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By post and email: propertyandtrust@lawcommission.gsi.gov.uk

Dear Sirs

Re: Law Commission's consultation paper number 205 on The Electronic Communications Code ("Paper")

I am writing as Chair to the Land Law committee of the City of London Law Society. The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS Land Law committee has considered the Paper and would like to congratulate and express its thanks to the Law Commission for an excellent, erudite and thorough analysis of this crucial area of law, which can have a significant impact on transactions affecting our member firms and their clients.

We do not propose to respond to all of the questions raised by the Law Commission as some of them are technical and specific to particular types of property such as railway lines and canals. We do, however, comment below on several significant issues and in places more than one perspective is provided where there were different opinions among committee members.

The key issues in the sphere of the Code which we come across most regularly are the interaction of The Electronic Communications Code ("Code") with Part II of the Landlord and Tenant Act 1954 ("1954 Act"); alterations to and removal of electronic communications apparatus; the ability to contract out of the Code; compensation and consideration under the Code; and alienation by Code operators. The Paper touches upon all of those issues, on which we

comment. When "owner" is referred to below, this may include "occupier". When "operator" is referred to, this usually means "Code operator".

General

The Law Commission considers that there must continue to be legislation under which the requirement for a landowner's consent for an operator to place apparatus on the owner's property may be overridden. The Law Commission comments that electronic communications services are considered so important to society that such compulsion is justified. The owner is entitled to financial recompense. The Law Commission considers that is compatible with the European Convention on Human Rights.

The Law Commission questions whether the Code should contain general obligations alongside Code rights such as the operator insuring against damage to land arising from the presence of apparatus. There is a possible concern about whether this may unwittingly lead to potential double insurance problems (with the owner's insurance). Public liability insurance rather than buildings insurance should be addressed in the Code as that is the most likely risk to occur and public liability insurance is unlikely to give rise to any real double insurance issues.

Access Principle

A fundamental principle of the Code is that no person should unreasonably be denied access to an electronic communications network or to electronic communications services, which the Law Commission terms the "Access Principle". The Law Commission considers this principle unclear and, potentially, out-of-date and asks whether, at a time when many areas do have access to electronic communications services, the Access Principle should also focus on the need for those systems to be fast, high quality, robust and modern.

This raises the question that, although it may be justifiable to override private property rights to ensure access to electronic communications services, is it justifiable to override rights (merely) to allow for the latest technology to be installed?

Upgrading, sharing and assignment

The Law Commission questions whether ancillary rights of upgrading, sharing and assignment should be expressly included in the Code. This is commented on below.

Upgrading

Should the owner be entitled to a sum if the operator exercises a new Code right to upgrade? It is debateable whether an owner should be compelled to accept such an upgrade right (absent provision in an existing agreement). Clearly, if it is obliged to accept upgrade works, it is logical that there should be some appropriate financial recompense for the owner.

Sharing

In relation to sharing, should any Code right to share be subject to the provisions of any operator/owner agreement? That is the current position. The Law Commission questions whether section 134 of the Communications Act 2003 (which turns an absolute prohibition on sharing into one that requires the landlord's consent, not to be unreasonably withheld) could be extended beyond a landlord and tenant situation. If the Code is to incorporate a sharing right, this should be subject to the provisions of any operator/owner agreement.

We are not entirely convinced that section 134 should be extended to an operator/owner situation. It would be valuable to understand the background to the section's introduction and whether the motivations were related to the landlord and tenant relationship- if so, this may be a disincentive to an extension of the section. If a provision in an agreement that an operator is prohibited to share is converted into a provision that any sharing by the operator is subject to the owner's prior consent, not to be unreasonably withheld, this may simply lead to a clash between the owner and operator's respective commercial interests in determining what is reasonable.

What is crucial here is the basis on which the owner receives compensation for the grant of the original right to the operator. If it is based on the diminution in the value of the owner's land rather than the market value of the right, then there is a much stronger argument that the operator should be entitled to share. The net effect is that the same infrastructure is then used by a number of operators, which is unlikely to further diminish the value of the owner's land.

