

To: Department for Culture Media & Sport

Date: 30.4.2015

Ref: LMS

Circulation:

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The NFU represents 47,000 farm businesses in England and Wales. In addition we have 40,000 countryside members with an interest in farming and the country.

Reforming the Electronic Communications Code

Consultation Document 26 February 2015

The NFU welcomes the Government's key objectives to provide a modern and robust legal framework for the rollout of electronic communications apparatus. To ensure that the code enables connectivity, expands mobile coverage and takes into account the interests of all parties. This third point is critical. The Electronic Communications Code going forward needs to provide a fair mechanism for agreements to be reached between the site provider and the network operator. It must allow the operator to build and maintain their equipment and in so doing provide the site provider with a fair rental income and protection of their rights. Site providers who are landowners do need clarity and certainty as was highlighted by the Law Commission.

It is agreed that the Code also needs to recognise the public interest in the provision of the network services but landowners only want to have infrastructure on their land by agreement and to achieve this the code needs to be effective, practical and simple to apply.

As a consequence, any new code has to make sense within the increasingly competitive and diverse communications market (which will have new competitors and business models in the future with new equipment) but also make sense for landowners, particularly farmers, who have to be mindful of all the other regulations they have to comply with on their land.

Technologies are developing rapidly and landowners are very aware of this and are very keen for the Code in its practical operation to cover this. Indeed, most mast sites and where cables cross land are reached by agreement and not enforcement through the Code and we would wish this to continue.

We are particularly concerned that there should be a fair policy on:

1. The consideration/payment that is to be determined should be at market value.
2. Landowners/farmers who are site providers should receive consideration for mast sharing and upgrading, given that this will mean more impact on their land and activities whilst allowing communications companies to compete and meet new and wider market opportunities.
3. The Protection of Code rights needs to ensure the landowner's rights are considered, for example the right to contract out of the code in the future and how far the code should be binding on successors. The code needs to work fairly and practically.

The NFU welcomed the fact that the late amendments to the Infrastructure Bill were withdrawn to allow this consultation on the revised code rather than legislation being rushed through Parliament. We would however comment that the nature of the questions asked does appear to be primarily directed at the code operators, rather than the landowners and wider interest groups whose views are equally important if the code is to work fairly and effectively.

We do know that the Government has committed under the Mobile Infrastructure Project to provide mobile mast infrastructure for code system operators to use to reach a wider rural market. We would not wish the revised Code to impose further restrictions on landowners to make the practical delivery of this infrastructure more problematic. Nor would we wish the revised Code to be drafted to prevent alternative telecommunications providers access the market for farmers and their wider rural communities.

Consultation questions

The Definition of Land and Ownership of Property

Q.1: *What is your understanding of the meaning of “land” in the existing Code?*

The Definition of Land

'Land' includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land: Law of Property Act 1925.

There are two considerations for whether an object is a 'fixture' or chattel. The first is the degree of physical attachment, or 'annexation', to the land. The more permanent an object is affixed to the earth or to a building, the more likely it is that it will be classified as a fixture but in any case, even if the mode of annexation is only slight, its character will be one of a fixture. In the absence of any connection with the land, and the article is 'no further attached to the land than by its own weight' it will be considered a chattel. Further, the more difficult it is to remove the item without serious damage; the more likely it is that the item will be seen as something intended to comprise a permanent enhancement of the realty.

It is our understanding that the Code envisages ownership of the apparatus remaining with the electronic communications operator, and not transferring to the occupier of the land even though it is fixed to the land. The Code is overwriting the common law position. So, it appears that the intention behind the code is that “land” refers to the area of ground on (or under or over) which electronic communications equipment is situated. In practical terms any definition has to ensure that the telecommunications equipment and mast, fencing, cables and associated works that the code operator physically install on a landowner's property do not impose additional cost or liability on that host landowner.

Q.2: *Assuming there was no definition of land and no provision about the ownership of property in the revised Code and that general principles of land law apply:*

a. *Which, if any, of the following apparatus are likely to become part of the land on general land law principles?*

- i. Masts*
- ii. Poles*
- iii. Cabinets*
- iv. Underground conduits and ducting*

b. *Does the statutory regime of the revised Code (which makes provision for*

rights to install apparatus on land, and have it removed from land and specifies the purpose for which such apparatus is installed on land) affect your answer in (a)?

Q.3: *Should the revised Code be explicit or say nothing about the definition of land and the ownership of property? Please give reasons.*

Referring to our comments above, the general principles of land law would mean that all the apparatus mentioned above would become a fixture and so be part of the land. Further the code is overwriting this.

