
COMMUNICATIONS BREAKDOWN

What has the new Electronics Communications Code got in store?

A workshop for the Property Litigation Association Annual Conference at Oxford on Friday, 24 March 2017

by

Oliver Radley-Gardner
Falcon Chambers

Oliver Radley-Gardner is a barrister at Falcon Chambers, and covers all areas of property and landlord and tenant law. His recent cases include Balogun v Boyes Sutton & Perry [2017] (Court of Appeal), a case concerning the solicitor's duty to warn in conveyancing negligence cases, The Crown Estate v Wakley [2016] (High Court), a case about misrepresentation and breach of covenant, and Sinclair Gardens Investment v Ray [2015] (Court of Appeal), about non-PCL deferment rates in enfranchisements.

He is also often instructed in cases with a telecoms flavour, whether in relation to proceedings brought under the Electronic Communications Code, or other communications-related issues. He was junior counsel in Bridgewater Canal Co Ltd v GEO Networks, the most recent of the handful of reported cases which engages with the Code in any detail, and the only Court of Appeal discussion of the Code.

He is the co-author of the first edition of a new textbook (produced with other colleagues in Chambers), *Residential and Commercial Service Charges*, the co-author of the second edition of *Adverse Possession* (with Stephen Jourdan QC), and a contributor to *Fisher and Lightwood's Law of Mortgages*. He completed the second edition of a co-authored European law textbook, *Fundamental Texts on European Private Law*, shortly before Brexit. He will not be retiring on the royalties.

He is ranked by Legal 500 and Chamber and Partners, and is Junior Counsel to the Crown, B Panel.

FALCON CHAMBERS

Falcon Court
London EC4Y 1AA

Switchboard: 020 7353 2484

Fax: 020 7353 1261

Email: radley-gardner@falcon-chambers.com

Twitter: [@falconchambers1](https://twitter.com/falconchambers1)

COMMUNICATIONS BREAKDOWN

A Workshop

To look at the Draft Electronic Communications Code (“DECC”)

And the Transitional Provisions

(which are more important than one might think)

PART I: DECC:

A LOOK AT SPECIFIC ISSUES UNDER THE GENERAL REGIME

When and How Can We Expect DECC?

1. The following materials are available online.
 - (1) The Law Commission, Law Com 336 The Electronic Communications Code, giving much background, is here:
http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc336_electronic_communications_code.pdf
 - (2) DECC: current iteration of the Digital Economy Bill (“DEB”) is that of 8th February 2017:
https://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0102/lbill_2016-20170102_en_1.htm
 - (3) DECC: the explanatory notes (up to date to November 2016) are here:
<https://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0080/17080en01.htm>
 - (4) The published timeline for the Bill is here
<http://services.parliament.uk/bills/2016-17/digitaleconomy/stages.html>

The Third Reading in the House of Lords is scheduled for 29th March 2017. Then we will have consideration of the amendments in both Houses. There is no set time for this. Then we will have Royal Assent. There is no set time for this but it can be within minutes of the amendments being considered.

2. As to the precise date it will come into force, I have heard a range of dates suggested. Most recently, in the last week, I have heard it suggested that it might be as early as May 2017. If that is so, then negotiators will need to get their skates on if they

would like to still have agreements with some of the benefits of the ECC regime attaching to them.

3. DECC will, when in force, become Schedule 3A to the Communications Act 2003 (Clause 4 DEB).

What Does DECC Do?

4. DECC will reform the law relating to occupation of land by electronic communications operators. Operators are, and remain, electronic communications providers who have received a direction under section 106 of the Communications Act 2003 ("the 2003 Act"). OFCOM keep a list of these on their website: <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/policy/electronic-comm-code>.

It Will Replace ECC For Operators (Subject to Transitional Provisions)

5. DECC will replace the incoherent Electronic Communications Code ("ECC"). ECC is contained in Schedule 2 of the Telecommunications Act 1984, as amended by the 2003 Act. Everyone agrees that it is a terrible piece of legislation, though there is a case to be made that at least we are all now used to it. Here is what Lewison J (now Lewison LJ) thought in Bridgewater Canal Company Ltd v Geo Networks Ltd [2010] EWHC 548 (Ch), paragraph 7:

"In my view it must rank as one of the least coherent and thought-through pieces of legislation on the statute book. Even its name is open to doubt. Although section 106 of the Communications Act 2003 says that the code set out in Schedule 2 to the Telecommunications Act 1984 is referred to as "the electronic communications code" in "this Chapter", the amendments made by the 2003 Act did not include changing the title to Schedule 2, so that in Schedule 2 itself it is still called "The Telecommunications Code". I have simply called it the Code."

6. We can't ignore ECC altogether due to the Transitional Provisions in Schedule 2 to DEB. ECC is now quite old fashioned, and still rooted in the 1980s privatisation world from which it traces its origins, but with a few superficial changes in 2003 to pay lip service to the emergence of new technology. As with dangerous dogs and legal highs, legislation struggles to keep up with innovation and changes in technology. DECC is trying to set out a modern and lasting framework.

