

THE NEW ELECTRONIC COMMUNICATIONS CODE - KEY SIGNALS FOR LANDOWNERS

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OVERVIEW

- *The Digital Economy Act 2017 ("DEA 2017") received Royal Assent on 27 April 2017, and introduces a new Electronic Telecommunications Code (the "New Code").*
- *The New Code will only apply to agreements entered into after it comes into force.*
- *The New Code has not yet come into force, and there is no indication as yet of when the Secretary of State will issue regulations to bring it into effect.*
- *New agreements will have Code rights but not 1954 Act protection - removing the potential confusion of operators claiming rights under both regimes.*
- *New termination procedure includes a ground for possession resembling Ground Funder the 1954 Act. This potentially brings greater clarity to the termination process but it depends on the courts approach.*
- *Automatic rights for operators to assign upgrade or share apparatus are likely to make it very difficult for landowners to know who is operating on their land and what operations are being carried out.*
- *New process for acquiring Code rights - agreements created by court order without any documentation may result in uncertainty for landowners.*
- *Compensation and rent to be on a no-scheme basis, so landowners cannot charge or assess fees on a 'special purchaser' basis - this is likely to result in lower rents.*

BACKGROUND

The Electronic Communications Code ("**Code**") gives rights to certain telecommunication services providers ("**operators**") to install and maintain "**apparatus**" such as masts, exchanges, cables and cabinets on over and under public and private land. The Code regulates legal relationships between landowners and operators, enabling operators to acquire rights over land in certain circumstances.

In our article "[the new Electronic Communications Code – Areas of Concern for Landowners](#)" in August 2016 we analysed the Government's proposals for a revised Code. At that time, there was no fixed date for the new Code to take effect and there was little detailed information available from which to analyse the likely effect of the new Code. Overall, the implication was that the balance of interests would be shifted in favour of operators at the cost

of landowners, whose financial and commercial incentives to accommodate operators, and their ability to develop their land in the future, seemed set to be significantly adversely impacted.

How does the New Code measure up to expectations? In this article we consider the extent to which the details of the New Code have shed light on its likely impact on landowners and operators, and whether the New Code hits the mark in terms of achieving the Government's stated aims.

SECURITY OF TENURE

One of the key considerations for both landowners and operators is the extent to which Code agreements can grant, and exclude, rights of security of tenure for occupiers. The draft Code stated that the security of tenure provisions of the 1954 Act would not apply to a lease the primary purpose of which is to grant Code rights. The New Code expands on this and provides some detail.

As anticipated, all New Code agreements will be outside the 1954 Act and will not benefit from security of tenure if the primary purpose of the agreement is to grant Code rights. There is no definition of "primary purpose" so there is a clear potential for dispute here.

New Code agreements will be purely governed by the New Code (i.e. agreements cannot be governed by both the 1954 Act and the New Code), which contains an alternative form of security of tenure benefiting operators.

There will be two steps under the New Code for landowners to recover possession of a site from an operator; first the termination process under part 5 and secondly the removal process under part 6.

TERMINATION

Until there has been an application by the landowner and an order made by the court, the operator retains all its rights under the Code agreement. To terminate an agreement, the landowner must serve notice specifying the date on which it proposes that the agreement will end and the ground on which it should end. The notice must be a minimum of 18 months and cannot expire any earlier than the end of the fixed term or the break date (much longer than the 28 days' notice currently required under existing paragraphs 20 or 21). The grounds of termination are similar to those applying to a landlord's refusal to grant a new lease under the 1954 Act:

1. Substantial breaches of the operator's obligations in the agreement;
2. Persistent delays in making payments under the agreement;
3. The landowner intends to redevelop all or part of the land on which the site is located, or neighbouring land, and cannot reasonably do so unless the agreement comes to an end; or
4. The operator is no longer entitled to the agreement because the paragraph 21 test is not met (see below).

It may be that the courts approach to these grounds will be similar to that currently adopted when considering the grounds for refusal under the 1954 Act, but this is uncertain.

Once a termination notice is served, the agreement will end in accordance with its terms unless the operator serves a counter-notice within 3 months and applies to court for an order under paragraph 34 within 3 months of serving the counter-notice. If the court decides that the landowner has substantiated any of the grounds, it must

order the agreement to end. If the court finds that the landowner has not substantiated any of the grounds, it can order the agreement to continue, to be replaced by a new Code agreement, or to be modified in some way.

The test referred to in the fourth ground above is as follows: where the parties cannot agree terms a court can impose the New Code on a landowner where (a) financial compensation is adequate to overcome any prejudice caused to the landowner; and (b) where the public benefit to the New Code rights being granted outweighs the prejudice to the landowner. Note that the method of calculating compensation and rent is now to be by reference to the open market value of the land without the telecoms equipment i.e. the 'no scheme' valuation. As stated in our 2016 article, this is very likely to suppress rental income, particularly in relation to roof top leases where there are few other competing uses; financial compensation therefore seems unlikely to be adequate.

