases that may be an extensive and long term interest but in others it may be narrowly defined and more transitory. In either case, a tenant can only grant an agreement that can give rise to Code rights within the limits of his agreement. The easiest illustration of that is that a tenant with a tenancy for a year has no legal power to grant any right that runs beyond the end of the tenancy. As the result of a Code agreement may lead to Code rights that can have just that effect in practice, some tenancy agreements may bar the tenant for creating any Code rights.

The tenant has the immediate occupation and use of the property. The better that property is serviced, the more a typical tenant may be willing to pay in rent or to remain there.

The landlord's interest is in the long run use of a property balancing its current use and rent against potential needs to maintain or redevelop it. Code rights can seriously complicate both major maintenance operations and redevelopment. A tenant who burdens a property with Code rights and then leaves may have limited the landlord's future use of the property or created new cost without achieving a continuing benefit to any tenant.

The proposals in the consultation paper indicate no means for the various relevant practical concerns of all potential parties (landlord, tenant, other tenants and so on) to be balanced in the way that the Code does.

In principle, none of these issues can be new. Until the recent advent of wide-scale mobile telephone coverage, tenants have long wanted and obtained telephone lines for properties whether residential or commercial. Where there were problems, they were with operators' delivery, not landlord's recalcitrance – a position still widely reported by those trying to secure fibre lines to premises, taking many months after making large payments to operators. Of itself, that suggests some caution as to creating any wide reaching strong powers.

However, we see in the paper a particular concern about "multi-dwelling units" such as blocks of flats – but perhaps potentially also HMOs – especially where there is an absent landlord or a landlord that does not respond to an approach. If there is substantive evidence of this as an issue, rather than assertion, then we would suggest an answer specifically tailored to such residential circumstances (where the issue may on occasion lie with other tenants as much as the landlord) and so not bear on commercial, agricultural or other simpler residential lettings.

Most of the 1,7 million private landlords cited at the paper's paragraph 5.5 will not be landlords of "multiple dwelling units" – though many, indeed, will be themselves be, in turn, tenants of such units.

It does appear that, despite the rapid evolution of many forms of connectivity, the paper has an implicit premise that fibre is the only answer. There are presumably circumstances where mobile connectivity is sufficiently good for it to remain the viable answer it has been for many tenants. That point should be one to be considered in each case, especially where it is clear that the tenancy may not last long and the property may be redeveloped.

However, while the paper's discussion is in terms of fibre, the proposals are simply in terms of "digital infrastructure" and so our response has to take into account the potential for the proposed powers to apply to imposing a mast or other apparatus, not only fibre.

That may also matter to the tenant of business or agricultural property who might face the financial penalty of dilapidations on the end of the tenancy where the effect of action was to impose burdens on the landlord and the future use or re-use of the property.

That answer should though be developed in accordance with the principles of the Code rather than introduce new means, such as a court, for such action. Forcible entry under a magistrates' warrant is a strong remedy and sits awkwardly with all other impositions on property under the Code being through the Tribunal (still the county court in Northern Ireland) to which it was moved in recognition of the relevance of its expertise to Code issues.

In summary, when most landlords will be anxious to have the benefit of connectivity for their properties:

- which circumstances, which tenants and which landlords is this aimed at?
- what is the evidence that helps identify the issue and so develop a more precise solution?
- how does this take proper recognition of the balance of interests involved?

Would there be a similar power for a landlord to impose connectivity on a tenant, despite the covenant of quiet enjoyment?

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

Many landlords wish to see their buildings well connected to modern communications infrastructure in order to make them attractive to tenants. Those buildings which do not offer good connectivity will become less appealing to tenants over time and the landlord's investment is likely to suffer as a result. It is, therefore, often good business sense to enable

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good connectivity, which begs the question of why operators are having difficulty in securing consent from landlords at the moment.

It is useful to review the current context within which the proposals sit. When electronic communications apparatus is placed on land or in or on a building by agreement with the property owner, the rights of the property owner to use their property as they wish are constrained by the Electronic Communications Code (EC Code), because the apparatus cannot be removed except in very limited circumstances and then usually only with at least 18 months' notice.

The experience of property owners in dealing with operators over sites for apparatus which does not directly benefit the building (such as rooftop antennas to improve mobile coverage in the locality) has made some cautious of further dealings. This is because of the very considerable cost and delay which can arise when it is necessary to engage with operators to remove or temporarily relocate their apparatus to allow for repair or maintenance work, or in the case of redevelopment of a building or site. Recent experience of the very hardline approach taken by some operators under the new EC Code to renewals of existing agreements for siting apparatus on rooftops or on land and the nominal payments on offer have only served to strengthen the views of some landlords that having electronic communications apparatus on their property is a burden which they would rather not bear.