It Will Modernise The Framework For Operator Relations With Each Other, And With Occupiers of Land

7. There are a number of things that DECC intends to do:
- (1) It aims to provide a more certain structure for security of tenure of operators. In so doing, it follows to a degree the structure of the 1954 Act, but takes that all a stage further.
 - (2) It aims to ensure that operators cannot assert rights as between themselves under DECC. Presently, under ECC, and operators would be able to assert a compulsory purchase right under paragraph 5 ECC, or claim security of tenure under paragraph 21 ECC, against another operator. DECC seeks to stop that happening, and to ensure that DECC only relates to operator/landowner disputes.
 - (3) It aims to clear up the 1954 Act mess, by providing that¹ the usual telecoms lease cannot take effect as a 1954 Act tenancy, by way of amendment to the 1954 Act.
 - (4) It aims to ensure that it is not just providers of actual electronic communications services (which are more often than not Mobile Network Operators, “MNOs”) are protected, but that the more recent beast, the Wholesale Infrastructure Provider (“WIPs”) are also protected, and to remove any doubt that there might have been that an operator had to in fact be providing electronic communications networks. Providing kit is now definitely enough.
 - (5) It aims to confer upgrading, sharing and alteration rights as a default, to reflect the fact that WIPs exist and MNOs now like to share to cut infrastructure overheads and negotiating costs.
 - (6) It seems to want to cap the value of electronic communications agreements by putting in place, under the compulsory purchase provision, quite generous (to the operator) compensation machinery.

Overview Schematic of DECC

8. The above is really an examination of the core of DECC’s equivalent of what was the “General Regime” under ECC, that is, the regime which governs most land occupier/operator relations. It does other things, though. In tabulated form, it might be helpful to have it set out as follows:

Part	SUBJECT MATTER	SUB-ISSUES	DECC PARAGRAPHS	FUNCTION
Part I	Key definitions		Paragraphs 1 – 7	
		“Operator”	Paragraph 2	The beneficiary of a section 106 direction.

¹ Devil is in the detail though!

		“Code Rights”	Paragraph 3	<i>See below</i>
		“Statutory Purposes”	Paragraph 4	Either providing a network or infrastructure
		“Electronic Communications Apparatus”	Paragraph 5	<i>See below</i>
		Operator’s Network	Paragraph 6	For a network provider, everything in the system unless excluded under section 106(5) of the 2003 Act.
		Infrastructure System	Paragraph 7	Providing (including establishing and maintaining) an infrastructure system
	General definitions		Paragraph 1	
		Court	Paragraph 93	The County Court
		Occupier	Paragraph 104	
		Electronic Communications Network/Services	Section 32 of the 2003 Act	
		General Interpretation	Section 405 of the 2003 Act	
Part II	Conferral and exercise of Code Rights		Paragraphs 8 - 13	
	<i>Conferral</i>	Grantor	Paragraph 9	Identifies the person who has the power to grant a code right, identified as the “ <i>occupier</i> ” of land, identified as “O” in the remaining paragraphs; see too paragraph 10(1). For a definition of occupier, see paragraph 104.
	<i>Conferral</i>	Grantee	Paragraph 10(1)	To create a “Code Right” under DECC the grantee must be an operator within paragraph 2.

	<i>Conferral</i>	Burden of Code Right	Paragraph 10	Creates (1) a “cascading burden” – binds successors and derivative owners of O, and grantees of occupation rights by such persons at a time when they were bound by a Code Right (paragraph 10(2)) (2) owners of an interest in land who agree to be bound (paragraph 10(4)), referred to as “P”. A similar cascading burden provision is then applied by paragraphs 10(5) & (6).
	<i>Conferral</i>	Form of Code Right	Paragraph 11	Must be conferred (11(1)) (a) in writing (b) signed by/on behalf of parties (c) state the term length (d) state the notice length needed for termination, if termination is to be by notice. This also applies to variations (11(2))
	<i>Exercise</i>	Mode of exercise	Paragraph 12	Code Right must be exercised in accordance with terms and is treated as the exercise of a statutory power, save insofar as they are exercised against a freehold or leasehold owner not bound by that right.
	<i>Exercise</i>	Access to Land	Paragraph 13	
Part III	Assignment, Upgrading and Sharing		Paragraphs 14-17	
		Assignment	Paragraph 15	Renders restrictions on assignments void; creates a “mini” 1995 Act. Query what the relationship with the 1995 is where there is a lease within DECC.

		Upgrading and Sharing	Paragraph 16	Renders void any agreement that ousts or limits sharing and upgrading; conditions are as set out in paragraph 16
		Operator sharing	Paragraph 17	Deals with operators sharing with others
Part IV	Compulsory acquisition of rights		Paragraphs 18 – 26	
			Paragraph 19	Notice procedure to acquire rights,
			Paragraph 20	Test to be applied to deal with an application under paragraph 19.
			Paragraph 21 & 22	Effect of “imposed agreement” and terms.
			Paragraph 23 & 24	Consideration formula and machinery for payment.
			Paragraph 25	Interim code rights
			Paragraph 26	Temporary code rights
Part V				
	Termination and modification		Paragraphs 27 - 34	
			Paragraph 28	Agreements to which Part V applies.
			Paragraph 29	Security of tenure, continuation of rights
			Paragraph 30	Termination notices by site provider, grounds of opposition.
			Paragraph 31	Operator counter notice procedure; procedure for hearing grounds of opposition.
			Paragraph 32	Variation of agreements by notice
			Paragraph 33	Court orders available under an application made pursuant to paragraphs 31 & 32
			Paragraph 34	Interim “rent”
Part VI	Removal		Paragraphs 35 - 43	
			Paragraph 36	Conditions entitling landowner to give removal notice.
			Paragraph 37	Rights of neighbouring

				landowner to have apparatus removed.
			Paragraph 38	Information rights in relation to operator agreement terms.
			Paragraph 39	Enforcement of removal by landowner
			Paragraph 40; 41	Enforcement of removal by others. Paragraph 41 deals with street works.
			Paragraph 42	Right to have land restored.
			Paragraph 43	Court orders
Part VII	Transport rights	land	Paragraphs 44 - 54	
Part VIII	Street Works		Paragraphs 55 - 58	
Part IX	Tidal Waters		Paragraphs 59 - 63	
Part X	Undertaker's works		Paragraphs 64 - 71	
Part XI	Overhead apparatus		Paragraphs 72 - 74	
Part XII	Rights to object to certain apparatus		Paragraphs 75 - 80	
Part XIII	Tree lopping		Paragraphs 81	
Part XIV	Compensation		Paragraphs 82 - 85	
Part XV	Notices		Paragraphs 86 - 90	Form and service of code notices, OFCOM powers to prescribe.
Part XVI	Dispute resolution		Paragraphs 91 - 97	Court and tribunal powers. SOS Power to confer jurisdiction to UT/FTT
			Paragraph 93	Definition of Court
Part XVII	Supplementary		Paragraphs 98 - 107	
			Paragraph 98	Relationship with existing law
			Paragraph 99	Although headed "relationship between this code and agreements with operators", this is the contracting out provision
			Paragraph 100	Ownership of apparatus

