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Lord Adonis
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Lord Clement-Jones
Lord Empey
Baroness Falkner of Margravine
Lord Fox
Lord Haselhurst
Lord Holmes of Richmond
Baroness Kennedy of Cradley
Lord Kennedy of Southwark
Lord Lea of Crondall
Lord Liddle
Lord Livermore
Baroness McIntosh of Pickering
Baroness Morgan of Cotes
Lord Stevenson of Balmacara
Baroness Wilcox of Newport

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My Lords,

Telecommunications Infrastructure (Leasehold Property) Bill Committee Stage

I am grateful for your contributions to the debate at Committee Stage on 19 May and 2 June. As I promised, I am now writing to you to give you a fuller answer to some of the points that were raised.

I want to thank all of those who took part, and appreciate your overall support of the Government's aim of providing every home and business in the country with access to gigabit-capable connections as soon as possible.

During the first Committee session, we discussed at length the importance of a balance of rights between landowners, operators and the wider public. The Government continues to believe - and operators agree - that negotiated, consensual agreements between landowners and operators are the most efficient and cost-effective means to gain access to land for the purpose of installing digital infrastructure.

To facilitate the delivery of this, the Government amended the Electronic Communications Code (the Code) in 2017. The Code seeks to balance the rights of operators and the rights of landowners, against a backdrop of the wider public interest. This balance underpins consensual, negotiated agreements and aims to facilitate the easier, faster deployment of digital infrastructure. This approach is maintained in this Bill.

As a result, the Government understands and appreciates why it is important to preserve this balance, even though I sympathise with the sentiment behind many of the arguments already put forward.

Types of tenancy in scope of the Bill

I appreciate that noble Lords are seeking clarity on who is able to make a request for a communications service, and thereby start the Part 4A process. I agree with them that we should be seeking to ensure that as many people as possible are within scope. It is one of the reasons why the concept of "lessee in occupation" is of such crucial importance to the Bill.

As drafted, this Bill allows a lessee in occupation - i.e. someone who has a leasehold agreement with a person able to confer on an operator or otherwise be bound by a code right - to request that an operator provide an electronic communications service to the premises so occupied. It is that which is the trigger for the whole process set out in the Bill.

It is for that reason that the Bill does not use the language of landlord and tenant law, which was one of the - entirely understandable - points made during the first Committee session. Rather, the Bill amends the Code. Paragraph 12 of the Explanatory Notes to the Digital Economy Act 2017 explain what the Code does and merits full repetition here, as it stresses why it is important to regard this Bill in terms of the wider context of the Code in which it operates, rather than as an aspect of landlord and tenant law:

> "The electronic communications code ("the code") enables electronic communications network providers to install and maintain electronic communications networks by giving network operators certain rights. Under the code, operators have rights to install and keep electronic communications apparatus on land. Generally, the code requires that operators secure the agreement of the land owner before installing apparatus, but also provides that when permission is not given by the land owner, an operator can apply to the County Court or Sheriff Court in Scotland for permission..."

Please also note that - as I mentioned during the first Committee session and had also been mentioned in another place during the Report stage debate there - both Assured Shorthold and Assured Tenancies are amongst the most common ways in which property is rented from private sector landlords in the UK. They are both forms of lease, and therefore a person renting under such a tenancy is occupying premises under a lease and would be able to request an operator to provide an electronic communications service to those premises.

During the first Committee session I was asked by Lord Clement-Jones about other types of tenancy, specifically what were referred to as tenancies at will and renewable leases. While I did address this during the debate, I promised to write with further clarification.

The starting point has to be a consideration of what constitutes a lease. Not all tenancies have to be in writing or formed by deed. The case law on this is relatively settled, expressed particularly clearly by the Appellate Committee of the House of Lords in its judgment in *Street v Mountford* [1985] UKHL 4. An agreement is a lease if it provides for (i) exclusive possession, (ii) of defined premises, (iii) for a fixed or periodic term and (iv) at a rent. This is a matter of substance rather than form, e.g. it does not become a lease simply if the parties describe it as such. In a later case, the Court of Appeal held in *Ashburn Anstalt v Walter John Arnold and W. J. Arnold & Company Limited [1989] Ch 1* that there is no requirement that a lease reserve a rent. Also the reservation of a right of inspection or a right of way indicated a tenancy. The distinguishing feature of a lease, as opposed to a licence, is that the tenant has exclusive possession of the let property.

My understanding is that a tenant at will could be a person able to make a request that would trigger the Part 4A process.

Regarding renewable tenancies, it was not stated by Lord Clement-Jones exactly what legal provision or principle he was referring to when he used that expression. However, Government's views set out above apply equally in relation to those tenancies. If an agreement for occupation constitutes a lease, then the fact that it is renewable does not change the Government's intended approach. As I mentioned at the first Committee session,

> "... my understanding is that in relation to renewable tenancies—a point raised by the noble Lord, Lord Clement-Jones—if they have the characteristics of a lease, they would not be affected by this Bill."

My understanding is that the impact of that would therefore be that so long as a renewable tenancy has the hallmarks of a lease then it would not fall outside the scope of this Bill. I must stress again, though, that this will be both a matter of substance that will turn on the facts of each case and ultimately, the interpretation of the law will be a matter for the courts.

