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## The New Telecommunications Code: are you equipped?



telecomms

After a long wait, the new Electronic Communications Code is due to come into force at the end of this year or early 2018. The new Code is a complete replacement of the existing Telecoms Code, introducing new procedures and timescales. This article gives an overview of the main changes to the Code and how the new procedures will work.

### History

The current Code was first enacted 33 years ago as Schedule 2 to the Telecommunications Act 1984. Technology has changed considerably in that time with the emergence of devices such as mobile phones, tablets and smartwatches. The current Code was deemed not fit for purpose and the Law Commission was therefore asked to review it. Following a consultation process in 2012 and 2013 the Law Commission recommended a wholesale replacement of the Code. The new Electronic Communications Code (**New Code**) was set out in Schedule 1 to the Digital Economy Act 2017 (**DEA**) which was given Royal Assent on 27 April 2017.

### The New Code

This article highlights the main changes under the New Code.

### Part 1: Code Rights

The Code Rights are set out in Part 1, paragraphs 3(a) to 3(i). The rights include the installation and keeping of apparatus on, under or over the land; the right to inspect, maintain, adjust, alter, repair, upgrade or operate; the right to carry out any works; the right of access; the right to connect to a power supply; and the right to interfere or obstruct a right of access.

**Apparatus** is defined in paragraph 5 as “*electronic communication apparatus means apparatus designed or adapted for use in connection with the provision of an electronic communications network or for use which consists of or includes sensing or receiving of communications or other signals transmitted by means of an electronic communications network, lines and other structures or things designed or adapted for use in connection with the provision of an electronic communications network*”.

A **line** includes wires, cables, tubes, pipes or other similar things and a **structure** will include the building only if the sole purpose of that building is to enclose other electronic communications apparatus.

## **Part 2: Conferral of Code Rights and their exercise**

A Code Right can only be conferred on an operator by an agreement between the occupier of the land (for the time being) and the operator. The agreement must be in writing, signed by or on behalf of the parties and state for how long the Code Right is exercisable and the period of any notice required to terminate the agreement.

Where Code Rights are conferred by way of an agreement, they will bind the occupier granting the Code Rights, the successors to the occupier, those deriving title from the occupier and in turn their successors and any other person with an interest in the land who has agreed to be bound. This means that any tenant granting a sublease would bind the subtenant and their assignees. A landlord consenting to a Code agreement would also be bound.

## **Part 3: Assignment**

This is one of the major new changes under the New Code. Paragraph 16 provides that an agreement will be void to the extent that it prevents or limits assignment to another operator; or makes assignment subject to conditions (including payment of money).

It is not clear how widely “conditions” is meant to be interpreted. On the face of it, the term appears wide enough to exclude a condition requiring an operator assigning its interest to notify the landlord of the assignment. The only condition that would not be void is the requirement for a guarantee agreement (AGA).

## **Part 3: Upgrading and sharing of operators**

Under the New Code an operator may upgrade or share any apparatus with another operator on two conditions. The first is that any changes as a result of the upgrading or sharing have no, or no more than a minimal, adverse impact upon appearance; and secondly that the upgrading or sharing imposes no additional burden on the landowner.

An additional burden under paragraph 17(4) includes any additional adverse effect on the other party’s enjoyment of the land and causing additional loss, damage or expense to that party.

It is not clear whether this is a subjective or objective test. As with assignments, an agreement will be void to the extent that it prevents or limits the upgrading or sharing or makes this subject to conditions (including payment of money). It is therefore difficult to see, if the operators cannot be made subject to a condition to liaise with the landlord in advance of any upgrading or sharing, how the operator can ascertain whether it can satisfy the two conditions.

It is also difficult to envisage how an operator will be able to satisfy the second condition, of not imposing an additional burden on the other party to the agreement in circumstances where it is proposing to share the site with another operator. The additional equipment and access requirements for maintenance, installation and repair would themselves suggest an additional burden on the other party to the agreement.

## **Part 4: The power of the court to impose an agreement**

If the parties cannot reach an agreement between them then the court can impose an agreement on a relevant person. The procedure is that the operator will need to give the relevant person a notice in writing setting out the Code Right it is seeking and all the other terms of the proposed agreement. If the relevant person does not agree to the proposal then after 28 days (or earlier if a written rejection is received) the operator may apply to the court for an agreement to be imposed.

The court may make an order to impose an agreement only if two conditions are met. The first is that the prejudice to the relevant person is capable of being adequately compensated; the second, that the public benefit in making the order outweighs the prejudice to the relevant person. In deciding the second condition the court must have regard to the public interest in access to a choice of high quality communication services. This is very different from the test under the old Code, which is whether there would be substantial interference with that particular operator's network and whether the public would have access to any communications network.