			Paragraph 101	Conduit works
			Paragraph 102	OFCOM power to regulate operator conduct.
			Paragraph 104	Definition of “occupier”.
			Paragraph 107	General definitions

What Will This Paper Not Cover In Detail?

9. This paper will not cover:
- (1) Interim and temporary rights
 - (2) Variation of agreements post-termination (paragraph 32 DECC)
 - (3) CPO powers under Part IV (save in outline)
 - (4) The special regimes under Parts VII – XI
 - (5) The special rules on objections to apparatus (XII) and tree lopping (XIII)
 - (6) Compensation under Part XIV

A More “Regulatory” Approach

10. As we can see from what follows, DECC will place a number of things into the hands of the regulator and take them away from the County Court. One provision that is worth flagging up now in that regard are the first two parts of paragraph 102 DECC:

- (1) OFCOM must prepare and publish a code of practice dealing with—
 - (a) the provision of information for the purposes of this code by operators to persons who occupy or have an interest in land;
 - (b) the conduct of negotiations for the purposes of this code between operators and such persons;
 - (c) the conduct of operators in relation to persons who occupy or have an interest in land adjoining land on, under or over which electronic communications apparatus is installed;
 - (d) such other matters relating to the operation of this code as OFCOM think appropriate.
- (2) OFCOM must prepare and publish standard terms which may (but need not) be used in agreements under this code.

11. We may therefore find that (a) in addition to any litigation tools that we have to deal with, landowners may have a regulatory stick with which to threaten operators who are dragging their heels, and (b) there may well be suggested terms for DECC agreements, which at the very least are likely to influence the terms of any rights acquired under the CPO provisions under Part IV, or any renewal rights which might be granted under Part V following a termination application in relation to a DECC-regulated agreement.

A Closer Look at “Code Right”: Set Menu or A La Carte?

12. The drafting here appears to me to be rather unhappy. The paragraph is headed “Code Rights”. If one looks at paragraph 3, it is provided that a “code right” is “a right” for the statutory purposes (and note highlighting below) to

- (a) *to install electronic communications apparatus on, under or over the land,*
- (b) *to keep installed electronic communications apparatus which is on, under or over the land,*
- (c) *to inspect, maintain, adjust, alter, repair, upgrade or operate electronic communications apparatus which is on, under or over the land,*
- (d) *to carry out any works on the land for or in connection with the installation of electronic communications apparatus on, under or over the land or elsewhere,*
- (e) *to carry out any works on the land for or in connection with the maintenance, adjustment, alteration, repair, upgrading or operation of electronic communications apparatus which is on, under or over the land or elsewhere,*
- (f) *to enter the land to inspect, maintain, adjust, alter, repair, upgrade or operate any electronic communications apparatus which is on, under or over the land or elsewhere,*
- (g) *to connect to a power supply,*
- (h) *to interfere with or obstruct a means of access to or from the land (whether or not any electronic communications apparatus is on, under or over the land), or*
- (i) *to lop or cut back, or require another person to lop or cut back, any tree or other vegetation that interferes or will or may interfere with electronic communications apparatus*

13. Looking at that section, it is not clear to me whether the draftsman has in mind (a) a single compendious Code Right which includes items (a) – (i) as sub-rights automatically, or whether (b) it is possible to select rights *a la carte* from (a) – (i). A landowner may wish to take the *a la carte* approach so as to preserve a bit of leverage – after all, if there is no DECC-protected right to power up, but only a contractual right,

then that could be a little awkward for an operator at the end of the contractual term of a DECC protected agreement.

14. One might have thought that what Parliament intends to do is make sure that, when an operator under an agreement complying formally with paragraph 11 is given rights for electronic communications purposes, that is, statutory purposes falling within paragraph 4 DECC, then that should sweep with it automatically all the default rights under paragraph 3. After all, they are all essential to maintaining a communications site. What is the sense in installing apparatus under (a) without a right to keep under (b), repair under (f) and power up under (g). Indeed, the reason for the insertion of (g) is that Parliament was persuaded that this separate right needed to be guaranteed under paragraph 3.

15. On the other hand, it would appear that the answer may not be (a), but instead that it is rather (b).² That is not just because of the troublesome “or” at the end of sub-right (h), but also because, under paragraph 13 DECC, sub-paragraph (2), it is provided that:

“The operator may not exercise the right [of access to land] so as to interfere with or obstruct any means of access to or from any other land unless, in accordance with this code, the occupier of the other land has conferred or is otherwise bound by a code right within paragraph (h) of paragraph 3.”

16. That might suggest that in fact it is possible for an operator to have a Code Right within paragraph 3 but without having had conferred the right conferred in (h). Furthermore, when one then comes to the termination and removal provisions, it would appear that what an operator must in fact secure are individual Code Rights under paragraph 3.