The consultation document does not explain how the obligation on landlords to respond would work. Operators can already refer a request for a new agreement to the Upper Tribunal in England (or the Lands Tribunal in Scotland, or the county courts in Northern Ireland) on only 28 days' notice for new apparatus. The Tribunal is then obliged to decide the matter within 6 months.

Tenants may also have opportunities to request the landlord's consent for improvements to the property under their tenancy agreements. In England and Wales, they have statutory rights to be informed of the landlord's identity and contact details:

- Landlords of premises which consist of or include a dwelling are obliged under s.47 and s.48 of the Landlord and Tenant Act 1985 to provide the tenant with the landlord's name and address for service of notices.
- Landlords of business premises are obliged to provide the name and address of those with an interest in the property under s.40 of the Landlord and Tenant Act 1954.

These obligations mean that it should be possible for a tenant to know how to contact their landlord.

How will the proposed obligation on landlords to respond to a request work? Landlords will already be familiar with formal notices – some in prescribed form – which require a response within a set timeframe for a variety of landlord-tenant matters, such as rent reviews or request for consent for the tenant to carry out works. If such a format is to be proposed here, the request should come from the tenant and the landlord must have enough time to be able to assess it, consider the possible consequences for the property and all of the occupiers and then come to a decision and communicate that to the tenant. The time period to respond should be not less than 28 days.

A landlord should be able to request further information from the tenant if there is insufficient detail in the initial request to allow a fully informed decision to be taken. Where a landlord refuses to allow consent for access, their reasons for doing so should be given.

What might be meant by "facilitation"? Where a landlord with knowledge of his property and potentially wider and longer term interests than the tenant sensibly proposes an alternative answer that still gets fibre to the tenant would be that be accepted as facilitation? Or, as it would not be what the operator proposed (ostensibly on behalf of the tenant), would that be seen as frustration? Whose interests are to be taken into account? How are the differing interests to be balanced?

If such a procedure was to be introduced with the tenant closely involved, then we believe that more landlords would respond to requests. It may be that one reason why landlords do not always respond at the moment is that they do not understand that the request coming from an operator is being made on behalf of the occupiers. Indeed, having an operator as the intermediary may, in some circumstances, be positively counter-productive.

Landlords should be able to refuse a request to install apparatus where there are legitimate reasons for doing so.

2. ***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?***

The fundamental principle of agreement between the parties has always applied to communication apparatus, from the days of semaphore and the telegraph. The Law Commission carefully reviewed the principle in its report of 2013 and considered whether a compulsory purchase-type approach should be introduced instead. It concluded that the principle of agreement should remain and the Government accepted its recommendation.

As it stands, operators have no rights under the EC Code unless there is a written agreement in place between them and the property owner or occupier. Clearly some aspects of the approach which is loosely sketched out in the consultation will undermine the facilitation of negotiated agreements if operators can use the courts to force entry. There is a serious question here about how far commercial convenience for a corporate entity should be permitted to outweigh a property owner's rights to manage their asset as they see fit. It seems likely to us that if operators are granted powers to use the courts to secure entry in a relatively quick and cheap process, they may well tend to see this as a short cut to bypass the negotiation of proper agreements with property owners and will be careless of property owners' interests.

The relationship between operators and property owners is already unbalanced: the operators are mostly very large corporate entities with significant resources and their own commercial agenda. While there are some corporate landlords, particularly in the commercial property sector, there are many more small businesses and individual investor landlords, particularly in the residential let property sector. The fact that the EC Code requires operators to enter into a written agreement before Code rights will be granted gives landlords some measure of protection in husbanding their property rights against a commercial entity seeking to impose apparatus on them.

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

No, unless the circumstances are exceptional. Recourse to the courts to force entry should always be a last resort which should be more time consuming and costly for the operators than negotiating an agreement with a willing and active landlord. If that is not the case, then operators will use the courts as a means of securing access quickly to suit their own commercial timetable, resulting in too many applications to the courts and no meaningful attempts to negotiate access with the property owner.

There is also a risk that having a preliminary matter decided by the magistrates court could have unforeseen consequences if and when an operator seeks to have a full agreement imposed by the Tribunal.

