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TELECOMMUNICATIONS INFRASTRUCTURE

Telecommunications infrastructure: Further consultation

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The aim of the Telecommunications Infrastructure (Leasehold Property) Act ('the Act') is to encourage landowners to respond to requests for access issued by operators and creates a route through the courts that operators can use to access blocks of flats and apartments if a landowner is repeatedly unresponsive to requests for access. The Act prevents a situation where a leaseholder is unable to receive a service due to the silence of their landowner.

The consultation, which has a deadline of 4 August 2021, seeks views on the terms which will accompany the interim Code rights provided to operators who have successfully applied for an order under the terms of the Act (a Part 4A Order).

Background

Since introducing the Electronic Communications Code as part of the Digital Economy Act 2017 in December 2017, the government and courts have been busy seeking to refine and interpret its meaning.

In a world where 5G and 6G will shortly become the norm, the role of telecommunications in our daily lives has never been more prevalent. Further, the arrival of the coronavirus pandemic has brought the need for all homes across England and Wales to have good connectivity enabling people to work from home and communicate with friends and family into sharp focus, given that office working and physical visits have not been possible. Accordingly, access to telecommunications is key.

The Act received Royal Assent on 15th March 2021 and amended the Code by introducing a new Part 4A. It permits operators to apply to court for interim Code rights in circumstances where a tenant in a 'multiple dwelling building' (ie a block of flats or apartments) has made a request for services from an operator, the connection requires an access agreement with another person, such as the landlord, but the landlord has

repeatedly failed (four formal notices must be served) to respond to the operator's request for access.

If an operator encounters these circumstances (and according to the government, currently 40% of requests do not receive a response), the operator may make an application to the First-tier Tribunal to acquire interim Code rights to the property, if they first satisfy certain conditions. These conditions include the issuing of three notices to the landowner over a 28-day period, and a final notice which leaves no less than 14 days for a response.

If an agreement is imposed and the Tribunal makes a Part 4A Order, it will last for the period ordered by the court – up to a maximum of 18 months. The Act currently applies to premises if they form part of a building that contains two or more separate dwellings and can enable the operator to not only connect the individual who made the service request, but also, provided there will be no additional burden on the landlord, any other residents in the building.

Consultation summary

The Department for Digital, Culture, Media & Sport (DCMS) would now like views on:

- the terms that will accompany the interim Code rights provided to operators who have successfully applied for an interim/part 4A order;
- whether the scope of the Act should be extended to include other property types (such as business parks and office blocks);
- procedural matters relating to the application process; and
- the length of time for which interim rights should remain valid.

The government, in carrying out this consultation, is seeking to achieve a fair balance between landlord, operator and individual's interests.

Consultation questions and policy proposals

The consultation seeks the answer to 42 specific questions on their proposals, which are split between various sections and I would encourage you to read the consultation in detail and to answer the questions asked. However, a broad summary of the proposals on which your views are being taken is below:

Terms to accompany Part 4A interim Code rights

Providing the landowner with details of the works to be carried out

A Part 4A order can only be made where a landowner has failed to respond to repeated requests for access rights. Once an order has been made, DCMS think it is important that the landowner is kept informed of any subsequent action the operator plans to take. DCMS

propose that the terms accompanying Part 4A Orders should require operators to provide details of their works to the landowner prior to undertaking the works, that operators should send details of their intended installation plans to the landowner no less than five working days prior to works taking place (by recorded delivery to their registered address) and that, at the same time as sending the notice by recorded delivery, place details of their plans on physical notices to be affixed in a prominent position within a common area of the building. The intention is to ensure that other residents in the property are aware of the works and to provide notice should the landowner visit the property.

Obtaining necessary consents, permits, licences, permissions, authorisations or approvals for the works to be carried out

Operators are currently required to obtain any consents, permits, licences, permissions, authorisations or approvals that are necessary for the works to be carried out.

However, as many of the consents (etc) may be building or location-specific, and may vary across different regions of the UK, DCMS do not propose to place in regulation any specific list. They intend instead to place the burden on the operator to ensure that they have undertaken the necessary investigations to ascertain what consents (etc) they require, and to obtain all such authorisations as are legally required.

Giving notice to the landowner (or other specified persons) before entering on the connected land

DCMS are of the view that, although operators will have gained rights to access the property through a successful application under Part 4A, such access should not take place without interested parties being given specific notice of the time and date that it will take place.

DCMS propose that such notice be combined with the details of works notices (as referred to above) to ensure that both the landowner and residents are aware of operator's intention to enter the property and carry out the works. DCMS also propose that notice should be given to any individual or organisation which has otherwise been empowered by the landowner to supervise their property (such as a property management company).