17. If it is right then it appears to me that any agreement must individually confer the Code Rights in (a) – (i), enumerating those that are to be included, and perhaps state for good measure that they are to be use for “*statutory purposes*” and are meant to be within DECC. That will obviously give rise to a trap for the unwary operator, as it is only a Code Right that has the benefit of the cascading protection conferred by paragraph 2 DECC, does not confer the rights under paragraph 12, and the Code Right further is a touchstone of the security of tenure machinery under Part VI of DECC. Query, then, whether DECC gives the Code Right conferring occupier control of the operator by withholding certain Code Rights, or conferring them only on the understanding that they

² This may be supported by that the Law Commission have said in Law Com 336, at 2.15; 2.16 (in relation to ECC which is somewhat similarly drafted, but with fewer rights); and 2.23 (albeit in a different context).

are not conferred on the basis of DECC but rather purely as a matter of contract between the parties.

18. Can an occupier effectively contract out of DECC by making clear that it is not proposing to confer any Code Rights for “*statutory purposes*”? Is such a contracting out caught by the anti-avoidance provisions under paragraph 99 DECC, which provides that:

Relationship between this code and agreements with operators

- 99(1) This code does not affect any rights or liabilities arising under an agreement to which an operator is a party.
- (2) Sub-paragraph (1) does not apply in relation to paragraph 98 or Parts 3 to 6 of this code.

19. Part III is a reference to the Assignment, Upgrading and Sharing provisions. Part IV is the Compulsory Purchase section. Part V deals with Termination. Part VI deals with Removal. Part II, which deals with agreements conferring Code Rights, is not caught by paragraph 99.

A Closer Look at the Part II Agreement: Formalities

20. As we saw in the opening section, for there to be an agreement under Part II, it must satisfy paragraph 11:

An agreement under this Part—

- (a) must be in writing,
- (b) must be signed by or on behalf of the parties to it,
- (c) must state for how long the code right is exercisable, and
- (d) must state the period of notice (if any) required to terminate the agreement.

21. If it is not in writing, or signed by only one party, or is of indeterminate length (which is much rarer in practice), then it will not be apt to confer a Code Right. This means that it will not be within Part II, and, again, none of the consequences that DECC attaches to a Code Right will apply. Again, a trap for the unwary: how many times do we see agreements with operators that are “site access agreements” maybe signed by just one party?

22. Again, I am not sure that paragraph 99 DECC deals with this clearly. For a start, there is no provision preventing the parties from contracting out of Part II, that is, from

entering into an agreement that never gets into DECC in the first place. That is not what the Department for Culture Media and Sport think DECC should do, however:³

“We have given careful consideration to all the views expressed by stakeholders on this issue. We recognize that there is a divergence of views as to whether there should be measures in the reformed Code on the ability to contract out. We also recognize that the existing Code is unclear on the flexibility to contract out. The Government is bringing forward a new Code that makes significant policy changes in important areas in order to support investment in network growth and sustainability, and equip the UK with the best possible digital communications infrastructure. Given this, on balance, the Government considers that any attempts by one or more parties to gain advantage by circumventing the new Code’s provisions must be prohibited if the Code is to be truly effective. We will therefore make provision in the revised Code to prohibit the ability to contract out and stop parties making private agreements capable of excluding Code provisions.”

I am not sure that this objective has been achieved.

The Terminological Differences: The Importance of the “Occupier”/“Site Provider” Distinction

23. As we have seen, paragraphs 10(1) and 104 DECC, and occupier has the *power* to confer Code Rights within paragraph 3 DECC. If conferred for statutory purposes upon an operator, in an agreement which conforms with paragraph 11 DECC, that occupier’s name changes under DECC. Once that agreement has been entered into (or once that person is bound by such an agreement), so that the occupier is party to a DECC-regulated agreement, he becomes a “Site Provider”.

24. This distinction is more than just semantic. As the Law Commission explain in Law Com 336, at paragraph 6.90:

[O]ur recommendations differentiate between cases where electronic communications apparatus is on land because it was installed pursuant to Code Rights that bound the landowner who now wishes to remove it, and cases where it is present despite the fact that Code Rights either have not been conferred or have not been validly conferred vis-à-vis the landowner who now wishes to remove it.

³https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523788/Electronic_Communications_Code_160516_CLEAN_NO_WATERMARK.pdf

The Law Commission explained that, where the Occupier is a Site Provider, its hands will be tied by DECC to the extent that an agreement will only be terminable through Part V DECC.

25. In other cases, the Law Commission took the view that the ordinary law should apply. It explained at paragraph 6.123 that it would treat cases of operator apparatus on land not pursuant to a Part II agreement as follows:

“In these cases we take the view that the revised Code should not restrict the landowner’s rights to possession of the site (nor, therefore, to have the apparatus moved or temporarily removed). Thus in the following cases, for example, the revised Code will have no effect upon the landowner’s ability to have the electronic communications apparatus removed in the same way as he or she would be able to remove any other material placed on his or her land by a stranger:

(1) where the apparatus has been placed on land pursuant to Code Rights granted by someone with a lesser interest in the land which has now come to an end – for example by an occupier who has left, or by a tenant whose lease has expired;

(2) where the apparatus has been placed on land pursuant to Code Rights granted by someone unlawfully – for example by a tenant but in breach of the tenant’s covenant with the freeholder;

(3) where the apparatus has been placed on the land by mistake or in a deliberate trespass;

(4) where the apparatus has been placed on the land pursuant to Code Rights granted by, or binding upon the landowner but which have come to an end because the landowner established one of the grounds for termination recommended above; and

(5) where the apparatus was installed under one of the special regimes, discussed in Chapter 7, and the circumstances that gave rise to the special regime have ended – for example because a road has been stopped up or a railway line has become disused.”