Thus, for example, would the magistrates court be able to impose conditions on the access rights? If not, then the access rights might be very wide, presenting problems for some building owners with sensitive sites. But if so, then the magistrates court may well be encroaching on and pre-empting the jurisdiction of the Tribunal (specifically chosen by Government for this role with its expertise), without having the necessary specialist skills to consider all of the property issues in detail.

Fundamentally, Code rights can only exist by agreement and the recourse for disputes over agreements is to the Tribunal. Establishing the magistrates court as an alternative route can only create problems to the prejudice and confusion of the parties and the larger reputation of the system. We see no mechanism offered for the magistrates' court to be able to balance the interests of the various parties in any individual set of circumstances.

Further, we note that, in Scotland, it is proposed to use the higher level of the Sheriff Court with its greater judicial standing and do not see why these matters are proposed for relegation to the magistrates court in England and Wales. When the Government made the positive choice to move recourse from the county court and Sheriff court to the Tribunal, there was never any suggestion that such cases should be allocated to magistrates court or that it was even fit for such work.

It is noted at the paper's 5.6 that such recourse to the magistrates court is available to the water companies whose use of this without serious check or balance supports a pattern of high handed and inconsiderate behaviour that makes them unwelcome. Such recourse may once have been merited by the public health needs for good sanitation and potable water but high level connectivity, while desirable, is not an equivalent public health issue. Experience of that model strongly suggests that this is not one to be made available for electronic communications apparatus.

These issues should remain within the forum of the Tribunal with its specialist expertise rather than be complicated by a dual judicial structure with the lower court able to create situations that pre-empt the facts for the Upper Tribunal.

4. ***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?***

We think that it is not merely a matter of how much time passes, but also of the ways and number of times that the operator has attempted to contact the landlord. We suggest that the tenant or occupier is brought into the process so that they are involved in making the approach to the landlord. The landlord and occupier have an established relationship and this should assist in getting a response.

We suggest that at least three attempts should have been made by the tenant to contact the landlord before an operator can seek entry via the courts (or rather the Tribunal). We prefer that a three month time window is permitted to give more scope for situations where an individual landlord many be unavailable (as perhaps by death or illness or the extended process of a sale and purchase), or a corporate landlord or charity may wish or need to refer matters to a board, committee or trustees before responding. The landlord may have to consult other tenants who may have their own concerns.

5. *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?*

It should be necessary for the operator and the tenant/occupier to provide the landlord with a clear and accurate non-technical summary of the works to be carried out, together with sufficient technical detail for the landlord (with advisers) to be able to assess the likely impact on the property and on any other occupiers. The tenant/occupier should explain the need for the works and the additional benefits that they expect to receive as a result.

Attempts to contact the landlord should be recorded so that evidence can be presented to a court or other decision maker. That might include copies of correspondence, proof of delivery of documents or witness testimony from those who have attempted to contact the landlord by telephone or in person.

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

Yes. As suggested above, it should be clear to all parties what the tenant is requesting and what works will be necessary to deliver the communications service required. The tenant should be involved in the process of requesting agreement from the landlord – that should not be left solely to the operator. There is experience of some operators pursuing only perfunctory attempts to communicate.

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

No, we think that the period of temporary access should be defined and be given a maximum period of, say, 6 months. That would align the temporary access period with the time period for a request for a new agreement under paragraph 20 of the EC Code, giving the parties time to negotiate the details for an agreement. If the parties fail to reach agreement within that 6 month period, the operators will reserve the right to take the matter

to the Tribunal, which will have the power to award costs if the landlord was found to have been unduly obstructive.

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

It is difficult to say. On the one hand, it may encourage those landlords who had not appreciated the urgency of the situation, but who would be prepared to enter into an agreement. However, there may be other landlords who are so concerned by the powers and modus operandi of the operators that they will resist the additional burden which is to be placed on their property interest.

9. *Do you foresee any issues with operator/landlord negotiations which take place after the installation has taken place?*

Once the equipment is installed, the operator has the whip hand in negotiations. It is unlikely that the landlord will be able to make any changes which will affect the physical location or route of the equipment – that is one reason why it is important for landlords to discuss such matters properly at the earliest opportunity. The key matters left for the agreement will be arrangements for access for maintenance and repair and any financial matters.

Overall, we think that the proposals outlined are premature, given that the new EC Code is still bedding in and both operators and site providers are reviewing their positions, and that rouse should only be had to the Tribunal with no use made of the magistrates court.

We trust that the responses given above are helpful and would be pleased to discuss matters further with officials if required.

Yours faithfully,

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