Limiting operator rights of access to specified times, except in cases of emergency

In order to avoid disruption to other residents from the works being undertaken at unsociable hours, DCMS propose to limit an operator's access times to properties (except in cases of emergency). The proposal is that operators should not start work any earlier than 09:30 and that all works should complete by 18:30. However, this may be altered with the express agreement of a managing agent or otherwise empowered individual or organisation (such as a residents' association).

The manner in which the works are carried out

In order to ensure that works are carried out to the highest possible standard, and in line with all statutory obligations, DCMS propose that a suitably qualified individual, such as a supervisor, should formally sign off the works following their completion to confirm that they are safe, the installation has been undertaken correctly and that the works, in their opinion, have been completed to a reasonable professional standard.

Restoration of the connected land at the end of the works, to the reasonable satisfaction of the landowner

DCMS propose that the operators should be compelled to ensure that the property is restored to as near its original condition as possible at the end of their works. With each building and each installation likely to be unique, it is the intention of the DCMS to not specify what that should be in detail.

DCMS further acknowledge that ‘reasonable satisfaction’ is subjective and therefore has the potential to lead to disagreements if and when the landowner eventually contacts the operator. DCMS do not intend to require operators to collect and keep records of the installation but would encourage that to take place.

Insurance cover or indemnification of the landowner

Concerns were raised in some responses to a previous consultation that landowners’ insurance may not cover any damage to the building caused by operators undertaking work not directly sanctioned by the property owner, and DCMS appreciate that there is significant variation in insurance cover.

However, having engaged with operators, DCMS note that operators would, as a matter of course, have sufficient insurance to cover their installation. Accordingly, DCMS propose that those seeking to use a Part 4A Order must possess sufficient public liability, indemnification and third-party insurance to cover their installation and maintenance of the equipment. Similarly, the operator must ensure they have insurance or indemnification cover for any potential damage that may occur to the property (including individual dwellings), the lives of the residents or loss of income to the building owner. DCMS propose that the minimum level of insurance cover that an operator should possess for any installation should be £5m.

Maintenance or upgrading by the operator of apparatus installed on, under or over the connected land in the exercise of the Part 4A code rights

As set out above, the Part 4A Order provides operators with access to the property for a period of up to 18 months. DCMS believe it is important that the equipment is suitably maintained, functioning and is not left to become derelict should residents choose not to take out a service. Accordingly, DCMS propose that operators should, for the duration of the Part 4A Order, have the right (subject to any other conditions in the regulation) to re-enter the property for the purpose of maintaining and upgrading the apparatus.

Imposing requirements or restrictions on the landowner for the purposes of preventing damage to the apparatus; facilitating access to the apparatus for the operator, or otherwise preventing or minimising disruption to the operation of the apparatus

Installations undertaken as a result of a successful application to the courts for a Part 4A Order have been undertaken legally. As such, DCMS believe that it is right that those installations are protected from unnecessary or vexatious interference.

DCMS propose that, for the duration of the period that the Part 4A Orders are valid, landowners should be prevented from interfering with apparatus, restricting operators’ access to the property or otherwise taking actions which would prevent the

telecommunications services being delivered to households in the building. However, this will not restrict the landowner's rights to raise a case at the Upper Tribunal (Lands Chamber) to end or alter the Part 4A Order, or seek to enter into a negotiated agreement with the operator.

In considering these proposals, and in the context of the idea of an 'unresponsive' landowner, a scenario could be envisaged where a landowner enters their property, discovers the equipment with no knowledge of the Part 4A Order and proceeds to undertake actions which put them into contravention of regulations of which they had no knowledge. To avoid this scenario, DCMS propose that operators be required to affix notices on installed equipment, which sets out the circumstances of the installation and provides contact details and reference numbers for the operator.

The assignment of the agreement

DCMS suggests that, in a situation where the ownership of an operator changes, the rights and responsibilities of the Part 4A Order are transferred to the new owner.

Preventing an operator unnecessarily preventing or inhibiting the provision of an electronic communications service by any other operator

The Act does not limit the number of simultaneous Part 4A orders that can exist on a property. For example, if Operator A makes a successful application via the courts for a Part 4A Order, this does not prevent Operator B applying. The Act also does not prevent a leaseholder with an existing connection from requesting a new service from an alternative operator.

Despite this, it remains possible that Operator A could potentially install their equipment in such a way as to physically restrict or prevent Operator B from installing their own infrastructure. Accordingly, DCMS propose that it should be expressly specified in the terms that installations undertaken by an operator who has gained access to premises following a successful application for a Part 4A Order should not unnecessarily prevent or inhibit the provision of an electronic communications service by any other operator.