26. It therefore follows that, when acting for or against an operator, it will need to be checked whether the occupier counterparty is bound by any Part II agreement – if so, then Part V DECC will need to be operated. If not, then, so the Law Commission proposed, the matter was to be dealt with outside DECC under the general law of landlord and tenant; the operator in such a case would only have CPO powers to fall

back on.⁴ It seems to me that that policy was departed from in DECC, due to a further terminological shift in DECC which we will get to when we consider termination, where the term “Landowner” is used in preference to “Occupier” and “Site Provider”. The relationship between the last two has been explained and is understood. The slight puzzle is the first term.

27. What we know is

OCCUPIER + PART II AGREEMENT = “SITE PROVIDER”
 (CODE RIGHT +
 FORMALITY +
 OPERATOR GRANTEE)

A Closer Look at “Apparatus”

28. The Code Right under paragraph 3 DECC is a right to do one of the specified things listed in (a) – (i) with “electronic communications apparatus” to land. “Electronic Communications Apparatus” is a defined term, under paragraph 5. This says:

- 5(1) *In this code “electronic communications apparatus” means—*
- (a) *apparatus designed or adapted for use in connection with the provision of an electronic communications network,*
 - (b) *apparatus designed or adapted for a use which consists of or includes the sending or receiving of communications or other signals that are transmitted by means of an electronic communications network,*
 - (c) *lines, and*
 - (d) *other structures or things designed or adapted for use in connection with the provision of an electronic communications network.*
- (2) *References to the installation of electronic communications apparatus are to be construed accordingly.*
- (3) *In this code—*
“line” means any wire, cable, tube, pipe or similar thing (including its casing or coating) which is designed or adapted for use in connection with the provision of any

⁴ See Law Com 336 at 6.130 and following.

electronic communications network or electronic communications service;

“structure” includes a building only if the sole purpose of that building is to enclose other electronic communications apparatus.

29. The first thing to note is the absence of an ownership condition – it is the use of the apparatus that is protected here. What we do know from DECC is that under paragraph 100 that

“The ownership of property does not change merely because the property is installed on or under, or affixed to, any land by any person in exercise of a right conferred by or in accordance with this code.”

30. That deals with the problem, which is probably not actually a problem, of the accession of masts and other apparatus to the landlord’s land at the end of the agreement under ECC. But it seems clear that there is no ownership condition for the protection of apparatus. It need not be the operator’s own kit. It is enough if it is used in connection with the relevant network.

31. One point does require very careful unpacking, however. Paragraph 5(1)(d) refers to “other structures” as being protected as apparatus. Does that mean buildings? Roof tops? It probably does not mean open land, but could one argue that the demised roof space is apparatus and DECC protects the lot? The answer to that seems to me to be no. Paragraph 5(3) says that

““structure” includes a building only if the sole purpose of that building is to enclose other electronic communications apparatus”

32. A room in a building used to house the apparatus, or an equipment cabin, is therefore a “structure”, but a building on which a mast sits isn’t. Nor is, say, an electricity pylon, water tower or field. To that, we must then add the definition of “land” in paragraph 107 DECC, which deals with the other side of the coin. This says:

“land” does not include electronic communications apparatus;

33. “Apparatus” can therefore never be “land”. It does not seem that the apparatus must be in use. It is enough that it is designed or adapted for relevant use. What is the point of this? The answer is, to avoid inter-operator warfare. An operator can acquire rights to land to install its apparatus on it. What it cannot do, or at least that is the hope,

is free-ride on the outlay of another MNO, or a WIP, and acquire rights to install antennae on a mast that it has never paid for. DCMS say this:

“The Code provides for a series of rights which will be binding on site providers - there has been considerable debate on the definition of land within the Code, and in particular whether “apparatus” should be regulated under the new Code.

The Government received a number of responses on this issue, and there were strongly opposing views on all sides, suggesting the legal position under the current Code to be ambiguous. However, the original purpose of the Code was to allow access to land so that communications infrastructure could be installed rather than to allow access to the infrastructure itself. That rationale has not changed, and Government does not want to increase regulation and risk disruption of market incentives for investment in passive infrastructure. There is an existing and well understood legal framework in place to provide for access to apparatus in cases where there is significant market power and / or anticompetitive behaviour. As the UK’s independent regulator for telecommunications, Ofcom is responsible for ensuring effective competition in telecommunications markets. Given this, the Government will exclude apparatus from the scope of land within the Code and avoid “gold-plated” regulation.”

34. In short, what DCMS are saying, and what DECC is seeking to implement, is that no MNO can lay claim on another MNO or WIP’s infrastructure. By putting the apparatus beyond the reach of DECC rights, MNOs will never be able to have a fight about apparatus under DECC.

35. At least that is the theory. The practice seems to me to be a little different. This is because, when rights are granted to MNOs over mast sites, they are not limited to apparatus. They will also extend to surrounding land - which is not apparatus. The MNO will need that land in order to run cables, and keep equipment cabins and other associated apparatus. When the MNO sublets to an incoming MNO, that incomer MNO will in turn need to use the land as well, if that MNO wants its own cabling and equipment cabin. It would therefore appear that, to the extent that the rights granted by the “sitting” MNO to the incoming MNO are not over apparatus but associated land, then MN v MNO disputes will continue - particularly if the true effect of the definition of Code Rights is that they are separate rights. If that is so, then to the extent that a right to run cabling or keep equipment cabins on land not covered by the sitting MNO’s apparatus, that is a sufficient right rendering the agreement conferring it a “Part II agreement”.

A Look At Sharing/Upgrading

Assignment

36. It is to be noted that a clause which prevents or limits assignment of a Code Right Agreement, or makes it subject to conditions (including payment conditions) is void, though guarantees are allowed to be taken: paragraph 15(1) and (2).⁵ Paragraph 15 then puts in place a special scheme for release of the outgoing assignee: it looks as if a mini-Landlord and Tenant (Covenants) Act 1995 scheme (though only reminiscent of that scheme, and different in some respects) has been put in place. This is also based on the Law Commission proposals, it would appear that the intention is that the release provisions are going to operate differently, section 5 of the 1995 Act notwithstanding (see Law Com 336 at 3.27).

