



FACULTY OF ADVOCATES

Faculty of Advocates Response to

DCMS Consultation Paper on Reforming the Electronic Communications Code

The Faculty restricts its observations to questions 1, 2 and 20.

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

The Faculty understands the word “land” to be used in the existing Code with its ordinary legal meaning of the *solum* of any ground, whether or not covered by water, including any buildings or structures erected thereon.

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 fixtures 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)?”

Under the general principles of Scots land law, all moveable items which are so attached to land, whether directly or indirectly, and whether in themselves or as part of buildings or

structures, as to become heritable fixtures would accede to the land and form part of it – **Brand’s Trs v Brand’s Trs (1876) 3 R (HL) 16**. In determining whether or not fixtures have become heritable, it is necessary to consider the whole circumstances. These may include the degree and extent of physical attachment; whether or not the item in question can be removed without material damage to itself or the ground or building to which it is attached; any special adaptation of the ground or building for the use of the item; how far the use and enjoyment of the ground or building would be affected by removal of the item; and any factors indicative of whether the attachment was intended to be of a permanent or quasi-permanent character – **Scottish Discount Co v Blin 1985 SC 216**. In some cases the degree of attachment may be conclusive, irrespective of other factors.

The Faculty therefore considers that it is not possible to give any general answer to the question. This is particularly so, given that the structures and apparatus in relation to which Code Rights may arise can vary considerably, as can the terms on which, and circumstances in which, they may be erected or installed.

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 Faculty agrees that registrable leases, in which Code Rights are created, should require to be registered in the Land Register of Scotland in order to bind successors in title of the landlord. The Faculty further considers that deeds creating Code Rights which are intended to be created as heritable servitudes under s.75 of the Title Conditions (Scotland) Act 2003 should be subject to the same registration requirements as other deeds of servitude.

While the Faculty sees some merit, having regard to the publication function of the Land Register of Scotland, in requiring all deeds creating Code Rights to be registered, in order to bind successors in title, it considers that this would impose an excessive administrative burden on the Keeper of the Registers. It therefore considers that such deeds, other than those referred to in the foregoing paragraph, should not be registrable. The Faculty considers it likely that Code Rights will, in most cases, relate to objects or structures whose physical presence is sufficiently apparent to alert third parties to the possible existence of rights.