CENTRAL ASSOCIATION OF AGRICULTURAL VALUERS

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Dear Sirs,

CAAV Response to Ofcom Consultation
Digital Economy Bill: Proposed Code of Practice, Standard Terms of Agreement and Standard Notices

I write on behalf of the Central Association of Agricultural Valuers in response to the Ofcom consultation paper on the Digital Economy Bill: Proposed Code of Practice, Standard Terms of Agreement and Standard Notices

Introduction
The Central Association of Agricultural Valuers (CAAV) represents, briefs and qualifies some 2800 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, government agencies and others, this work requires an understanding of practical issues.

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 under developing policies, aims to ensure that they are designed in as practical a way as possible, taking account of circumstances.

Our particular interest in this consultation arises because many of our members advise clients from time to time in respect of Code agreements and other interactions with

operators. A small number of our members specialise in this area and there are also CAAV members working for operators.

In preparing this response we have consulted our membership generally and our technical Property Committee in particular. We have also had ongoing discussions with a larger group of professional advisers which includes surveyors and lawyers who specialise in telecommunications work.

Kate Russell, a Technical and Policy Adviser with this organisation, was a member of the drafting group which prepared the draft Code of Practice and our response to the consultation is also informed by her experience in that work.

I set out below the CAAV response to the consultation.

Publication

Paragraph 90 of the Electronic Communications Code requires that notices given under the Code must be in the form prescribed by Ofcom. Paragraph 1.6 of the consultation document commits Ofcom to publishing the final versions of the notices, standard terms and Code of Practice as soon as possible:

> *After the consultation closes we will review all submitted responses and publish finalised versions of the Code of Practice and accompanying standard terms and conditions in a final statement which will be published as soon as possible following the entry into force of the relevant provisions of the DEB*

We expect Ofcom to ensure that the publication of these documents is widely publicised so that those affected by electronic communications apparatus are made aware of the changes. This is particularly important as it is reported that a majority of landowners with electronic communications apparatus on their land are not represented by professional advisers. The CAAV will hold briefing sessions on this for its members later in the year.

The Code of Practice

The draft Code of Practice fails to address two fundamental issues which we strongly believe should be included, namely:

- sanctions for any failure to comply with the Code of Practice and
- prior notification for upgrades

a) Sanctions for failure to comply

The main weakness of the Code of Practice as drafted is that there are no sanctions for a failure to observe it. In our discussions with civil servants on the drafting of the revised Electronic Communications Code we repeatedly raised concerns about the imbalance of power which exists in the telecommunications sector, for instance in the mast sector there are now only two main tenants (CTIL and MBNL) occupying thousands of sites each and in the fibre sector where Vodafone and SSET have a virtual duopoly of fibre on electricity pylons. On the other hand, there are thousands of individual landlords, most of whom will own only a single site. One of the answers from officials to these concerns was a Code of Practice to be published by Ofcom.

However, as currently drafted, there is nothing in the Code of Practice to guide any of the parties in the event that another of the parties acts in a way which is in contravention to it.

Those operators who have been involved in drafting the Code of Practice have all been willing to invest time and energy in doing so, but we fear that in the real world of negotiations, some may find that the behaviours advocated by the Code of Practice are inconvenient and so are not observed. To take one frequently encountered example: when the initial term of an agreement has expired and both parties have indicated their willingness to enter into a further agreement, many agents have told us that can be very difficult to negotiate new terms because the operator's chosen solicitor simply fails to respond to correspondence. While the new EC Code will assist with that particular point by providing timescales for renegotiation, similar problems of failing to respond may arise in relation to other issues.

At present the only response to these concerns was a suggestion by Lord Ashton during a debate on the Digital Economy Bill that failure to observe the Code of Practice could be taken into account by the courts in the event of a dispute:

> "...I understand the desire to ensure that Ofcom's code of practice effects real change in behaviour within industry. It will have weight. Indeed, failure to abide by it could be taken into account by a court or tribunal in the event of a dispute."
> (*Lords Hansard, 31st January 2017, column 1183*)

That suggests that the parties have to resort to potentially costly formal dispute resolution procedures to deal with a Code of Practice breach, which is unlikely to be a proportional remedy.