If, however, the compensation for the original grant is based on the market value of the right, then sharing will result in greater income to the operator, which means the right is worth more and the owner should receive additional compensation. This point is also linked to the right to assign mentioned below.

Assignment

The Law Commission questions whether operators should benefit from a general right to assign Code rights to other Code operators, regardless of what any owner/operator agreement provides. There is some objection to such a provision- the owner may only have agreed to the agreement and application of Code rights, because it was a particular operator and another operator should not be forced on the owner. There was, however, an alternative view that the operator should be able to assign to (or share with) another Code operator, but subject to the owner's prior written consent, such consent not to be unreasonably withheld. Such a view raises the concern highlighted above under ***Sharing*** of a clash between the respective commercial interests of the owner and operator.

Paragraph 20 of the Code

The Law Commission considers that the alteration regime in paragraph 20 of the Code is essentially fit for purpose. One possible concern with the current paragraph 20 is the extent to which it can be amended by agreement. Paragraph 20 is not specifically mentioned in paragraph 27(2) (which specifies the Code provisions that cannot be excluded by agreement), although paragraph 20(1) does provide that the right to give the notice requiring alterations under

paragraph 20 applies, notwithstanding the terms of any agreement binding the person requiring the alterations. So it would appear that that right cannot be "contracted out", although some of the detail of paragraph 20 may be amended by contract through for example a "lift and shift" provision. Can the parties contract out of the operator's right to serve a counter-notice under paragraph 20 and, ultimately, take the matter to court? The position is unclear and should be clarified.

The Law Commission proposes that it should not be possible for operators and landowners to contract out of the alterations regime in a revised Code. This proposal would deal with the uncertainty point mentioned above, but is it correct that the operator and owner should not be able to agree to disapply whole or part of the Code's regime on alterations for their own transaction or situation? We refer below to the Law Commission's proposal to allow the owner and operator to "contract out" of paragraph 21. If countenanced for that paragraph, why not for paragraph 20? Should the parties have, potentially, to go to Court for an alteration to go ahead? Could a third party (such as a subscriber) require them to go to Court, even if the owner and operator do not wish to? Another view was that there should be no contracting out of the Code, other than in relation to paragraph 21.

Paragraph 21 and interaction with paragraph 20

Paragraph 27(2) in effect provides that paragraph 21 is not without prejudice (i.e. it is with prejudice) to rights or liabilities arising under any agreement to which the operator is a party. That in effect gives operators "security of tenure" in relation to the apparatus, which they have installed at the owner's property.

There is a potentially interesting point on the interaction between paragraphs 20 and 21. As stated previously, there is an argument (on which there is as yet no definitive position) that, in the case of an improvement, paragraph 20 can be used to remove apparatus without needing to go to court. The argument is based on an assumption (which may be incorrect) that the parties can by agreement contract out of the operator's right to serve a counter-notice under paragraph 20 and, ultimately, take the matter to court to try to stop the alteration of the apparatus.

Since "alteration" is defined in paragraph 1(2) to include "removal", it would appear that the Code permits the parties to remove the apparatus pursuant to paragraph 20 without having to go to court (where there is an improvement). However, this undermines paragraph 21, which the Code clearly states cannot be contracted out.

The position is ambiguous, resulting from the existing Code being poorly drafted. Common sense suggests that paragraph 20 applies to a relocation situation and paragraph 21 to a permanent removal, but this is not definitive. Operators may use paragraph 21(12) to argue that an owner is not under paragraph 21 entitled to remove on the ground only that he is entitled to give a notice under paragraph 20. There is some weight in this argument, but paragraph 21(12) could be interpreted to mean simply that an owner cannot use a paragraph 20 ground in a paragraph 21 application, leaving open the possibility of removing the apparatus by a paragraph 20 application as described above (in the case of an improvement). This ambiguity should be resolved in the revised Code. Even if there is provision for contracting out of paragraph 21 of the revised Code

(see paragraph below), this ambiguity should be clarified for where paragraph 21 is not contracted out.

