PRODUCT SECURITY AND TELECOMMUNICATIONS INFRASTRUCTURE BILL

SUBMISSION ON PART 2 OF THE BILL

TO THE COMMONS COMMITTEE CONSIDERING THE BILL

BY

THE CENTRAL ASSOCIATION OF AGRICULTURAL VALUERS (CAAV)

14th March 2022

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Note – Proposed amendments with drafts are specifically raised at:

- 4.7.5-8 to enable disputes over the terms of an agreement to be referred to arbitration (as part of Alternative Dispute Resolution) rather than having to go to Tribunal with its cost. That is the second part of a two stage approach set out at 4.7.1.
- 5.1-4 to provide a general right of compensation for site provider's loss or damage under Code agreements, complementing that for imposed agreements.

At 4.3.6 we urge the deletion of Clauses 61 and 62 and at 4.8, we suggest a stronger approach on operators' complaints procedures.

1. The CAAV

1.1 The Central Association of Agricultural Valuers (CAAV) represents, briefs and qualifies some 2,900 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, Electronic Communications Code operators, government agencies and others, this work requires an understanding of practical issues.

1.2 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 (here including both owners and operators) under developing policies, aims to ensure that they are designed in as practical a way as possible, taking account of circumstances.

1.3 Our particular interest in this consultation arises because many of our members advise on matters under the Electronic Communications Code, for both fixed line and mobile infrastructure. While many of our members advise rural land and property owners and occupiers on a wide range of matters of which this is only one, other members have become specialists in this topic. Some members act exclusively for operators and infrastructure providers.

1.4 The CAAV has been involved with the practical application of the Code for many years now, in 2010 issuing the first known professional guide in our publication, *Telecommunications Masts*. We submitted a full response to the Law Commission consultation in 2012 and have worked closely with Government and other stakeholders since then on the development, legislation and implementation of the Code as well as in improving awareness of it and expertise in it among CAAV members, through briefing notes, conferences and webinars. The Code still results in a large proportion of the questions we receive from members.

2. Introduction

2.1 This submission relates entirely to Part 2 of the Bill with its amendments to the Electronic Communications Code.

2.2 We have learnt that the application of the Electronic Communications Code in the many and varied circumstances of the real world is complex, intricate and often surprising with a remarkable capacity to pose unforeseen questions and produce unforeseen outcomes, especially as it operates in a sector in which commercial practices as well as technologies evolve rapidly. With that practical experience, we do not understand that the Bill's measures are founded on a full and rounded review of evidence and experience but see them as "patching" measures in response to operators' concerns without taking stock of the whole picture, as is needed.

2.3 Aside from the deeply problematic atmosphere in the sector reviewed below, there have been two particular developments since the new Code was drafted:

- the commercial disposal by many network operators of their masts to third parties ("infrastructure providers") who are then the tenants of site providers and charge market rents to network operators who then see no saving from the Code's measures that might benefit end users
- the necessary acceleration of 5G which has seen operators being exceptionally and unhelpfully secretive about protective zones required under the International Convention on Non-Ionising Radiation (ICNIRP) causing concern where there may often in reality need be none but not informing site providers and neighbours where those working or living should know they are within protection zones.

3. A Sorry Story

3.1 With the national need for improved connectivity, an Electronic Communications Code is necessary legislation to regulate the relationships between the owners of land and buildings

with their personal, business and property interests and the providers of communications infrastructure. It is that infrastructure that serves the public interest in connectivity; the operators are just a means to that public policy end. The Code gives exceptional rights to an operator to require an agreement and to remain on property after that agreement has expired – that is a statutory privilege and should not be a basis for abuse. Unlike compulsory purchase, these are continuing and evolving relationships with leases in circumstances that can change. The predecessor Codes since 1984 and the preceding legislation of the nineteenth and twentieth centuries have done this with little recourse to litigation until the last decade. The new Code has now seen several hundred cases referred to tribunals and courts across the United Kingdom, now reaching the Supreme Court, a feat not achieved under predecessor Codes. Similarly, there are now thought to be more expired agreements with opertaors holding over than there were in 2017.

3.2 The tragedy of the 2017 Code is that, far from encouraging collaboration over sites assisting roll-out, some leading operators have made heavy handed, confrontational and attritional use of the powers and privileges they were given by it, very largely to reduce the cost of renewing existing agreements rather than winning new ones or make themselves attractive as tenants. The irony is that, as reported to November's RICS Telecoms Conference, even if rents may now be much reduced, the overall cost of securing a site has doubled and timescales lengthened. A further irony is that any savings are now less likely to be for the mobile operators serving the public. They have often sold their masts and now pay market rents to mast owners benefiting from the lower rents due from site providers who have to live with the sometimes awkward consequences.

