

Ms K Hurst
Department for Culture, Media and Sport
100 Parliament Street
London SW1A 2BQ

***** 2016

Dear Ms Hurst

Digital Economy Bill – The Electronic Communications Code

I write on behalf of the Compulsory Purchase Association (CPA).

The CPA is a members' organisation promoting best practice skills for those engaged in compulsory purchase and compensation assessment. Our members include barristers, lawyers, planners, surveyors, valuers, accountants and land referencers. The Association is regularly consulted by the Department of Communities and Local Government, and its advice has been taken into account in the preparation of recent legislative reform of various aspects of compulsory purchase and compensation. The Association was consulted by your Department following the publication by the Law Commission of its Report on the Communications Code.

The CPA has concerns about the drafting of certain provisions in Schedule 1 to the Bill - the Electronic Communications Code (the Code). The CPA is not concerned with any underlying policy; its concerns relate to the clarity and practicable workability of the Code. We make the following comments.

1. **The Code Rights:** Paragraph 3(c) and (f) contain quite wide powers to carry out any works on the land, in respect of which apparatus is to be installed or kept, and to interfere with or obstruct a means of access to or from such land. We do not understand the Code, in its reference to a “code right” as meaning anything other than the extent of the rights in paragraph 3, and in particular as including, where appropriate, (c) and (f). We do understand that, where appropriate, the Court may make an order conferring a code right on an operator, with limitations. This would not appear to leave any discretion to the Court as to limitations on the exercise of the code rights identified in sub-paragraphs (c) and (f) and perhaps an illustration will show the practical difficulties. If one assumes there is an intention to place apparatus on the roof of a multi-let building containing, say, residential, commercial and perhaps retail units, many of which are accessed through secured areas, with the need for security passes, codes or otherwise, we fail to see how the grant of a code right consisting of (c) and/or (f) can sensibly be exercised. Inevitably, access to complex buildings have to be the subject of security arrangements.

2. Whilst we accept that under Code paragraph 22(2) the imposed agreement shall contain such terms as the Court thinks appropriate, and Code paragraph 22(5) requires a Court to ensure that the least possible loss and damage is caused by the exercise of the code right, we do not think that this necessarily provides adequate protection to all occupiers and the owners of all interests in a multi-let, or indeed any large building, unless the conferment of the two Code rights mentioned above can be done with limitations or conditions where appropriate. It must be borne in mind that most occupiers and tenants of a multi-let building will not be bound by any imposed Code paragraph 19 Agreement, and such buildings usually have tight security arrangements for the benefit of the occupiers and tenants, not infrequently managed by a management company. The legal problem is that whilst, say, the freeholder may have reserved sufficient rights to the roof such that a Code paragraph 19 Agreement could be imposed as against the freeholder, any Code paragraph 3(c) and (f) rights would not bind, or would certainly be inconsistent with the rights of, the tenants.

3. **Power of Court to impose agreement:** We have the following principal concerns here. First, the “Court” is the County Court for the

purposes of the imposition of an agreement under Code paragraph 19, including the terms of the consideration: see paragraph 22(3). The Court may also order the payment of compensation under Code paragraph 24. Whilst we appreciate the reservation of powers to confer jurisdiction on other tribunals in Code paragraph 91, we think that it is profoundly unsatisfactory that the assessment of consideration, on market value principles, is left with the county court, and compensation matters goes to the Upper Tribunal (Lands Chamber). Subject to the point we make below about arbitration, we suggest that all disputes, including the conferment of Code paragraph 19 agreements, should go to the Upper Tribunal.

4. Second, making an application, whether to the county court or the Upper Tribunal, and securing both a hearing and a decision, within a reasonable time, especially in the case of applications for interim or temporary code rights, is somewhat problematical in terms of the expeditious provision of apparatus in many cases. We note that the use of an arbitration is suggested in other places in the Code for other purposes, and we wonder whether the use of either an arbitrator might not provide a more expeditious, as well as being an informed and knowledgeable, alternative forum.

