THE NEW ELECTRONIC COMMUNICATIONS CODE - AREAS OF CONCERN FOR LANDOWNERS

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By: Steven D. Cox

OVERVIEW

- The Electronic Communications Code ("Code") gives rights to certain providers of telecommunications networks (as Code "operators") to install and maintain their apparatus
- The Code has long been criticised for being out of date and the Government published proposals for a revised Code in May 2016
- The Government's aim with the new Code is to ensure and incentivise continued investment in digital communications networks. To achieve this, the new Code confers greater powers on operators
- The new Code is expected to introduce a valuation system that will significantly lower rents
- Operators will be able to upgrade apparatus and share it with other operators
- There will be an automatic right for operators to assign Code agreements
- Prospective landowners will need to very carefully inspect properties pre-acquisition. It may become very difficult to tell what apparatus is in place and who owns it
- Given the significant impact of the valuation change, the new Code will not apply retrospectively

Introduction

The Electronic Communications Code ("Code") gives rights to certain providers of telecommunications services (as Code "operators") to install and maintain their "apparatus" (such as masts, exchanges, cables, cabinets etc.) in, over and under both public and private land. The Code regulates the legal relationships between landowners and operators, and enables those operators to acquire rights over land in certain circumstances.

In February 2013, the Law Commission recommended that the Code should be completely rewritten. Following consultation, the government published proposals for a revised Code in May 2016. Clause 4 of the new 'Digital Economy Bill' introduces a new Code. There is no fixed date for this new Code to take effect, but the Government is committed to implementing the new Code as early as possible.

The Code has long been criticised for being out of date, as well as being complex and unclear. It frequently causes disputes between landowners and operators, in particular in relation to recovering possession of land previously occupied by an operator, and the nature of the interaction between operators' rights under the Code and operators' rights as tenants under the security of tenure provisions in the Landlord and Tenant Act 1954. The

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Government acknowledges a 'profound shift' in the last decade in that digital communication, once seen as a luxury, is now a 'basic need' and 'an essential part of the economic and social fabric of the country'. The communications sector has changed beyond recognition since the Code was first established in 1984, and the Government wants to ensure the new Code is capable of accommodating changes and advances in technology as they occur, whilst continuing to balance the rights of landowners and the need for more extensive communications coverage, better connectivity and faster services.

The Government's aim with the new Code is to ensure and incentivise continued investment in digital communications networks. To achieve this, the new Code confers greater powers on operators, making it easier for operators to maintain and update their apparatus with new rights to upgrade and share infrastructure without landowner consent, allowing upgrades in technology to be rolled out as they occur. This shifts the balance of interests in favour of operators, at the cost of landowners, who are likely to find that their financial and commercial incentives to accommodate operators are significantly reduced.

From the information available so far, the key changes in the new Code are likely to be as follows:

"No scheme" valuation

The new Code is expected to make major changes to the way land is valued. The Government proposes the introduction of a valuation system based on compulsory purchase principles; this is the "no scheme" rule. The value of land will be assessed on the basis of its value to the landowner, rather than to operators. The Government considers that going forward landowners should not have a share of the economic value created by the high demand for the services the operator offers; this economic value should remain solely with the operator. This is expected to significantly lower the rents landowners can charge operators to use their land. As well as suffering this significant reduction in income, costs for landowners could escalate due to disputes that may well arise in determining the rate of compensation for the use of a particular piece of land.

Automatic right for operators to upgrade or share apparatus

Operators will be able to upgrade apparatus and share it with another operator, notwithstanding any term of the Code agreement if (a) the upgrade or sharing has no adverse impact on the appearance of the apparatus, and (b) the upgrade or sharing does not impose any additional burden on the landowner.

This will allow operators to make more effective use of current sites and will ensure that operators cannot be charged extra by landowners for making these changes. This is a significant change for landowners, who have previously been able to restrict sharing arrangements and upgrades and negotiate with operators in return for any additional rights. The fact that equipment may be shared without consent means that landowners (and potential purchasers of land) may not know exactly what apparatus is on their land and whose it is. There is clearly the potential for dispute between operators and landowners as to the extent of any adverse visual impact of works and whether any works place new burdens on landowners. This change coupled with the proposals in relation to 'no scheme' payments increases the adverse affect on landowners and further reduces the incentives on landlords to accommodate operators.

Automatic right for operators to assign Code agreements

Any provision in a Code agreement will be void to the extent that it prevents or limits the assignment of that agreement, or makes assignment subject to conditions. The only exception is where a Code agreement is a lease under the Landlord and Tenant (Covenants) Act 1995, where landowners can still require outgoing operators to

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provide an authorised guarantee agreement. Again, as assignment of Code agreements can take place freely, landowners and prospective purchasers of land will find it even harder to identify what operators are on their land, and they will lose the chance to renegotiate current agreements when they expire.

Limitations on contracting out

It has never been possible to contract out of the Code, but often landowners negotiate private agreements with operators whereby the operator agreed not to exercise their Code powers in exchange for an indemnity in favour of the landowner in respect of any costs incurred if the operator exercised their Code powers after the expiry of a Code agreement. The new Code will expressly state that, save for compensation due under the Code itself, operators will not have to pay compensation, or be subject to any other liability, in respect of any loss caused by the lawful exercise of their Code rights.

Retrospectivity and transition

Given the significant impact of the valuation change, new Code will only apply to contracts signed after the law comes into effect and will not apply retrospectively. In future there will be transitional arrangements as to how and when existing agreements transition to the new Code. Over the next 10-15 years there will be a shift to the new Code, as existing Code agreements come to an end.

Conclusions

Landowners need to carefully consider their current Code agreements. There is a possibility that operators may trigger any early termination rights in their agreements in order to be able to apply the provisions of the new Code, once the new Code comes into effect.

Landowners also need to carefully consider any new Code agreements, in particular with regard to any development plans the landowner may have in respect of the land in question. It is easy to see the potential barriers to redevelopment of property in the future when operators can upgrade, share and assign agreements freely.

Prospective landowners will need to very carefully inspect properties pre-acquisition. It may become very difficult to tell what apparatus is in place and who owns it. Lack of inspection could prove to be very costly later on in terms of the development potential of a particular site.

The transitional arrangements will not be firmed up for some time and so it is not clear as yet the extent to which the Code will affect pre-Code agreements.

The new Code does have some positive points for landowners. The new draft Code states that the security of tenure provisions of the 1954 Act will not apply to a lease, the primary purpose of which is to grant Code rights. This is a very welcome development and removes the issue of operators resisting landowners seeking to recover possession by relying on the security of tenure provisions under both the Code and the 1954 Act. Further, the grant of Code rights will not constitute a disposal giving rise to tenant's right of first refusal under the Landlord and Tenant Act 1987.

The balance between the desire of landowners to protect their property interest and the need for ever greater connectivity is a delicate one. It remains to be seen whether the new Code will tip the balance in favour of operators by decreasing financial and commercial incentives for landowners.

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KEY CONTACTS



STEVEN D. COX
OF COUNSEL

LONDON
+44.20.7360.8213
STEVEN.COX@KLGATES.COM

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