Upgrade and Share

37. As we all know, operators' requirements are always changing as the demand, technology and the market changes. Taller masts, different antennae, and different equipment, are always a necessity to keep a site up to date. Paragraph 16(1) gives the right to "upgrade" apparatus covered by a protected agreement, and a right to share⁶ with another "operator". Paragraph 16(5) renders a clause preventing or limiting such things, or making them subject to a condition, void. This is subject to two conditions which I have found quite troublesome. The first condition is that the changes which result from the sharing or upgrading must have "no" or "*no more than a minimal*" adverse impact on "*appearance*". Who is to judge that? The second condition is that upgrading imposes "*no additional burden on the other party to the agreement*". Again, how is that to be tested? Does it render condition one largely nugatory? Upgrading may entail a greater loading on the site, and sharing may entail a greater number of maintenance or inspection visits.

⁵ These have been amended during the writing of this paper. See amended version of Bill: <http://www.parliament.uk/documents/commons-public-bill-office/2016-17/compared-bills/Digital-Economy-AAC-tracked-changes.pdf>

⁶ Including the right to carry out works necessary to facilitate sharing: paragraph 16(6).

A Look At Security of Tenure

38. There are two stages to the procedure for terminating an agreement with an operator: a termination stage, and a removal stage. As we shall see, this was modelled on the operation of the Landlord and Tenant Act 1954 by the Law Commission, though, as we shall also see, that was with bells on.

Part V of DECC: Continuing and Terminating Agreements with Operators

39. One interesting drafting issue about DECC is that each little part has a preamble paragraph (which is not a recital or a heading) which tells you what the Part is going to do. That is a novel drafting technique but is helpful in giving a steer as to how the following part is to be approached. In Part V, the introductory paragraph is as follows:

To What Agreements Does Part V DECC Apply?

- 27 This Part of this code makes provision about—
- (a) the continuation of code rights after the time at which they cease to be exercisable under an agreement,
 - (b) the procedure for bringing an agreement to an end,
 - (c) the procedure for changing an agreement relating to code 25 rights, and
 - (d) the arrangements for the making of payments under an agreement whilst disputes under this Part are resolved.

40. Just to remind ourselves an agreement with the essential DECC building blocks (apparatus, operator, Code Right, and so on) is in principle a DECC agreement. However, it may not necessarily be within Part V, termination, as a result. In order to come within Part V, it has to go through one further qualifying hoop to attain the status of a “code agreement”.

41. Those further qualifying conditions are in paragraph 28 DECC, which provides as follows:

Application of this Part

- 28 (1) *This Part of this code applies to an agreement under Part 2 of this code, subject to sub-paragraphs (2) to (4).*
- (2) *This Part of this code does not apply to a lease of land in England and Wales if —*
- (a) *its primary purpose is not to grant code rights, and*

(b) *it is a lease to which Part 2 of the Landlord and Tenant Act 1954 (security of tenure for business, professional and other tenants) applies.*

(3) *In determining whether a lease is one to which Part 2 of the Landlord and Tenant Act 1954 applies, any agreement under section 38A (agreements to exclude provisions of Part 2) of that 40 Act is to be disregarded.*

(4) *[...]*

(5) *An agreement to which this Part of this code applies is referred to in this code as a “code agreement”.*

42. An agreement can therefore only be outside Part V of DECC if it is a lease but is not for the primary purpose of conferring Code rights, and has, or would have but for contracting out, protection under the 1954 Act. The point of this is to avoid the dual protection issue, that is, the fact that it is currently quite widely argued that a particular agreement under the ECC enjoys duplicate protection under the 1954 Act and under ECC.

43. The policy is perfected by an amendment to the 1954 Act, which will have a new section 43(4), care of Schedule 3, Part II paragraph 4 of DEB:

Landlord and Tenant Act 1954 (c. 56)

4. *In section 43 of the Landlord and Tenant Act 1954 (tenancies to which provisions on security of tenure for business etc tenants do not apply) after subsection (3) insert—*

“(4) This Part does not apply to a tenancy—

(a) 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), and

(b) which is granted after that Schedule comes into force.”

44. When does a lease which confers Code Rights not have that as its primary purpose? That is not crystal clear, but the Law Commission in Law Com 336 are clear that the answer is “rarely”:

6.86 *There is of course room for doubt and for dispute as to the primary purpose of a lease. But we think that difficulties will arise in only a few cases; the lease of a mast site falls clearly on one side of the line, the lease to a Code Operator of a retail unit, where the lease incidentally permits the tenant to install a cell site on the roof, falls on the other.*

6.87 *It follows that in a mixed use lease where Code Rights are not the primary purpose of the letting, which is contracted out of the 1954 Act, the Code Operator will have no security. Where security is important, therefore, the Code Operator will want a separate lease for the apparatus.*

45. Whilst there will be little room for doubt in the common or garden mast agreement, if there are more complex agreements granting Code Rights as well as other rights (for instance, the grant of an office lease with permission to put a mast on top), then there will be more room for debate - and delay.