Water and sewerage undertakers are also subject to a Code of Practice governing their behaviour in relation to the land which is used to support their infrastructure. There is a long history of the water industry Code of Practice being widely ignored by contractors on site – indeed we suspect that many contractors have been altogether ignorant of the Code of Practice because the undertakers do not require observation of it as part of the contract. However, in acknowledgement of the potential difficulty of holding undertakers to account against the Code of Practice, there is a remedy for claimants affected to complain to Ofwat with powers for Ofwat to fine undertakers and award modest sums of compensation to claimants for breaches of the Code of Practice. The process is far from ideal and the sums awarded are typically only a few hundred pounds, but at least there is some way to hold undertakers to account and Ofwat notes such breaches.

We request that some form of sanction is available to any party to a Code agreement who is aggrieved by an operator's failure to observe the Code of Practice. At its most basic, this sanction could be by way of written representations to Ofcom, who would adjudicate cases and issue a direction where necessary with the ability to fine wrongdoers and compensate the aggrieved party.

b) Notification for upgrades

The EC Code permits an operator to carry out works to upgrade a site provided that the upgrade:

- has no more than a minimal adverse impact on the appearance of the site and
- does not impose an additional burden on the other parties to the agreement.

However the EC Code does not require the operator to give prior notification of such upgrades to the other parties before undertaking the works. We believe this to be an omission in the EC Code, because in practical terms, if the operator does not tell the

landowner what upgrades are proposed, how can the landowner let the operator know if those upgrades are likely to have an adverse impact or impose an additional burden? In practice what may happen is that an operator carries out the works without giving any prior notification to the landowner, and where the works have an adverse impact or impose an additional burden then the landowner may require the operator to remove them (as they will have no consent under the EC Code), which would put the operator to additional and unnecessary expenditure.

It would clearly be of practical benefit to the operator to know beforehand whether any upgrade works are likely to give rise to such an issue and we therefore suggest that the Code of Practice should encourage parties to consider this issue when terms are being negotiated. A new paragraph could be inserted after 4.40 to read:

> **"Upgrades**
> An Operator has powers under the ECC to upgrade the apparatus provided that the upgrade
> - has no adverse impact (or no more than a minimal adverse impact) on the appearance of the apparatus and
> - imposes no additional burden on the Landowner.
>
> Unless the proposed works will clearly have no more than a minimal adverse impact, the Operator should notify the Landowner of the proposed upgrade in advance, in order for the parties to assess whether the upgrade is likely to have any of these effects. The Operator should then allow a reasonable period for the Landowner to make any comments on the proposals. Where the Landowner is concerned that the upgrade will have more than a minimal impact on appearance or impose an additional burden, he should inform the Operator, who should consider those concerns and seek to resolve them before the upgrade is carried out."

Standard Terms
We endorse the view stated in paragraph 3.9 of the consultation document that the purpose of standard terms is to provide parties with a starting point for their negotiations, rather than to provide a final set of terms for all parties. The circumstances of the parties and the site can vary and agreements should be tailored to fit where necessary.

Other comments on the draft Code of Practice
Our comments on the scope and drafting of the Code of Practice are as follows, using the paragraph numbers from the consultation document.

4.5 We suggest that the following phrase is added to the end of this paragraph:
"...while respecting the proper interests of those whose properties will be subject to Code rights in the interests of connectivity for the public."

4.6 The Code of Practice refers to Landowners, but the EC Code enables an operator to deal with occupiers, potentially creating an agreement binding on the landowner to his significant detriment. We consider that the Code of Practice should provide that operators take steps to satisfy themselves that they are negotiating with a party who has a lawful right to grant the necessary agreement.

4.8 This paragraph refers to operators being responsible for the behaviour and conduct of their contractors and we are pleased to see this important point established at the outset. The person who the landowner or occupier is most likely to encounter on site will often be a contractor and while contractors act under the operator's direction, only the operator has Code Powers, so it is important that the responsibility for the exercise of those powers is seen to remain with the operator.

4.9 In order to be absolutely clear, we suggest that the second bullet point of this paragraph requires a new second sub-bullet to read

- The installation of apparatus and facilities

4.15 – 4.17 We consider it important that the issue of professional advice is raised early in the Code of Practice so that the parties can decide whether they require such assistance or not. These paragraphs cover the essential points of suitable qualifications or experience and responsibility for fees.