Therefore, the NFU believes that the Code should be explicit about the ownership of property for the clarity of both parties. We are in agreement with the Law Commission in their report that even though the mast for example will be a fixture as it is attached to the land, it should remain the ownership of the infrastructure provider. This will then enable property rights to remain the same. This is something we agree with and believe is needed. A commercial infrastructure provider is likely to want to maximise the use of a mast and keep full control.

Q.4: *If you think the Code should be explicit, should the definition of land be defined as:*

- a) not including electronic communications apparatus?*
- b) including electronic communications apparatus?*
- c) including some electronic communications apparatus (e.g. masts) but not other apparatus (e.g. cables or conduits)?*
- d) including the electronic communications apparatus of infrastructure providers (those whose activities fall within the ambit of paragraph 4(b) of the revised Code – i.e. those who provide infrastructure systems), but as not including the apparatus of other Code operators (those whose activities fall within paragraph 4(a) of the revised Code – i.e. those who operate networks)?*

In responding to the above points, please provide reasons. Please also include in your responses any views or evidence on the impact of the definition on network deployment, the market, competition and/or legality (e.g. compliance with the EU regulatory regime).

Following on from our answer to Q.3 above, the NFU believes that the definition of land should not include electronic communications apparatus under the proposed code. Then when an agreement ends between the site provider and the operator, the operator must remove the mast, duct, cabinets etc. from the land. It must be possible for the site provider to take action if this is not done and claim for damages.

How consideration is to be determined

Q.5: *Does paragraph 23 of the revised Code meet the aim of providing a clear and workable definition of market value? Please provide evidence to justify your answer.*

The NFU is in agreement that the first parts of paragraph 23 (1) and (2) are clear. The value undertaken must be an amount representing the market value between a willing buyer and a willing seller in an arm's length transaction. Valuers and surveyors are also used to working with this definition.

The code then goes on and at 4 (a) to state that the market value is assessed on the assumption that there is more than one site. This seems reasonable as there are plenty of masts and so there will be another site which will be a comparable. This does then mean that a ransom value cannot be applied.

However the NFU strongly disagrees to the drafting of paragraph 4 (b) that assignment of code rights and upgrading and sharing of apparatus do not apply. So no value can apply to this. In reality code operators can seek the permission of a number of landowners to site equipment, to allow them to provide additional services..

If the market is working we would ask that the code should not seek to interfere to the benefit of one party over another. Hence, market value must assess the rights that are being given and the apparatus in question. So the market value must be assessed on the value to the operator and the landlord to be fair and not just the operator as stated at 23 (3) (a) in the draft code. It will be necessary for comparable transactions to be looked at and taken into account when assessing market value. Paragraph 4 (a) will allow comparable evidence but if 4 (b) is applied it will not and will expect valuers to ignore what is really happening on a site.

Therefore the consideration does need to be market value. As we all know there is a strong market rental value out in the market place for masts which is working well with an average rental of £5000pa. We have received evidence that the rents for greenfield/rural sites are £5000pa to £5,500pa, slightly higher in the south east at £6000 to £6,500 and only reaching £7,500 within the M25. Sites within rural towns can fetch £8,000 to £9,500pa.

There have been discussions in the stakeholder meetings with DCMS that the rent should be assessed for compensation as is paid by other utilities for equipment crossing and being situated in and on private land. as was stated in the Law Commission report Telecom operators are commercial businesses who run their businesses for a profit and are not like other utility companies who have to provide a service to the country or their region in which they operate. For example National Grid has to maintain 'an efficient, co-ordinated and economical' system of electricity transmission. National Grid also has a duty relating to the preservation of amenity. National Grid does not have a competitor.

Q.6: *Some stakeholders have argued that provisions that do not allow the new automatic rights (to assign code rights or to, share and upgrade apparatus) to be included in the basis for valuation are unworkable in practice. What evidence can you provide that either supports or challenges this view?*

Q.7: *Does paragraph 23 of the revised Code prevent or reduce the scope for charging above market value for Code rights? Please provide evidence to justify your answer.*

The NFU is in agreement with this, that you cannot expect a valuer to value a site and provide the market value if they are being asked to ignore the fact that the site has upgraded apparatus and is site sharing. The NFU is in agreement that the market value must be assessed on the assumption that there is more than one site which the operator could use for which the operator intends as stated at 23 (4) (a). This if applied correctly will eliminate the ransom rents as is highlighted at paragraph 40 in the consultation document and discussed at all meetings with DCMS on this consultation. The NFU does know that there are higher rents being paid for some mast sites but there is normally always a reason for this. The market value is then recognising this and it is not a ransom rent.