Contracting out of paragraph 21

The Law Commission proposes that the operator and owner can, by agreement, contract out of the "security" provisions of paragraph 21, either absolutely, or on the basis, for example, that there will be no security if the land is required for development. As the Law Commission suggests, if the parties can contract out of paragraph 21, owners may be more willing to have apparatus installed at their properties. We are not convinced about the need to refer to development which over-complicates- would the owner need to prove the land was required for development and, if so, how? The owner may not want there to be security, even if there is no development. Also the owner and operator may well want to know up front whether the agreement is contracted out of paragraph 21, giving them greater certainty. We would prefer absolute contracting out of paragraph 21, akin to that for Part II of the Landlord and Tenant Act 1954. If the operator does not wish to contract out absolutely, then it has the option to use paragraph 5 of the Code.

Compensation under the Code

On the subject of compensation, paragraph 27(3) of the Code provides as follows:

"Except as provided under the preceding provisions of this code, the operator shall not be liable to compensate any person for, or be subject to any other liability in respect of, any loss or damage caused by the lawful exercise of any right conferred by or in accordance with this code."

This indicates that:

- where the operator lawfully exercises its Code rights, the only liability that the operator will have in respect of compensation or loss and damage will be pursuant to the Code, and any provision in a wayleave agreement or other document imposing further liability on the operator in those circumstances will be in breach of the Code;

- where the operator unlawfully exercises its Code rights, the operator is liable not only pursuant to the Code, but also subject to any further contractual liability contained in the agreement.

This Code provision could be useful for operators in warding off aggressive attempts by landlords to impose liabilities in wayleaves going beyond the Code. There is, however a tension between paragraph 27(3) and 27(2) referred to above. The failure to refer to paragraph 27(3) in paragraph 27(2) would suggest that the parties can contractually override the effect of paragraph 27(3). However, in the absence of case authority, the position is not definitive. The revised Code should clarify this issue.

On a different point, the suggestion in paragraph 6.83 of the Paper about re-visiting previous financial awards made under the Code may be perceived as undesirable because of the consequential uncertainty it may create.

As to appropriate compensation methodology, when utilities were non-profit making bodies, the compulsory purchase legislation was arguably an adequate methodology for calculating compensation. However, particularly in relation to electronic communications, the right to install equipment in a particular location may result in considerable profit to the Code operator and further revenue if the right can be shared with or assigned to other operators. The return, which the operator will earn as a result of the new asset, should be factored into the equation.

Forum for adjudication

The suggestions for alternative dispute resolution procedures for valuation issues are to be welcomed as a way of reducing delays and expense.

Standard terms for operator/owner agreement

While the revised Code can facilitate standardisation of agreements between owners and operators and may be beneficial, any use of standard terms should, as the Law Commission suggests, be voluntary for the reasons it highlights.

Interaction with Part II of the Landlord and Tenant Act 1954

The Law Commission rightly highlights the problems relating to the interaction between paragraphs 20 and 21 of the Code on the one hand and Part II of the Landlord and Tenant Act 1954 on the other. Currently, owners will often seek to contract the lease out of sections 24-28 of the 1954 Act to avoid the problems. We, therefore, support the Law Commission's suggestion that, where an operator leases land for the placement and use of electronic communications apparatus, which is protected by the security provisions of the Code, Part II of the 1954 Act should not apply to the lease.

There may be practical difficulties in ascertaining whether the Code applies. It may be, therefore, clearer to provide that Part II of the 1954 Act does not apply to the lease, if the Code applies or there is a statement in the relevant document that the owner and operator consider the Code applies.

Conclusion

In summary, we have found the Paper to be thought-provoking and it makes many sensible suggestions, which should improve the relationships between the property industry and electronic communication operators, and the way landlord and tenant legislation and the Code interact.

Please do let us know if you would like to discuss further any of the points made in this response.

Yours faithfully

Jackie Newstead

Chair, Land Law Committee

THE CITY OF LONDON LAW SOCIETY
LAND LAW COMMITTEE

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