The process for making an application to the Tribunal and the duration of interim Code rights

Conditions that the operator must satisfy before giving the landowner a final notice

DCMS believe that Part 4A Orders, allowing telecoms operators to enter private property without the express permission of the property's owner, should only be used where all reasonable efforts to communicate with the landowner have failed. To ensure that Part 4A is used in this way, it is important that operators can demonstrate that they have taken steps to identify the landowner and have been issuing notices to the correct person at the correct address, or have otherwise undertaken a reasonable level of investigation that has determined that the landowner is unidentifiable.

Existing legislation gives tenants in England and Wales a legal right to know, or request, the name and address of their landlord. The Part 4A process places a requirement on operators to have a request for a broadband service be made by a resident in the property. In most cases, it should therefore be relatively simple for the operator to engage with the

resident to request details of their landlord. DCMS therefore propose that an operator must engage with the individuals making the service request to ascertain the identity and address of the landlord.

Operators should also use other routes available to them, such as the Land Registry, to identify landowners. DCMS are also proposing that operators affix notices to the building (either outside or in common areas) giving notice of their intention to install equipment and requesting information as to the owner of the property.

Evidence requirements needed for a Part 4A application

The Act allows operators who fulfil the criteria otherwise set out in the Act, to make an application to the First-tier Tribunal (or the Sheriff Courts in Scotland).

DCMS propose that the operator should provide evidence that they have:

- an individual in the property requesting a service;
- performed a search of the land registry;
- engaged with the individual in the property requesting a service regarding the identity and address of the landowner/landlord; and
- copies of notices issued to the landowner with proof of postage.

DCMS are welcoming views on whether the operator should be required to provide copies (physical or digital) of the above documents as part of the application process, or whether a signed, legally binding document confirming they have been undertaken should be more appropriate.

Specify the length of time the operator has after issuing the final warning notice to make an application to the tribunal

As drafted, and as explained above, the Act requires that the operator must leave a minimum of 14 days between issuing the final notice and making an application to the Tribunal for a Part 4A Order. This minimum time is intended to provide a final opportunity for the landowner to receive and issue a response.

Once those 14 days have elapsed, it is reasonable to assume additional time will be required by the operator to physically make the application to the court. However, DCMS consider 42 days from the issuing of the final notice to be an appropriate time frame.

Specify the length of time (no longer than 18 months) after which the Part 4A rights will expire

As already noted, the Act requires that interim Code rights for a Part 4A Order will be valid for a period 'no longer than 18 months'.

In setting this maximum period on the face of the legislation, the government was seeking to strike a balance between the needs of operators, landowners and those living in blocks of flats, as well as the wider public interest. DCMS wish to know if 18 months is indeed an appropriate timeframe or if another period would be better.

Policy proposals regarding the scope of the legislation

Types of property in scope

The Act currently addresses the issue of unresponsive landowners in the context of 'multiple dwelling buildings' (eg blocks of flats). A 'multiple dwelling building' is defined as a building which contains *'two or more sets of premises which are used as, or intended to be used as, a separate dwelling'*. However, DCMS also recognise that there are other types of property other than multiple dwelling buildings that could be similarly affected by the issue of unresponsive landowners.

Evidence supplied as part of a previous consultation suggested that similar problems are encountered by leaseholders in office blocks and business parks. The Act contains powers for the Secretary of State to extend the scope of the provisions to cover other property types via regulation. DCMS query whether the scope of the Act should be extended to include office blocks and business parks (or indeed any other properties).

Comment

It is hopeful to see the government now consulting on further matters in relation to the Code. However, it will be interesting to see how much engagement the consultation elicits and whether landowners do use this opportunity to voice their concerns about the Part 4A of the Code.

Some may think that the suggested proposals place too many obligations on operators, but I see many positive suggestions within the consultation. For example, the fact that the proposed works might have to be carried out to a reasonable professional standard is encouraging as the operator's reputation could be at stake if works are signed off that subsequently fail or cause issues. The proposals in respect of insurance and yielding up may also provide further comfort for landowners.

Conversely, granting operators unlimited access for the duration of the Part 4A Order perhaps goes a step too far and, to me, the timeframe of 18 months seems adequate for interim rights. Should further more permanent rights be required, then operators should follow the usual routes.

As to whether Part 4A Orders should be extended to further buildings, such as business parks, there may be some merit in that.

Next steps

The consultation period ends on 4 August 2021 and I would encourage all landowners (and operators) to respond to ensure that the balance that DCMS hope to retain between the rights of operators and landowners (even in their absence) and those living in blocks of flats and apartments seeking to access broadband is fair.

Whatever the result, it is clear that there is likely to be more consultation and case law in respect of the Code over the coming months and years.

Citation reference:
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