46. If an agreement is a “code agreement” to which Part V applies, then this has a number of important consequences:

- (1) A “code agreement” (note, *not* merely a Code Rights) will be continued by operation of paragraph 29(2) if it bound a “site provider”, and it either it ceases to be binding or may be terminated (paragraph 29(1) DECC).
- (2) If the site provider who is party to the agreement wishes to bring it to an end, then a notice procedure under paragraph 30 DECC applies. Please note that the notice procedure must be initiated by the party to the agreement – it seems that if one is simply bound under the cascading provisions in paragraph 10 DECC without being a party, then that person cannot give notice.
- (3) The notice that must be given under DECC differs very materially from the notice which is currently to be given under paragraph 21 ECC:

DECC	PARAGRAPH 21
<p>Notice given by party to code agreement who is a “site provider”. This is defined in paragraph 29(1)(a) DECC as follows:</p> <p>“a code right is conferred by, or is otherwise binding on, a person (the “site provider”) as the result of a code agreement”</p> <p>It seems to me that this definition is at</p>	<p>Notice is given by a person entitled to require removal.</p>

<p>variance with what was recommended by the Law Commission (at paragraph 6.102):</p> <p>“Site Provider – to be defined in the revised Code as a landowner who has granted Code Rights, or had them imposed upon him or her by the tribunal, or is otherwise bound by Code Rights”</p> <p>I cannot see that under DECC a Site Provider has to be a “landowner”. A person without an interest in land can confer Code Rights, as we have seen under paragraph 9 DECC. The difference will become relevant when we get to removal.</p>	
<p>Notice must comply with paragraph 88 DECC; OFCOM power under paragraph 89; Service paragraph 90.</p>	<p>No formality requirements for notices</p>
<p>Notice must specify the date on which the code agreement should come to an end, being a date after 18 months from service of the notice and no sooner than the code agreement could have been terminated (paragraph 30(3) DECC)</p>	<p>No time need be specified, though an entitlement to require removal must exist. The operator has 28 days to give a counter notice either denying the entitlement or seeking further rights.</p>
<p>Notice must state a statutory ground for removal (paragraph 31(4) DECC):</p> <ul style="list-style-type: none"> (a) that the code agreement ought to come to an end as a result of substantial breaches by the operator of its obligations under the agreement; (b) that the code agreement ought to come to an end because of persistent delays by the operator in making payments to the site provider under the agreement; (c) that the site provider intends to redevelop all or part of the land to which the code agreement relates, or any neighbouring land, and could not reasonably do so unless the code agreement comes to an end; (d) that the operator is not entitled to the code agreement because the test under paragraph 20 for the imposition of the agreement on the site provider is not met. <p>So: tenant default (breach other than rent (a),</p>	<p>No need to specify anything apart from being able to show an entitlement to require removal as required by paragraph 21(1) ECC.</p> <p>There is no further rolling paragraph 20 ECC redevelopment break. The intention to develop ceases to be the basis of a right to alter apparatus (including removal, paragraph 1(2) ECC), but is relegated to a ground of opposition.</p>

<p>or rent (b)); redevelopment (c) or (d) no prospect of a forced renewal under paragraph 20).</p>	
<p>Operator response to the 18 month notice:</p> <ol style="list-style-type: none"> 1. Notice must comply with paragraph 87 DECC; OFCOM power under paragraph 89; Service paragraph 90. 2. Three months from the paragraph 30 notice: counter notice must be given. 3. Counter-notice must provide (paragraph 31(3) DECC): <ol style="list-style-type: none"> a. that the operator does not want the existing code agreement to come to an end, b. that the operator wants the site provider to agree to confer or be otherwise bound by the existing code right on new terms, or c. that the operator wants the site provider to agree to confer or be otherwise bound by a new code right in place of the existing code right. 4. Within three months after counter-notice, the operator must apply to the Court for an order under paragraph 33 DECC. 5. If there is either no counter-notice, or no application to the Court, then the code agreement comes to an end in accordance with the paragraph 30 notice (paragraph 31(1) DECC). 6. Paragraph 31(1) does not apply if the parties “agree” to continue to code agreement (paragraph 31(2)). It is not clear when they “agree”. 7. This means that, even if the operator does nothing, it will still have 18 months as a minimum before the code agreement ends. <i>Query</i> what happens if the operator fails to take the required steps under paragraph 	<p>Operator has to respond within 28 days with a counter-notice specifying one of the permitted statutory grounds. The form of notice is that prescribed by OFCOM.</p> <p>The giving of the counter-notice places no obligation on either party to go to Court, though usually the landlord will issue possession proceedings shortly after the counter-notice comes in, seeking also relief under ECC paragraph 21.</p>

<p>31(1)(a) and (b), then has a change of heart and initiates the CPO process under Part IV.</p>	
<p>The Court determined the ground of opposition when the operator gives a counter-notice and makes the required paragraph 31(1)(b) DECC application. This is slightly buried but is contained in paragraphs 31(4) and (5) DECC, which state:</p> <p>(4) If, on an application under subparagraph (1)(b), the court decides that the site provider has established any of the grounds stated in the site provider’s notice under paragraph 30, the court must order that the code agreement comes to an end in accordance with the order.</p> <p>(5) Otherwise the court must make one of the orders specified in paragraph 33.</p> <p>If the statutory ground of opposition fails, then the Court moves on to paragraph 33 DECC. The Court has a menu of orders that it can make under paragraph 33 DEC:</p> <ol style="list-style-type: none"> 1. Continuation of the existing code right in accordance with the existing code agreement for such period as may be specified in the order 2. Modification of the terms of the code agreement relating to the existing code right. 3. Where under the code agreement more than one code right is conferred by or otherwise binds the site provider, the court may order the modification of the terms of the code agreement so that it no longer provides for an existing code right to be conferred by or otherwise bind the site provider. 4. The court may order the terms of the code agreement relating to the existing code right to be modified so that— <ol style="list-style-type: none"> a. it confers an additional code right on the operator, or b. it provides that the site provider is otherwise bound 	<p>The Court will determine whether there was an entitlement to require removal and will then make a removal order under the operator has relied on paragraph 5 ECC by way of a defence, i.e. is seeking to CPO rights to remain.</p>

