



## New electronic communications code

The electronic communications code dates back to 1984. It regulates agreements between landowners and communications operators for the installation of equipment and infrastructure to provide facilities such as broadband, cable TV, mobile telephony and land lines. It covers leases of sites but also other contracts such as licences and wayleave agreements. The Digital Economy Bill currently before parliament will replace the 1984 code with a new one. The general tenor of the new code is to advantage operators at the expense of landowners.

### Valuation

Current practice is for the owner and operator to agree a market rent based on how the actual market is operating in the real world. This allows an owner to argue for a rent which reflects the scarcity of potential operating sites and a site's attraction to an operator as an opportunity to make money. An owner can therefore set a rent which in effect means they have a share in the profits which the operator may make from the site.

The new code will change this. The government's view is the owner ought not to have a "*share of the economic value created by very high public demand for services that the operator provides*" (Paragraph 27 page 15: *A New Electronic Communications Code* published by the Department for Culture Media & Sport May 2016). Paragraph 23 of the new code uses the term "*market value*". However, it skews the calculation of the rent in favour of the operator by requiring that the calculation be based on certain assumptions and disregards for example:

- 1 The value to the operator of the site is disregarded.
- 2 An assumption that there is more than one site which the operator could use (even if that is not the case).

Take the example of a corner of a field on a farm which the owner wishes to lease to an operator: the rent will be set by calculating how much profit the owner could make from that field corner if it used the land itself or rented it to a third party for agricultural use. Gone is any notion of how much profit the operator can make from the site.

Strictly the market rent calculation is only relevant where the parties cannot reach agreement on the terms of a letting and the operator asks the court to impose code rights on an otherwise unwilling owner. However, the fact that the operator can fall back on a court imposition of rights is likely to influence the negotiations for rent where the parties cannot come to a consensual arrangement.

### No contracting-out of security of tenure

The current code gives operators security of tenure. This means an owner is not guaranteed that they can recover possession of their land when the agreement with the operator ends. However, the practice has developed of

bypassing the security of tenure provisions. This is done by an operator agreeing not to assert its security of tenure rights.

The new code also confers security on the operator. However, it will be impossible to contract-out and any private agreement to exclude the code's provisions will be void.

One doubt under the old code is whether an operator has security available to business tenants under the Landlord and Tenant Act 1954 as well as code security. Owners have therefore tended to insist that code lettings be contracted out of the 1954 Act. The new code clarifies the matter: security of tenure provisions for business lettings under the Landlord and Tenant Act 1954 will not apply to agreements made under the new code<sup>1</sup>.

## Site-sharing and equipment-upgrade

An operator will be able to upgrade equipment without restriction unless the upgrade places an “*additional burden*” on the owner or has an “*adverse visual impact*”. Any attempt to exclude these provisions from the code agreement will be void.

In addition, an operator will have an automatic right to share a site with another operator and to transfer freely the benefit<sup>2</sup> of any lease or other contractual arrangement without the owner's consent<sup>3</sup>.

These changes will prevent owners pursuing the practice under the current code of restricting an operator's right to upgrade equipment, site-share or transfer code rights to another operator. The idea behind the restrictions is to enable the owner to obtain a payment or increased rent in return for relaxing the restrictions when the operator wishes to do something which is restricted.

## Relocation of equipment

The new code has no provision for equipment relocation, sometimes called “lift-and-shift” arrangements, where the owner wishes to redevelop. The current code allows for this under paragraph 20.

## Registration of code rights

The new code repeats the provisions in the current code – namely, a buyer of land is bound by code rights. There is no requirement for the operator to register code rights at the Land Registry.

## Are landlords bound by what their tenants do?

The new code uses the term “occupier” for the person who grants rights to an operator. Where land is subject to a lease, the tenant will grant the code rights as the occupier of the land. This raises the question of whether a landlord can find itself subject to code rights as a result of its tenant's actions.

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<sup>1</sup> Section 23 Landlord and Tenant Act 1954 will be amended so that the 1954 Act will not apply to “*a tenancy the primary purpose of which is to grant code rights within the meaning of Schedule 3A to the Communications Act 2003 (the electronic communications code)*”.

There will be a similar exclusion whereby granting of code rights will not be a “*relevant disposal*” for the purposes of tenants' rights of first refusal under the Landlord and Tenant Act 1987.

<sup>2</sup> Any transferee will be bound by the operator's obligations in the code agreement as well as taking the benefit of operator's rights. The transferor is released from future performance of the operator's obligations. However, this is on condition that notice of the transfer together with the identity of the transferee and a contact address is given to the owner.

<sup>3</sup> Where the code agreement is a lease, the owner as landlord can require the operator transferring the lease to give an authorised guarantee agreement in respect of the incoming operator's performance of the tenant's obligations in the lease.

A landlord is bound by an agreement between its tenant and an operator if the landlord agrees to be bound by it. The new code does not repeat the provision in the old code whereby landlords can be bound in some instances even without their agreement. This can arise where a tenant has a lease with a minimum term of one year and enters into a code agreement without approval from the landlord. Despite its lack of approval the landlord is bound<sup>4</sup>.

The new code addresses the situation where a landlord inherits equipment installed under an agreement made between a former tenant and an operator. It provides for a process whereby the landlord can require the operator to remove the equipment if the former tenant breached its lease when entering into the code agreement.

## Secure occupation – ending the agreement

The new code's security of tenure provisions are similar to those for business lettings under the Landlord and Tenant Act 1954. Broadly an agreement will continue on a statutory basis after any contractual term specified in the written agreement has ended. A party who wishes to end the arrangement can serve 6 months' notice and propose terms for a new written agreement. Failing agreement operator or owner can apply to the court to settle the terms of the new agreement.

There are similar arrangements where the owner wants the land back. However, in that case the minimum notice period is 18 months and the code sets out grounds for possession which the owner must specify. These grounds are similar to those in the Landlord and Tenant 1954 Act for business lettings; for example: where the operator has committed "*substantial breaches*" of the agreement; or the owner "*intends to redevelop all or part of the land*". If the operator does not want to go, the court decides the issue. This provision means an owner who grants code rights is not guaranteed they will recover possession of the land when the code agreement comes to an end.

## New code does not apply to existing agreements?

Schedule 2 to the Digital Economy Bill states that the new code will apply to code agreements made under the old code. However, the schedule then contains exceptions to this rule e.g. an express exclusion of the new provisions on unrestricted assignment, site sharing and equipment upgrade. The general tenor of these exceptions is that the old code will continue to apply to old agreements.

## Conclusion

Government commentary on the new code says it is committed to encouraging implementation of infrastructure in mobile and digital communication. The new code reflects this with its shift in the balance of advantages in favour of operators.



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<sup>4</sup>Section 134 Communications Act 2003 will continue to exist under the new code as well as the old. This is relevant where a landlord chooses for a tenant its supplier of "*electronic communications services*". The section implies into a lease an obligation on the landlord not to withhold consent unreasonably if the tenant wishes to obtain services through a new provider.