Our members report that operators sometimes use surveyors to create legally binding agreements under the Code. Whereas a lawyer is obliged to advise the parties that there may be legal ramifications in signing an agreement, there is no such obligation on a surveyor. The Code of Practice should therefore require the party offering an agreement to advise the other party to take the requisite advice (however simple the agreement).

4.18 The first bullet point of "customer demand" is otiose and should be deleted. New apparatus may be required for the other four reasons listed, each of which may be dictated by customer demand, but the apparatus is not installed directly as a result of customer demand.

4.23 The drafting of this paragraph is somewhat clumsy. We suggest that it is re-written as follows:

> "The parties may choose to meet on site during the assessment process to discuss practicalities and the Operator may ask the Landowner to provide certain relevant information, such as....."

4.26 The commas after the words "Authority", "parties" and "required" should all be deleted.

4.28 This paragraph would read better as follows:

> "As part of the terms of any agreement, the parties should agree access arrangements for construction, installation of apparatus, subsequent planned maintenance, upgrades and emergency maintenance to repair service-affecting faults. The essential matters which the parties should consider in relation to access are set out in **Annex B**. This information should be shared with contractors as necessary."

4.29 and 4.31 There is considerable duplication in paragraphs 4.29 and 4.31. We suggest that 4.29 is deleted and 4.31 amended to:

> "The parties should make every effort to reach an agreement by negotiation, but where they are unable to do so (or to do so within a reasonable period of time), the ECC provides that a court can impose terms or confer code rights on the parties. It

must be emphasised, though, that one of the principal purposes of this Code of Practice is to establish a voluntary process which avoids recourse to the courts.

4.32 In the first bullet point, the operator should make the contractor's name and contact details available to the landowner.

In the final bullet point, the example given in respect of landowner's property is "livestock". We are not sure that this is necessarily a helpful example – the need to safeguard the landowner's property might apply to anything from hedges alongside an access track to the lifts used to gain access to a rooftop site. It would be more helpful to include a reference to the need for the operator to have to reinstate any damage caused during the deployment stage, so we suggest that the following:

> "Procedures for safeguarding the property of the Landowner and any tenants or other occupiers of land affected, including reinstatement measures where damage occurs."

In order to maintain consistency, the second use of the word "operator" in this paragraph should be capitalised.

4.33 The full stop is missing from the end of the paragraph.

4.38 This paragraph would read better as follows:

> "As set out in Stage 2 Consultation Phase, any agreement between the Operator and the Landowner must address the Operator's rights of access to the site. The essential matters which the parties should consider in relation to access are set out in **Annex B**. Prior to entering into an agreement, Operators and Landowners should discuss preferred access routes and processes, both for routine visits and in cases of emergency, so that there are clear expectations as to what will happen when access is required."

4.41 This paragraph requires the operator to provide the landowner with the name of any other party who shares the site. The operator should also be required to provide to the landowner the relevant contact details for any such third party. If third party site sharers are likely to require physical access to the site then provision will need to be made for this between the parties. We therefore suggest the following addition to this paragraph:

> "Where third party sharers are likely to require physical access to the site themselves, the parties will need to provide for this in the agreed access arrangements."

4.42 In order to clarify that the operator will need to pay compensation for any loss or damage caused by such works, we suggest that the following phrase is added to the end of this paragraph:

> "...as soon as practically possible, and reimburse the owner and any occupier for all losses where this is outside the lease area."

4.45 In the first sentence we do not consider the word "national" to be necessary or especially helpful and think that the sentence would read better as

> "Operators will adhere to any requirements for managing location specific risks."

4.48 We suggest that this paragraph is amended as follows:

"When requested to remove redundant apparatus by a Landowner, the Operator will respond within a reasonable time, either explaining why the apparatus will still be needed or to propose a date by when the apparatus will be made safe or removed (and the site reinstated, if relevant)."

It may then be useful to insert a further paragraph to address the issue of third party apparatus which the operator may not be able to remove. We suggest the following wording:

"The operator will not usually be able to remove third party apparatus, such as electricity cables, from the site. Where such apparatus is present, the operator should discuss the practicalities with the landowner as part of the decommissioning process."