3.3 Aside from the difficulties that may be innate in the mis-match of scale, culture and interest in very large companies and their contractors wanting access to the property of small owners and businesses, offering negligible rents, capping their liability and lack of transparency serve to poison the atmosphere. In the real world, that has required operators to make substantial premium payments hidden by non-disclosure agreements until the Tribunal only recently understood that disclosure was needed to understand the market, requiring that disclosure in *Pippingford Estate* and finding it "indefensible" that these payments had been withheld from the court.

3.4 While rent levels make a simple story, the terms of leases governing the interaction between the parties, such as access to the site, and practical attitudes are often more important. It is a nonsense that Marks and Spencer, with its staff and customers, recently had to go to Tribunal to press for information about radiation zones, routinely denied to almost all site providers. Contractors are frequently careless about property, whether it be a field of cattle or a building with security issues. Yet there are few remedies and often only limited negotiation, with resulting frustration and resort to blame.

3.5 Experience of differing compulsory purchase regimes shows that the less that bad behaviour can be challenged the worse the behaviour of those given statutory powers will be. The need for checks and balances on the use of privilege should inform measures to make genuine improvements in this fraught sector.

4. The Proposals in Part 2 of the Bill

4.1 Defining the Occupier where there is a Code Lease – Clause 57

In part, the issue here is subject to the Supreme Court's decision after its recent hearing in *CTIL v Compton Beauchamp Estates*. We are aware of concerns that the redefinition of "occupier" in the Bill may have broader effects than those described to the prejudice of existing contractual agreements. It would be important to understand this so as to avoid unnecessary and more destabilising surprises.

4.2 Automatic Rights to Upgrade and Share Apparatus on Pre-2017 Agreements – Clauses 58 to 60

4.2.1 Clause 58 - The use of Code rights becomes more difficult for an owner of land or building where more operators, contractors and sub-contractors can come onto property or into buildings which may be schools, hospitals or police stations as much as fields or village halls.

4.2.2 We understand that the Code may necessarily give Code rights to a "first operator" with which the site provider has a direct relationship but do not see that the Bill explains how proposed Code right (fa) (clause 58(2)(iii)) for other operators is going to work. It does not look to fit readily with the Code's defining apparatus not to be "land" while Clause 58(4), adding a paragraph 9(2) to the Code, would make this entirely a matter between the operator without regard to the site provider.

4.2.3 Clauses 59 and 60 – We do not believe that it would help the atmosphere for Code operators to re-write and change the operation of the terms of existing agreements which may have been negotiated with specific points in mind.

4.3 Renewal of Business Tenancies Conferring Code Rights – Clauses 61 to 65

4.3.1 Rent/Consideration - The government was understood to have made it clear in the 2021 consultation that it did not intend to revisit the valuation framework. Indeed, the government's response to the consultation stated:

> "the government does not intend to revisit the statutory valuation framework. This issue was therefore not within the scope of the consultation."

4.3.2 The provisions here amending the basis for rent assessment of Code sites on the renewal of a subsisting agreement under the Landlord and Tenant Act 1954 are seen to do just that, directly importing the Code's valuation provisions. The change proposed here was not canvassed in the consultation which makes no mention of the Landlord and Tenant Act 1954 or the equivalent Order in Northern Ireland, while they are long standing frameworks for businesses in general in the respective territories.

4.3.3 We see no merit in the argument offered that this would bring the rest of the United Kingdom into conformity with Scotland which has no business tenancy legislation and so this issue does not arise there.

4.3.4 The present position here was intended as a transitional bridging process between the old Code and the new Code. We see no reason to move from that position.

4.3.5 The relationship with the 1954 Act is anyway the subject of the recent Supreme Court hearing in *Ashloch* on which a decision is awaited.

4.3.6 Proposal – That Clauses 61 and 62 be deleted

4.3.7 Compensation - We welcome Clauses 63 and 64 in remedying the anomalous position that while a Tribunal imposed Code agreement gives the site provider rights to claim compensation for loss or damage, both at the grant of the agreement and afterwards, a court directed renewal of a Code agreement does not.

4.4 Unresponsive Occupiers – Clause 66

4.4.1 Understanding the point of this Clause, it should require the operator to have taken particular efforts to establish direct contact with the proposed grantor rather than allow this to be convenient route to impose on off-lying land by the use of a succession of notices.

4.4.2 Again, we appreciate the provision of compensation provisions in proposed Code Paragraph 27ZG.

4.5 Interim Arrangements – Clause 67

4.5.1 We are concerned that these powers may encourage operators to use them on an indefinite basis rather than seek consensual agreements.

4.5.2 We are concerned at the potential of sub-clause (3) to lead to the backdated recovery of rents to the date of the application, not to the date when the liability is determined by the order. We are aware in a different context that Hillingdon Hospital Trust has already had to make a six figure provision for the repayment of mast rents it has been paid.