5. Third, in relation to the test to be applied by the Court, Code paragraph 20(5) provides that the Court may not make an order under paragraph 19 if it thinks that the relevant person intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made. In this connection a “relevant person” is a person required by an operator to confer a code right, and that person would normally be an occupier, and not necessarily a freeholder or other owner of reversionary or intermediate interests in a building or other land. Thus, it may be, that the freeholder or other reversionary owner is in the process of recovering possession against tenants with a view to developing the building or land, and yet that person would not be a person whose development intentions should be taken into account by the Court under Code paragraph 20(5). We believe that this point should be reconsidered because of the practical consequences which will arise to the prejudice of both the code operator and the freeholder or other reversionary owner.

6. **The measure of the consideration:** We consider that Code paragraph 23(1) lacks clarity. It expresses the consideration as the amount representing the market value of the relevant person's agreement to confer or be bound by the code right. Several points follow from this.

7. First, conceptually, the relevant person is conferring the right to impose a burden on himself: the market value of a burden must surely be a negative sum. We appreciate that "market value" is further explained in subsequent subparagraphs, but paragraph 23(1) is the principal direction, and the Court is likely to give particular emphasis to it.

8. Second, we accept that Code paragraph 23(2) makes the measure of the consideration much clearer and we suggest that Code paragraph 23(1) should state only that the amount of the consideration should be the market value determined in accordance with the succeeding subparagraphs rather than appearing to define the measure itself.

9. Third, Code paragraph 23(3)(a) compounds the confusion in stating that the market value must be assessed on the basis of the value of the right or agreement to the relevant person. The imposition of Code rights on the relevant person cannot have any value to that person; the only value of an agreement to the relevant person is the receipt of "the consideration".

10. Fourth, any use of the concept of market value directs a valuer to consider the transactions in the market place as comparables. On the artificial construct of market value in the Code, there will be no such comparables, and we consider that this will cause real practical difficulties.

11. **Rights to the payment of compensation:** We note that, in addition to the payment of a consideration, there will be an entitlement to compensation for any loss or damage that has been sustained or will be sustained by a relevant person. We make the following points. First, it will be extremely difficult on the date when the Court makes an order under paragraph 19 to then foresee the extent of the exercise of code rights into the future, and the effect of that exercise in terms of entry and works to "keep" apparatus. A "once and for all" determination of compensation will not be satisfactory in those cases where, perhaps some years later, extensive exercise of code rights

in respect of existing apparatus is invoked, perhaps to considerable cost and loss to the relevant person at a time. Whilst we understand the need to avoid continuous recourses to claims for compensation, some consideration should be given to the problem we have identified.

12. Second, we note that in cases where the parties cannot agree, the amount of compensation is to be determined by arbitration. We accept that this is a sensible method, and we have already suggested arbitration as a preferred method. We accept that the Upper Tribunal (Lands Chamber) can accept a reference to arbitration by consent, but it does seem to us that the Code should adopt a single forum for both the measure of consideration and the assessment of compensation.

13. **Terminating an agreement:** Code paragraph 30(3)(a) specifies an 18-month minimum notice period. We believe that this period is too long where a site provider intends to redevelop.

14. **Interim and temporary Code Rights:** There is no indication of what is meant by “interim”, or of any maximum period for which an interim order can be required. We suggest that such a maximum period ought to be inserted in the Code for clarity. The same point applies to temporary orders.

15. **Part 11 – Overhead Apparatus:** As we understand this part, there will be power to fly lines over land owned or occupied by a person other than a person whose land is the land upon which the apparatus connected to such a line is installed. We believe that this Part should make provision for compensation, as the flying of a line over land or buildings may damage their value, and could impede development. Second, provisions should be made by which such lines can be removed in cases of intended development.

In relation to the other legislation, we have succeeded to having amendments moved at the appropriate committee stages to deal with technical points, and we would be happy to assist in this way on this Bill.

Yours sincerely

Barry Denyer-Green

(National Committee Member, Compulsory Purchase Association)