The NFU would therefore consider that for the code to work in practice the market value of all sites must be carried out and calculated on assessing what is actually happening at the site in question.

The NFU is aware that operators have been highlighting that they are paying ransom rents for certain sites but have not been provided with evidence of where this is happening and how it has been an issue for delivery of infrastructure on our members' possible sites.

The NFU also has concerns over paragraph 24 which provides for the Secretary of State to amend the basis for calculating the consideration so as to move from ordinary market valuation principles to "no scheme" valuation principles. This should not be included as it is not necessary. There are already

different rents being paid for different sites taking into account the equipment on the site. As already stated there is a strong market and it should not be changed.

Upgrading and sharing electronic communications apparatus

Q.8: *Do you consider that the proposed automatic power to upgrade and share apparatus will have a positive effect on network sustainability?*

Q.9: *Are the conditions that must be met in order for the power to share or upgrade to be exercised (in paragraph 116(2)-(4) of the revised Code) appropriate to balance interests of site providers and operators, and the need to ensure network sustainability? In particular:*

- a)** *Is the 'exclusive possession' requirement necessary or does it place inappropriate restrictions on the ability to share and upgrade?*
- b)** *Is it appropriate to allow upgrading and sharing provided there is minimal adverse impact on the appearance of the apparatus?*
- c)** *Is it appropriate to allow upgrading and sharing provided there is no additional burden on the site provider? Is the meaning of "additional burden" clear and appropriate?*
- d)** *Should there be fewer, additional or no conditions attached to the exercise of the power to upgrade and share?*

Please give reasons and provide your views on the practical implications of the imposition of conditions.

Q.10: *Are there any other issues that arise from the exercise of the power to share or upgrade?*

In principle the NFU is in agreement that the upgrading and sharing of electronic communications apparatus is important to ensure the provision of strong and sustainable networks to enable customers, to benefit from technological advances and competition in service as stated in the consultation document. The NFU recognises that sharing apparatus can reduce infrastructure costs and with appropriate design the visual and environmental impacts of apparatus can be managed. However, it is important for all parties to know what they are signing up to for operational and practical reasons. For example, where operators wish to have the right to upgrade apparatus or provide apparatus sharing they should specifically include that right in the agreement with the landowner, and the parties can then reflect this in the consideration which is to be paid.

The NFU believes that consideration should always be payable when sharing apparatus occurs unless the owner agrees otherwise. An example of this could be where a not for profit company is providing a service.

If there is an automatic right to share and upgrade all landowners/site providers must be notified of the upgrade in apparatus or who is also site sharing the site. Details must be provided so that the consideration to be paid for this can be calculated fairly and so that the landowner knows who has access across his land. The NFU has been informed of the following evidence in regard to payments for site sharing where no rights for site sharing exist: it is typical to negotiate an annual payment equivalent to 30% of all monies paid by the sharer to the tenant and that 30% to be paid annually to the landlord with the tenant retaining 70% of the monies. The alternative is a sum equivalent to 15% of the head rent paid under the lease i.e. 15% of £5000pa.

In regard to upgrading we have been informed that where no rights exist for the equipment proposed, typically payments range as follows:

- For rights for cabinets = £750pa per cabinet
- For rights for dishes = £750pa per additional 600mm dish and £500pa per additional 300mm dish.
- For rights for antenna = £500 per antenna

This information will also enable a landowner to know whether the upgrading or sharing will result in any adverse impacts on its appearance. For example, for works where prior approval or planning permission is required under the planning system and whether there will be any additional burden in terms of site access and infrastructure, including additional landscaping hence land take. The first thing that is important here is the wording in paragraph 16(3) i.e. “*no more than a minimal adverse impact on its appearance*” - this will be the real test. If there is site sharing, this will lead to additional burden due to the fact that there will be another operator using the site and needing to gain access to the site to carry out maintenance and repairs.

It should not be possible for an operator to enter in to an agreement with a site provider and then automatically be able to upgrade the equipment or carry out site sharing without the site provider being compensated for this. Farmers and other landowners have to comply with a number of regulations with respect of the efficient working of their farm enterprises, including biosecurity, the need to ensure their farmsteads, equipment and livestock, are safe and to meet cross compliance rules. Hence they need to ensure they know who is accessing their land, when they need to access and what additional equipment is being added. Our members are part of wider communities that care about the visual appearance of the countryside, as custodians of this landscape they need to know when changes are being made which will be of interest to the wider community.

The operator should be paying for what he is using the site for. The figures above show that agreements in regard to consideration for sharing and upgrading in the market are being reached without a ransom rent being paid and more importantly that sharing and upgrading is taking place by agreement.