4.6 Disputes under the Code – Clauses 68 and 69

4.6.1 We would welcome such proposals to handle disputes if we believe that they would be effective. However, it can be hard for permissive procedural provisions to achieve the real change in behaviour that is needed.

4.6.2 A reference to Tribunal can be formidably expensive; indeed, the threat of it can be used by a well-funded party in negotiations. Making other routes more available would assist, especially now that the Tribunal has progressed in developing a case law understanding of many aspects of the new Code.

4.7 Alternative Dispute Resolution – Clause 68

4.7.1 While we agree that it is usually in the nature of alternative dispute resolution (ADR), that parties cannot be compelled to use it, the present wording of the Bill in giving operators the duty to "consider" the use of ADR "if it is reasonably practicable to do so" is too weak to carry credibility. **We urge consideration of a two stage answer** to improve this:

- a stronger wording reversing the test so that the operator is to propose ADR unless there is a compelling reason against it
- recognising that there are circumstances, including the unilateral recourse for a tenant or landlord to arbitration for agricultural tenancy issues, where the law intervenes to make ADR the route and we explore this further at 4.7.5-8 with a proposal..

4.7.2 It would be helpful if this Clause were amended to make it clear that alternative dispute resolution were, as we understand is intended, not limited to mediation but also generally covered other forms of dispute resolution, short of the Tribunal whether arbitration, adjudication, mediation, expert determination, early neutral evaluation or other.

4.7.3 The use of adjudication in building contracts (as under the Housing, Grants, Construction and Regeneration Act 1996) provides one example of a way to manage a dispute in a continuing commercial relationship but we advocate below the adoption of binding arbitration as a way forward.

4.7.4 Where arbitration is adopted, it should simply be under the provisions of the Arbitration Act 1996 (Arbitration (Scotland) Act 2010). With its practical provisions, arbitration offers an approach based on evidence and argument that is markedly cheaper and more flexible than a Tribunal hearing in arriving at a determination.

4.7.5 Proposal – Seeking a way forward, we see that mediation, a process to help the parties find the answer, should be encouraged but can only be voluntary with a framework such as that suggested by the Bill, building on the approach taken by courts. There is ultimately no assurance that mediation will give an answer.

4.7.6 The most effective way for ADR to give an answer in this context is by providing unilateral recourse to arbitration as is done in the Agricultural Holdings Act 1986 and the Agricultural Tenancies Act 1995 – and in many commercial contracts. With the existing framework of the Arbitration Acts, that would provide a fully developed structure to achieve outcomes and enable parties to move on.

4.7.7 We propose that, while the Tribunal should remain the forum for whether a Code agreement should be imposed with the important issues of property rights in that (in effect, Code Paragraphs 20(1) and 21), unilateral recourse to arbitration should be available to both site provider and operator for disputes or differences over the terms or operation of a Code agreement, including the determination of consideration and compensation. Suggesting that where a party invokes such an arbitration, with its focus on practical matters, would then exclude the Tribunal for the issues referred, the arbitrator should have the reserve power to refer specific points to the Tribunal, as where a practical matter disguises a fundamental matter.

4.7.8 Suggested Amendment – While further consequential amendments would be needed, the point of principle would be tested by this amendment, inserting a new Clause 68(2A) and based on the precedent of the Agricultural Holdings Act 1986 as amended by the Agriculture Act 2020:

"(2A) In paragraph 20
(a) In sub-paragraph (3)
(i) at the end of paragraph (3)(b) insert ", or"
(ii after paragraph (3)(b) insert

(c) either the relevant person or the operator has not referred one or more of the issues to be considered under Paragraph 23 to arbitration in accordance with Paragraph 20(3A)"

(b) After sub-paragraph 20(3) insert

"(3A) (a) A reference to arbitration under paragraph (20)(3)(c) shall be determined by the arbitration of a single arbitrator appointed by the agreement of the relevant person and the operator parties or a person appointed on the application of either party within the 28 days following the operator's notice under Paragraph 20(2) to a professional authority.

(b) A party may not make an application to a professional authority under this sub-paragraph in relation to a matter if the other party has already made an application to a professional authority under it in relation to that matter.

(c) The effect of the agreed appointment or application is to exclude the court from determining the matter referred unless the arbitrator so directs

(d) If the arbitrator dies, or is incapable of acting, a new arbitrator may be appointed as if no arbitrator had been appointed.

(e) In this sub-paragraph "professional authority" means—

(i) the President of the Central Association of Agricultural Valuers

(ii) the President of the Institution of Civil Engineers

(iii) the President of the Royal Institution of Chartered Surveyors.

(f) The Secretary of State may by regulations amend this sub-paragraph so as to—

(a) include a person in, or remove a person from, the definition of "professional authority";

(b) reflect changes in the name or internal organisation of any body mentioned in that definition.""