Even if on the facts there was no tenancy found, so that the person occupied as a licensee rather than a tenant, nothing would preclude such a person asking the licensor to provide a connection to the property in which they live. Nor does it preclude an operator from seeking to agree with a landlord/licensor that the latter confer a code right or that they otherwise be bound by that right, which is consistent with what the Code already provides. It goes without saying, though, that it is the role of the courts to interpret the law, applying that interpretation to the facts of the case before it.

We also discussed other types of property that could be in scope of the provisions in the Bill, in particular business parks, retirement homes and office blocks. We are keen to ensure that no groups are unfairly excluded from the scope of the policy. We would welcome evidence from operators or other interested parties, on whether - and if so when and to what extent - we could extend the Bill's scope to other premises. The power exists to do so within the Bill. Such evidence could include the scale of the issue, for example how many commercial business premises, retirement homes or any other type of property are not being connected, the frequency with which operators encounter a lack of response from landowners of these properties during deployments, and the impact this is having on network build. This will enable us to make an assessment as to whether further intervention is required.

Technology neutrality

We also discussed whether the Part 4A proposals should be limited only to operators installing gigabit capable connections.

The Code is a framework for the relationship between telecoms operators and landowners, it is not and was never envisaged to be a tool to push one type of connection - or indeed one type of operator - ahead of another. While the Government is and remains supportive of technologies such as full fibre, gigabit-capable and 5G services, the Code is not about *what* is being installed but about *how*, as mentioned above, operators install and maintain electronic communications networks by giving those operators certain rights.

Some noble Lords questioned whether the Government's reluctance to accept the amendment on this issue was at odds with our commitment to providing access to gigabit capable services to every home and business in the country. I can assure noble Lords that that is unequivocally not the case.

As mentioned previously, the Code is principally about regulating access rights for digital operators, not the technology they are installing. That said, the majority of the installations taking place around the United Kingdom *are* gigabit capable services and the steps we are taking to make access easier and cheaper the Government is supporting operators' delivery.

Ensuring the market remains competitive

Members of the Committee also raised points regarding competition and ensuring that tenants have a choice of service. I would like to assure the Committee that a tenant can at any time seek another service from a different provider; there is nothing in this Bill that would prevent that. Neither does the Bill prevent a different provider - if faced with a repeatedly unresponsive landlord - seeking to use Part 4A to gain interim Code rights to provide a service to that tenant.

My understanding of noble Lords' concerns - especially the valuable interventions of Lords Adonis, Clement-Jones and Stevenson - was that they centred on seeking to prevent an operator from installing their equipment in such a way as to preclude a successor operator from installing their own infrastructure. I must make clear that I agree that this is undesirable.

There is, though, already in the Bill a means by which those concerns can be addressed. Issues concerning how installations are to take place can potentially be addressed in the terms which will accompany a Part 4A order. Those terms will be specified in regulations - subject to the clear protections of both the affirmative resolution procedure and a consultation requirement - made under paragraph 27E(4) of the Code as inserted by this Bill.

As part of this consultation, we will be seeking input from stakeholders on a range of matters, including in relation to those competition concerns raised by noble Lords previously. I remain grateful to them for their valuable views on this important matter.

New build homes

With regard to new build homes, the provision of gigabit broadband to these developments is a crucial element of meeting our ambitious broadband strategy. As Lord Parkinson stated at Committee, we aim to lay the regulations that will give effect to the policy as soon as possible. Ensuring all new homes, rural and urban, are built with the future in mind, ready to support the next generation of digital infrastructure, is vital.

On 17 March 2020, Government published the response to the consultation on delivering gigabit capable connections to new homes. This announced that we will use existing powers in the Building Act 1984 to amend the Building Regulations 2010 to require housing developers in England to:

- provide a gigabit-capable connection unless the cost exceeds £2,000, or the network operator declines to provide a connection;
- install the next fastest broadband connection which can be installed below a cost of £2000, where a gigabit-capable connection cannot be installed below a cost of £2000; and
- install the physical infrastructure necessary for gigabit-capable connections even where a gigabit-capable connection exceeds the cost cap.

We intend to bring forward this legislation as soon as possible in this parliamentary session.

Lessons learned from previous network roll-out

Finally, I would like to respond to a question asked by Lord Holmes, with regard to lessons learned by Government. Our Superfast broadband programme has ensured that over 5.2 million premises have been served that would not otherwise have been served through commercial means. This process of contracting has involved two separate umbrella State aid decisions being put in place to enable contracts to be awarded. The first produced a framework agreement in which suppliers called off contracts, with only Openreach on the framework. The second was a competitive procurement process, introducing competition to the programme and making use of other lessons learned to improve contractual terms and delivery processes, but both contracting processes were led by Local Body partners on the ground.

I can assure noble Lords that the learnings from both of the phases of the superfast programme are being taken forward as part of the development of the next phase of the Government's objective of ensuring full gigabit coverage. This includes a review of the end to end procurement process and ownership of contracts.

I hope that this letter provides some reassurance to noble Lords that I have heard and addressed your concerns. While we remain committed to delivering nationwide coverage of gigabit capable broadband as soon as possible - that this Bill has been carefully drafted to address the problem of unresponsive landlords. I will be engaging with peers ahead of the Bill's Report Stage, but do please get in touch with my officials via dcmslordsminister@culture.gov.uk in the meantime if you have any outstanding questions.

I will place a copy of this letter in the library of both Houses.

Yours sincerely,

The Baroness Barran
Minister for Civil Society