### *Redevelopment*

The court may not make an order for an agreement if it thinks that the relevant person intends to redevelop all or part of the land to which the Code Right could relate or any neighbouring land and could not reasonably do so if the order were made. There is no timing of when the relevant redevelopment will take place and there is no requirement for planning permission. Given that under the New Code the requirement for longer notice periods to terminate both the agreement and to seek removal (taking at least two years), realistically a landlord would not have planning permission already and it would be unreasonable to expect the landowner to do so as it would have difficulty in being able to start on site within the three year planning permission window. Therefore it would appear that anything planned to be developed within five years would need to be considered by the court.

### *Terms of an imposed agreement*

If the court does impose an agreement the terms must include the payment of consideration and such other terms the court thinks appropriate for ensuring that the least possible loss and damage is caused to the persons who occupy the land, own interest in that land or are from time to time on that land. It must also specify how long the Code agreement will be exercisable and should determine whether there is a break clause or a lift and shift provision.

## **Part 5: Termination of agreements**

The good news is that under the New Code the security of tenure provisions in the Landlord and Tenant Act 1954 (**1954 Act**) will not apply to a Code agreement. The New Code instead provides its own continuation regime akin to the 1954 Act, albeit with much longer notice periods and different grounds for termination. These continuation and termination provisions do not apply to agreements where the primary purpose is not to grant Code Rights and where the 1954 Act security of tenure provisions apply, such as for offices or retail units.

The relevant person under the New Code can only bring a Code agreement to an end by giving written notice. The notice must give at least 18 months' notice, specify the grounds for terminating the Code agreement and be in a form prescribed by Ofcom.

There are four grounds for termination: (1) substantial breaches, (2) persistent delays in making payments, (3) the relevant person intends to develop all or part of the land or any neighbouring land, and (4) the test under paragraph 21 (imposition of the agreement) is not met. It is interesting to note that there is no right to terminate a Code agreement on the basis of own use.

Where a notice has been given the Code agreement will come to an end unless the operator serves a counter-notice within three months and then issues proceedings within three months of that counter-notice.

If the court finds any of the landlord's grounds made out he must order the termination of the Code agreement. Otherwise the court must order one of the following: (1) the Code agreement continues, (2) the Code agreement is modified, or (3) termination of the Code agreement and the imposition of a new agreement.

## **Part 6: Removal of equipment**

There is now a clear two stage process for obtaining vacant possession from operators. Once the Code agreement has been brought to an end the relevant person must then go through a second stage to remove the telecommunications equipment.

A right to remove equipment occurs where: (1) a landowner was never bound by a Code Right, (2) the Code Right has come to an end, (3) apparatus is no longer used for a Code Right and there is no reasonable prospect that it will be used so in the future, or (4) the Code no longer applies to the operator. The landlord can serve a notice requiring the removal of the apparatus which must be a written notice and in a form prescribed by Ofcom. Under the New Code there is a right for a landlord to serve notice on an operator to disclose whether it owns or uses equipment on any particular.

If agreement isn't reached within 28 days from the service of the notice to remove equipment then the landlord can apply to the court for removal.

## **Part 4: Consideration and valuation**

The amount of consideration payable by an operator must be an amount representing the market value of the relevant person's agreement to be bound by the Code Right. Market value is defined as being what a willing buyer would pay to a willing seller in an arm's length transaction with both parties acting prudently and with full knowledge and the transaction being subject to the other provisions of the agreement. The assumptions to be made from calculating the market value are that: (1) the right to which the transaction relates does not relate to the provision or use of an electronic communications network, (2) the rights to assign, upgrade and share do not apply, (3) the rights in all other respects correspond to the Code, and (4) more than one site is available to the buyer for that purpose.

## **Part 14: Compensation**

In addition to consideration, if the court imposes an agreement it may also award compensation to the relevant person for any loss or damage that has been sustained or will be sustained by that person as a result of the exercise of the Code Right to which the order relates.

Compensation includes expenses, diminution in the value of the land and the cost of reinstatement. However the calculation of the diminution in value of the land is the same assessment as for compensation for the compulsory purchase of an interest in land.

## **Schedule 2: Transitional provisions**

Schedule 2 of the DEA contains a number of transitional provisions including: (1) that Part 3 of the New Code regarding assignment of Code Rights and the upgrading and sharing of operators will not apply to subsisting Code agreements, (2) the termination provisions of the new code will not apply to a 1954 Act protected subsisting agreement, (3) where the unexpired term is less than 18 months on a subsisting agreement the notice period will be the unexpired term with a minimum of three months, and (4) where Code notices have been served but no application made to the court, the application will be treated as if given under the New Code.

## Other interesting points to note

### *Contracting out*

There is no ability to contract out of the provisions of the New Code. However, when considering the drafting of Part 17 this might not be quite as comprehensive as it first appears as it does not appear to apply to Part 2 of the New Code.

### *Dispute resolution*

The Government is proposing to move dispute resolution from the ordinary courts to specialist tribunals.

### *Code of Guidance*

Ofcom is currently in the process of preparing a Code of Guidance for parties. It will be a non-binding code, the main thread of which is for open communication between the parties.

## Further information



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