4.8 Complaints Procedures – Clause 69

4.8.1 It is astonishing that there are no provisions in a regulated sector expecting an operator with a Code licence to have a complaints procedure. While this clause remedies that, it does not do so in any way that gives confidence that matters will be improved. It needs to give much more detail of what the complaints procedure should look like, including frameworks for such matters as compensation for poor behaviour as unauthorised access or damage.

4.8.2 It should be clear that an operator is responsible for the behaviour of its agents, contractors and subcontractors acting for it with its authority and using its privileges.

4.8.3 The Code of Practice for behaviour in negotiations, required under the Code, has had no effect. OFCOM has no mechanism for received complaints that the Code of Practice has been breached and has not been interested in voluntarily adopting one; even those affected by the water industry are better served. Despite Government assurances during the passage of the

Digital Economy Act 2017, we do not recall the Code of Practice being mentioned in any Tribunal hearing or bearing on any award of costs. There are no penalties for breaching the Code of Practice, perhaps even commercial incentives to do so, and there should be penalties.

4.8.4 One way to make this initial step effective (rather than being an ineffective signal) would be to:

- introduce a procedure for time limiting and renewing Code licences with all the privileges they bring an operator and
- require that all complaints using the complaints procedure are reported to OFCOM with it having duties:
    - to publish them
    - to review them in its annual report
    - to take them into account in reviewing whether a Code operator should retain a licence.

4.9 Time Limits – Clause 70

The present time limit imposed under the Code's paragraph 97, following previous EU law, has, while a possible discipline, proved unrealistically restrictive in some cases in combination with some uncertainty as to exactly which cases the six months applies. Providing flexibility here appears pragmatic.

4.10 Rights of Network Operators in Relation to Infrastructure – Clause 71

4.10.1 We are not clear from the Bill or the Explanatory Notes as to which problems these provisions relate.

4.10.2 Is this intended to regulate the position of infrastructure providers such those with masts installed under Code rights? (see sub-clause 9(2)(a)).

4.10.3 If this is intended to implement earlier discussion of the possible use of water pipes for fibre optic cables, those water pipes (or, indeed, sewers, gas pipes and electricity cables) are usually only on land under statutory powers for specified statutory purposes and nothing broader. That could appear a wholesale revision of the defined powers taken over property, whether land or buildings, across the country over the last two centuries. If so, that is a larger task calling for much more consideration than a simple clause providing for general powers by regulation under this Bill.

5. Proposed Amendment for Site Providers' Compensation for Loss or Damage

5.1 In many situations, otherwise willing site providers are concerned that a Code agreement will limit the use of their property, including its maintenance and its development potential. Code operators, despite paying a lower than market rent, strongly resist provisions for subsequent compensation for later loss or damage and insist on capping their liability to the site provider, leaving the site provider exposed to any risks above that cap. We see this leading to site providers wishing to be taken to Tribunal where an imposed agreement would give them the benefit of the Code's Paragraph 25 which provides for later recourse to the Tribunal for later compensation should it arise. That paragraph does not apply to consensual agreements.

5.2 It would be fair and remove a significant point of contention if the Code paragraph 85 relating to consensual agreements were amended to resolve this situation.

5.3 As Code agreements often run for 10 or 15 years (the longest we have heard of is 99 years), such a provision allows for the site provider to be protected as circumstances, knowledge and technologies change and as apparatus possibly unthought of at the time of the agreement is deployed on the site provider's land or building with possible effects on the site providers operations and neighbours.

5.4 We ask that this new Clause 67A. modelled on the Bill's proposed compensation provisions at Clause 66, be added to the Bill to do this:

"Compensation under Code Agreements

67A After paragraph 85 insert

Compensation under Code Agreements

85A (a) This paragraph applies to any Code agreement that has not been imposed or directed by a court.

(b) The court may, on the application of the grantor, order the operator to pay compensation to the required grantor for any loss or damage that has been sustained or will be sustained by the grantor as a result of the exercise by the operator of the Code rights under the Code agreement.

(c) An application for an order under this paragraph may be made at any time after the Code Agreement is granted (including at a time when the code right granted has ceased to be conferred on the operator by the grantor.

(d) An order under this paragraph may—
(i) specify the amount of compensation to be paid by the operator, or
(ii) give directions for the determination of any such amount.

(e) Directions under sub-paragraph (d) may provide—
(i) for the amount of compensation to be agreed between the operator and the grantor;
(ii) for any dispute about that amount to be determined by arbitration.

(f) An order under this paragraph may provide for the operator—
(i) to make a lump sum payment,

(ii) to make periodical payments,

(iii) to make a payment or payments on occurrence of an event or events, or

(iv) to make a payment or payments in such other form or at such other time or times as the court may direct."

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