Assignment under the new Code.

Operators under the new code will be able to assign code rights and the assignee is bound by the terms of the agreement. The NFU would wish to see conditions being set in the new code that the Landlord has to be provided with details of the new assignee and changes that may take effect to the apparatus on the site. If the assignment does lead to any changes in apparatus then compensation must be paid to the landlord. All professional costs incurred must be covered by the assignor.

Any burden and liability must be clearly passed on to the assignee.

Contracting out of the revised Code

Q.11: *Are the provisions referred to in paragraph 96(2) in relation to which there can be no contracting out sufficient? If not why not?*

Q.12: *Should there be exceptions to the no contracting out principle? If so, what are these and why?*

Q.13: *If there are exceptions, should these be subject to criteria or regulated in some way (for example by a requirement for the court to approve the arrangements)?*

The NFU is in agreement that certain provisions of the Code should be binding and parties should not be able to ignore these rights or circumnavigate them as highlighted in the consultation document. The NFU agrees that it should not be so easy to contract out of the code rights that it becomes the default position and completely agrees that the revised Code should be the foundation that enables infrastructure rollout.

But when considering this and through discussions at the meetings that have taken place there may be limited occasions where it might be beneficial to allow the contracting out of the revised code where development of a site may be possible. For example this may actually enable infrastructure rollout

more quickly especially from a landlords position where if development of a site is possible he will want to be able to remove the old mast or equipment from the site as quick as possible.

The NFU believes that these contracting out provisions will need to follow an alternative form of agreement criteria and be regulated to ensure that they work for the wider benefit of all. It is hoped that agents and lawyers who deal with these cases on a regular basis will provide information as to how this should be carried out.

The NFU has received evidence where not being able to contract out is a big problem area in regard to equipment sited on a rooftop. The site is to be redeveloped and the rooftop has two operators, it is likely to cost the landlord in the region of £300,000 to £500,000 to pay the operators to leave the site so that the development can take place.

The role of land registration

- Q.14:** *Are the principles set out in paragraph 10 of the revised Code sufficient to ensure that Code rights bind the land as against a successor in title as if the Code rights were interests in the land, without the need for registration?*
- Q.15:** *If you consider that paragraph 10 is sufficient, is it necessary to provide that some Code rights should be treated as overriding interests, given that overriding interests are not registered? Does it matter if Code rights in leases and agreements other than leases are treated differently?*
- Q.16:** *Should the binding nature of Code rights on successor in title and others who acquire an interest in the land depend on whether the Code rights are registered under applicable land registration legislation?*
- Q.17:** *If your view is that Code rights should be subject to land registration legislation, what should be the consequences of a failure to register a lease containing Code rights (assuming it is required to be registered under the general law) against a successor in title?*
- Q.18:** *If there is no requirement to register Code rights under applicable land registration legislation, what will be the impact on the successors in title, i.e. purchasers of land, given Code rights will not appear on title documents?*
- Q.19:** *Are there other ways to protect purchasers of land apart from registration of Code rights under land registration legislation, for example by including questions about Code rights and electronic communications apparatus in standard form inquiries before the transaction is completed?*
- Q.20:** *In Scotland, if the Code right is not in a registrable lease, should the Code right nonetheless be registrable in the property register.*

The NFU is of the view that land registration is not necessary and does not fit with how the code works. But it is important that code rights are recorded so that they can easily be discovered by interested parties, such as potential purchasers of land. Pre contract enquiries before any purchase should be able to find details of a mast or any cables. To help with this it could be stated within the code that all agreements are in writing, operators to notify site providers regularly and to develop the Ofcom sitefinder database.

Transitional arrangements, savings and retrospectivity

- Q.21:** *Should any provisions of the existing Code continue to apply to existing Code agreements or apparatus installed under the existing Code once the revised Code comes into force? If so, which ones and why?*
- Q.22:** *Should any provisions of the revised Code continue to be applied to existing Code*

agreements or apparatus installed under the existing Code once the revised Code comes into force? If so, which ones and why?

Q.23: *Should the agreement of the parties be required in order for the provisions of the revised Code to apply to existing Code agreements or apparatus installed under the existing*

Code once the revised Code comes into force? If so, which provisions should require such agreement and why?

Q.24: *Should the provisions of the existing Code continue to apply (notwithstanding an existing Code agreement coming to an end) pending new Code agreements (or a court order for such rights) being sought under the revised Code once it comes into force?*

The Law commission in their report stated that they thought that it would not be possible to just simply apply the new code to existing agreements under the old code. The NFU is in agreement with this and to the point made that in some cases; there would be disruption to carefully-negotiated agreements by which the parties have sought to strike a balance within the context of the existing Code.