4.50 The second sentence of this paragraph suggests that where there is no need to re-negotiate terms on the renewal of an agreement, the period allowed for renewal will be short. However, if one party considers that the terms should be re-negotiated and the other does not, that might mean that the period of time needed to discuss the issues might not necessarily be short, whether or not any changes to the terms are eventually agreed. We therefore suggest that the second sentence is deleted.

4.51 The repeal of the provisions of paragraph 21 of the 2003 Code and the lack of an adequate substitute means that a landowner may not be able to carry out simple repairs to buildings (re-felting or replacement of roof etc). This is leading to many landowners being unwilling to enter into agreements for electronic communications apparatus on their properties. This paragraph should be strengthened to address such concerns.

4.52 The drafting of this paragraph is rather clumsy and we suggest that it is re-written as follows:

"Where a Landowner has a genuine intention to redevelop their property, paragraphs 30-31 of the ECC allow the Landowner to serve notice on the Operator requesting them to leave the site and giving at least 18 months' notice. Landowners may need to provide evidence that the intention to redevelop is genuine and should seek to give as much prior notice to the Operators as possible, in order that the Operator has adequate time to try to find an alternative site for the apparatus."

Schedule A

4.58 The "potential landowner" in line 2 would be more accurately described as "the landowner of a potential site".

In the third bullet point, first sub-bullet, the word "required" should be changed to "desired". At this stage in the relationship between the operator and the landowner, the parties are relying on negotiation and the language used should reflect that.

Schedule B

Footnote 27 – the word "by" should be inserted after "covered"

4.60 In the second main bullet point, the second opening bracket can be deleted. In the fourth bullet point the words "and business" should be added after "Landowner's property".

Draft Standard Terms

We are concerned that the draft standard terms included in the consultation document are very basic and presumably intended to cover only the most simple situations, yet there are no caveats published to guide parties on their appropriate use. These terms will clearly not be suitable for many situations, including the installation of apparatus on rooftops or for freestanding tower sites, and this fact needs to be made abundantly clear on the face of the document.

This point is illustrated by clause 2.1, which sets out the whole bundle of Code rights available to the operator. Not all of those rights may be appropriate in a particular situation and so it may be necessary for the parties to adapt the agreement to suit the circumstances. This should be made clear.

It would be helpful to repeat the point made in paragraph 3.9 of the consultation document on the front page of the agreement:

> "The purpose of these standard terms is to provide the parties with a starting point for their negotiations, rather than to provide a final set of terms for all parties. The circumstances of the parties and the site can vary and agreements should be tailored to fit where necessary."

Recital C – add the phrase "and has sufficient interest in the land to grant this lease"

Clause 1.1. Definition of "land" – this lacks detail. There is no reference elsewhere in the agreement to any areas where the operator may park vehicles or site equipment needed for works (e.g. cranes). That might create difficulties where such access is required.

Clause 1.2 – this phrase includes sub-contractors but not contractors, which seems to be an omission.

Clause 3. Payment – there is no provision for a review of the payment, despite the fact that such an agreement might be in place for many years. Without a review provision, the landowner would have to rely on the procedures in paragraph 33 of the EC Code to bring the agreement to an end if seeking a payment review, which seems unnecessarily onerous.

Clause 4.1(e) – add the words "or business" to the end of the paragraph.

Clause 6 – This bald statement needs further explanation or definition, including linking it to what the EC Code says about apparatus. The question of what might happen if Code powers were lost should also be considered.

Clause 7.1 – The question of whether any particular agreement is or is not a lease will depend on the particular circumstances of that agreement. A blanket statement such as this will not be given any weight by the courts – see the House of Lords decision in *Street v Mountford* – and it should be removed from the agreement. The EC Code clearly envisages that some agreements will be leases as it provides for Code agreements to be excluded from Part II of the Landlord and Tenant Act 1954 and the equivalent Northern Irish Business Tenancies Order. Nothing in the new EC Code acts to change the way that some agreements, as for mast sites, will take effect as leases. It should then be noted that the definition for lease in Scotland under the Leases Act 1449 is even broader with much less

latitude for licences and has been actively interpreted in this way by the courts (as in *Brador Properties v BT*).