REMOVAL

Once an order for termination is made under paragraph 31 there is a separate notice procedure to secure removal of the electronic communications apparatus from the site and restoration of the land. The notice of removal and restoration must specify a reasonable period for the removal and restoration. If within 28 days of the notice the parties have not reached agreement on the fact or timing of the removal and restoration, the landowner can apply to court for an order requiring the operator to remove the equipment or permitting the landowner to remove and sell the equipment. This two stage process will clearly involve delay and add extra expense to a landlord's development plans.

AUTOMATIC RIGHT FOR OPERATORS TO ASSIGN, UPGRADE OR SHARE APPARATUS

Agreements entered into under the New Code cannot limit the rights of operators to assign or share the lease in future or impose any conditions for such assignment to another telecoms operator (except for requiring a guarantee on assignment - but this will only protect the landowner after the first assignment of the lease and will not affect further assignments). Any agreement under the New Code will be void to the extent that it prevents or limits these rights or seeks to impose any condition on them: representing a significant reduction in landowner's control over their land. This is as anticipated last year.

Also as anticipated last year, telecoms operators will have a right to upgrade equipment erected pursuant to the New Code powers, provided the upgrade has "no more than a minimal adverse impact" on the appearance of the equipment and must place no "additional burden" on the landowner. "Additional burden" includes anything that has an adverse effect on the landowner's enjoyment of its land or causes additional loss, damage or expense to the landowner. 'Upgrading' is not defined and it is not clear whether this includes a right to add new apparatus, rather than just updating existing apparatus. Again, as discussed last year, there is clear potential for dispute between the parties as to how these new provisions will be interpreted.

APPLYING FOR CODE RIGHTS

If the operator wishes to trigger the process for seeking new rights under the New Code (part 4), it must serve a

notice setting out the Code rights that it seeks from the landowner. If the landowner does not agree to confer the rights within 28 days, the operator can apply to court to confer the rights. As under the existing Code, the court can make an order under this process if two conditions are met (referred to in the New Code as the paragraph 21 test) (see above). The difference in the New Code is that the court may not be required to make an order if the landowner intends to redevelop all or part of the land to which the Code rights would relate or any neighbouring land, and cannot reasonably do so if the order is made. It is not clear how this new defence will be interpreted and what the evidential burden will be on the landowner. The court may apply a similar approach to this as when considering a Ground F opposition under the 1954 Act, but again this is not certain.

If the court orders that a Code agreement is imposed, the agreement will take effect for the purposes of the Code as an agreement between the operator and the landowner (there is no need for the agreement to be formalised in writing or by deed to take effect). This means the provisions relating to free assignment, sharing and upgrading apparatus will apply to the imposed agreement. This is an important point for purchasers - a court order and therefore a Code agreement may exist in relation to a property despite not being formalised in any document.

Telecoms leases granted under the New Code will be overriding interests capable of binding successors in title even when they have not been registered at the Land Registry. For a purchaser, it is very important to carry out appropriate due diligence to establish whether there are Code rights affecting the land; clearly without the need to register Code leases and with the ability to freely share occupation and upgrade equipment, it will be increasingly difficult for landowners to keep track of who is in occupation of their land and which equipment belongs to which operator.

CONSIDERATION AND COMPENSATION

The assessment of consideration and compensation paid to landowners in return for the granting of Code rights over their land is currently based on the figure that would have been fair and reasonable if agreement had been given willingly. Under the New Code, consideration will be based on market value subject to various assumptions, on a "no-scheme basis". One of the assumptions is that there is more than one site that the operator could use, even if that is not the case. This means that no uplift can be applied to reflect a shortage of suitable sites. It is also assumed that the rights under the New Code to assign, upgrade and share freely do not apply, which clearly does not reflect reality. The effect of all this is that rental and compensation levels for landowners are likely to fall.

CONCLUSION

In terms of the Government's aims of facilitating the roll-out of new technology and clarifying the regime for landlords to let their spaces to Code operators, the commercial incentives to let land to operators are now practically non-existent, and there are clearly areas for potential dispute in the drafting, particularly around the effect of upgrades on the landlord, and how landlords will go about proving the redevelopment "defence" as a ground of termination.

The draft Code indicated that commercial incentives for landlords to enter into New Code agreements with operators would be adversely affected, but now that details of the New Code are available the balance of the

burden looks set to shift to an even greater extent towards the landowner, who will find it very difficult to control the use of its land, both in terms of what upgrades are made to equipment and which Code operators are allowed access onto its property, and in terms of future development.

The New Code is bound to have an effect on current and prospective negotiations for New Code leases; operators may exercise early termination rights in their current leases in order to take advantage of the New Code, or review their expired leases and open negotiations with landlords with a view to taking advantage of the new valuation provisions. Government priorities have shifted in the months since the publication of the draft Code; this will surely impact its coming into force. Landowners do not even have any certainty as to when the provisions of the New Code will come into effect; if the New Code slips down the priority list, this can only increase the already significant uncertainty for landowners.

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