The NFU is aware though that discussions held in the DCMS stakeholder meetings have highlighted that parts of the new code being applied in certain areas might help. Firstly, it would appear that there is no problem with the change in disputes going from the County Court to the Property Chamber of the Upper Tribunal. This should help resolve any disputes going forward. Secondly, for the new code to apply when an agreement is ending and the operator wishes to stay and the landowner is in agreement to this. The new code drafting should help this to happen which as it stands under the old code is a problem area. Thirdly, the exclusion of Part 2 of the Landlord and Tenant Act 1954 would be useful when agreements are being renewed.

Code rights

The NFU would like to raise a question on Code rights and for further clarification as to why 'adjust' and 'alter' is needed in 3(b) and 3(d). The NFU believes that 'alter' and 'adjust' should not be included. This then follows on that 'adjustment' and 'alteration' should be removed from 3(c).

The Code right 3(g) states to lop or cut back, or require another person to lop or cut back, any tree or other vegetation that interferes or will or may interfere with electronic communications apparatus. This is a clear example of where the landowner needs to know about works on site, both in practical terms and to ensure the landowner / operator work together to ensure the farmer can continue to comply with both habitat and farming payment specific legislation. The NFU believes that another person could be the landowner or a contractor working for the operator.

There are now very strict rules under the new Basic Payment Scheme and cross compliance which means that trees can only be lopped and topped at certain times of year to follow habitat guidance. Otherwise landowners and farmers risk receiving a penalty or even the whole of their BPS claim. Therefore it is very important that maintenance like this is requested to the farmer in plenty of time so that a specific derogation for this can be approved from the Rural Payments Agency.

Termination of an agreement

There are four rights in which a site provider can bring Code Rights to an end. The main right being for re-development. 'that the Site Provider intends to redevelop all or part of the land on which the apparatus is sited, or neighbouring land, and could not reasonably do so unless the Code Rights are brought to an end'. It may also be necessary for a landowner to bring code rights to an end if he has a change of use for a new enterprise on the farm whether this on the land or his agricultural buildings and the site or equipment are stopping the new enterprise from happening. It is likely that the rent or income

received from the new enterprise will be much higher than the rent received from the mast site or a dish on a rooftop of a building.

The rights to terminate are clearer in the new draft which is a vast improvement and if there are consequences for inaction which can be applied then hopefully this will eliminate some of the bad practices that have been carried out by some operators.

Code disputes

The NFU is in agreement with the new drafting that disputes should be by the First –tier Tribunal and Upper Tribunal (in England and Wales) which has followed the recommendation of the Law Commission instead of the County Court. In every case the dispute forum has to be effective, appropriate, proportional and accessible.

More information for Landowners and Farmers.

The NFU believes that more information is needed for landowners and it would be helpful if this was set out in an information pack when the Code Operator first makes contact with the landowner.

The information pack should explain the key provisions of the code, and explain the procedures that apply. In particular, landowners should be informed of the provisions which apply at the end of the agreement, and the procedures in place for securing the removal or alteration of apparatus.

Information provided to landowners should also highlight topics of particular relevance to landowners in the context of the notice of form that they are accompanying.

It was discussed in the last stakeholder meeting that perhaps a Code of Practice needed to be drawn up. This will need to be enforced if to be of any use.

Conclusion

We are particularly concerned that there should be a fair policy, taking into account the specific issues raised by this consultation on:

1. The code needs to work fairly and practically for Farmer/landowners as well as code operators.
2. The consideration/payment that is to be determined should be at market value.
3. The Secretary of State should not be able to amend the basis for calculating consideration so as to move from ordinary market valuation principles.
4. Landowners/farmers who are site providers should receive consideration for mast sharing and upgrading, given that this will mean more impact on their land and activities whilst allowing communications companies to compete and meet new and wider market opportunities.
5. If there is an automatic right to share and upgrade all landowners/site providers must be notified of the upgrade and any site sharing. Consideration must be paid for this.
6. If operators are going to be able to assign under the new code then details must be provided to the landlord. All liability must pass to the new assignee.

7. The Protection of Code rights needs to ensure the landowner's rights are considered, for example the right to contract out of the code in the future and how far the code should be binding on successors. There needs to be some set criteria and for this to be regulated.
8. Land registration should not apply as it is too complicated and expensive.
9. The code is clearer on how an agreement can be terminated and this is essential if landlords are going to be willing to provide a site for a mast and be confident that they will be able to end an agreement if the land has development potential.
10. Finally, an information pack must be provided to a landowner by a code operator which explains the procedure and rights that will apply in a practical manner.