7.1 should not be included in such a general standard agreement with its comprehensive aspirations It risks misleading parties and complicating matters.
Clause 10. Termination – we consider this clause to be confusing as it implies that a landowner can bring the agreement to an end in a much shorter timeframe than that permitted by the EC Code. The footnote goes some way to explain this but the overall clause is unsatisfactory.

10.3 – This open break clause should be amended by adding the words "provided that the provisions of clause 10.4 are met."

10.4 – apparatus should be removed before the termination of the agreement. After the agreement has been terminated, the parties will have no legal relationship. The apparatus and any activity by the Operator would be there by trespass.

Clause 11(2)(a) – the address for this purpose should be in the UK.

Clause 16. Mediation – We support the principle of a range of dispute resolution options being available to the parties to an agreement and consider the requirement to refer <u>any</u> dispute to mediation as drafted to be limiting as it does not guarantee an outcome. In some cases it may be more appropriate to use third party expert determination or arbitration.

Clause 17 – the first part of this clause refers only to England and Wales but the second part refers to the Scottish Sheriff Court. If intended for use throughout the UK the references need to reflect that – so to allowing for the laws of both Scotland and Northern Ireland to be invoked where appropriate and also including Northern Irish courts.

Notices
Assignment Notice
5 – The notice should supply not only an address for the assignee – which should be in the United Kingdom – but also practical contact details, not just the formal legal address.

Conferral Notice
5 – at the end of this paragraph, add "for the purposes of communications networks for the public."

10 – this reads as being rather heavy-handed. It might be softened by an opening sentence to the effect of

> "We will seek to agree with you suitable terms for an agreement between us. However, if we are unable to reach an agreement, the Code allows us to apply to the court to impose an agreement."

The Supplementary Information on page 52 of the consultation document is not particularly well drafted and we think that it should include reference to what the EC Code says about what could or should be in a Code agreement.

Interim Conferral Notice (page 53)
4 – at the end of this paragraph, add "for the purposes of communications networks for the public."

9 – see comments for paragraph 10 of the Conferral Notice above.

Supplementary Information – see comments above in relation to the Conferral Notice.

Termination Notice (page 59)
It should be made clear in the heading that this is for a landowner to terminate an agreement by serving notice on the operator.

Disclosure Notices (page 64 and 66)
These refer to paragraph 38(1) and (2) of the EC Code, but should refer to paragraph 39(1) and (2).

It would be helpful if the titles to these two notices made it clear as to which notice is to be served in which circumstances. It is not immediately apparent without careful scrutiny, which may mean that the wrong notice gets served.

Removal Notices (page 68 and 70)
The first of these notices refers to paragraph 39(2) of the EC Code, but should refer to paragraph 38.

Again, it would be helpful if the titles to these notices made it clear as to which notice is to be served in which circumstances. It is not immediately apparent without careful scrutiny, which may mean that the wrong notice gets served.

Overflying (page 108)
It would be helpful if the title made clear that this notice is for the operator to serve on a neighbour where there are overflying cables.

Paragraph 2 – As well as specifying that the cables are over 3m above the ground, this paragraph should also say that they are not within 2m of any building, in line with paragraph 74 of the EC Code.

Paragraph 3 – the word "will" is unnecessary and should be deleted. The sentence should read "You **have** a right to object..."

We propose that the notice should also refer to

- the fact that no Code rights apply where the cables are below 3m or within 2m of a building? Otherwise it could be read oddly.
- paragraph 74(3)(b) of the EC Code and the duty not to interfere with the carrying on of any business on the land.

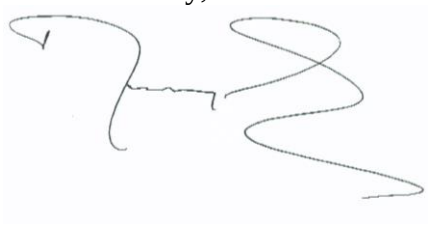
Other notices
We suggest that additional notices are required for:

- Informing the landowner of the name and contact details for any of the operator's contractors who will visit the site

- Advising landowners of the operator's intention to upgrade or share apparatus where that is not covered by Code.

We trust that the responses given above are helpful and would be pleased to discuss matters further with officials if required.

Yours faithfully,



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