<p style="text-align: center;">by an additional code right.</p> <p>5. The court may order the termination of the code agreement relating to the existing code right and order the operator and the site provider to enter into a new agreement which—</p> <ol style="list-style-type: none"> a. confers a code right on the operator, or b. provides for a code right to bind the site provider. 	
<p>Interim payments pending determination are recoverable from an operator under paragraph 34 DECC.</p>	<p>There is no express provision regulating payment, save for the compensation provisions under the CPO procedure and in relation to interim rights sought under paragraph 6 ECC (which is rarely, if ever, used).</p>

47. It follows that, if the agreement is not a code agreement because it is a lease within the (as will be amended) 1954 Act (or would be in it were it not to be contracted out), then the continuation tenancy will need to be terminated by either a section 25 notice or under the preserved landlord's common law termination methods under section 24, or by methods that are permitted due to contracting out. It therefore seems that a 1954 Act protected tenancy will be much more favourable to a landowner from now on, with a shorter default notice period in place.

48. Termination is not the same as removal. Under the old ECC, the paragraph 21 notice terminated the ECC hold over rights and then gives the Court jurisdiction under paragraph 21 to order removal of the apparatus, or to empower the Claimant to get rid of the kit. Under DECC, that is not so. All that a termination under Part V gets is access to Part VI, which regulates removal and is a separate and further process.

Part VI: DECC: Removal

49. As we have seen above, the Law Commission thought that if you were outside DECC because you never conferred Code Rights, then you should have common law remedies open to you. The operator is not, in such a case, placed in any more privileged position than any other third party. I am not entirely sure that this policy has carried into DECC. It seems to me possible that DECC Part VI may still govern removals against even trespassing operators. My reason for this is the wording of the removal provisions, which I think could have been improved on and clarified.

50. Things become a little difficult to follow when one sets the drafting against the background of that particular policy. The relevant paragraph is the lengthy paragraph 36 DECC:

When does a landowner have the right to require removal of electronic communications apparatus?

36(1) A person with an interest in land (a “landowner”) has the right to require the removal of electronic communications apparatus on, under or over the land if (and only if) one or more of the following conditions are met.

51. Pausing there – the removal right is vested not in the “*occupier*” (being the person with whom we became acquainted in Part II, and who has the power to grant Code Rights) or the Site Provider (being a sub-set of “occupiers” who have conferred regulated code agreements, whom we met in connection with termination under Part V), but rather the “*landowner*”. A landowner is a person with an “interest in land”. What is odd is that “interest in land” has a particular meaning to property lawyers it includes not just estates in freehold estate or for a term of years certain, but also easements, covenants, beneficial interests, inchoate proprietary estoppels, and so on. Are all these right holders “landowners” for the purposes of Part VI? Also, why the change in terminology? The difficulty with Law Com 336 is that there is actually very little discussion of what has become Part VI. The further point to note is that the right to require removal is conferred only if one of the “gateway” conditions in paragraph 36 are met. Does this mean that a person who is a landowner is (a) the sole person who can acquire the right to remove, and (b) that any person who is a landowner will now have to follow Part VI, despite what the Law Commission said about the common law position being retained in cases of trespass?

52. Let us look at the conditions and see if they assist. There are five conditions, and the first two are the most important ones:

The First Condition (Landowner Never Bound)	The first condition is that “ <i>the landowner has never since the coming into force of this code been bound by a code right entitling an operator to keep the apparatus on, under or over the land</i> ”. Does this mean that a landowner faced with a trespassing operator is within Part VI?
The Second Condition (Code Rights Ended or Landowner Ceased to	The second condition is that “ <i>a code right entitling an operator to keep the apparatus on, under or over the land has come to an end or has ceased to bind the landowner—</i>

Be Bound)	<p>(a) as mentioned in paragraph 25(7) and (8),</p> <p>(b) as the result of paragraph 31(1), or</p> <p>(c) as the result of an order under paragraph 31(4) or 33(4) or (6), or</p> <p>(d) where the right was granted by a lease to which Part 5 of this code does not apply.”</p> <p>In other words, the landowner must show that the Part 5 procedure has been gone through or something has otherwise killed the agreement.</p> <p>I would like to note two points. First, if the “Code Rights” under paragraph 3 DECC are rights that must be individually conferred, then it would appear that only right (b) (which is the right “to keep installed electronic communications apparatus which is on, under or over the land”) satisfies gateway condition two. Although it is hard to think of an example, if only some other Code Right (i.e. (a) or (c) – (i)) is being exercised, one is not in gateway condition two.</p> <p>Secondly, Condition Two is not drafted on the basis that the landowner has had to do something. Of course, the reason why the code agreement ceased to bind might have been because the landowner was the party site provider capable of operating Part V. On the other hand, it might be that some derivate interest owner conferred the relevant right, which may have bound the landowner under the paragraph 10 cascading provisions. If that derivative owner brought the Code Right to an end as a party under Part V, it would seem to me (subject to but supported by the qualification below) that this will do for a landowner then to operate the Part VI removal machinery in his own name.</p>
The Qualification to the First and Second Conditions	<p>A landowner may get through the first or second gateway conditions, but will still fail if (see paragraph 36(4)):</p> <p>(a) the land is occupied by a person who—</p> <p>(i) conferred a code right (which is in force) entitling an operator to keep the apparatus on, under or over the land, or</p> <p>(ii) is otherwise bound by such a right, and</p> <p>(b) that code right was not conferred in breach of a covenant enforceable by the landowner.</p> <p>This certainly seems to confirm that the category of “landowner” under Part VI is narrower than “occupier” under Part II and “site provider” under Part V. The effect appears to be that if an occupier <u>lawfully</u> granted a Code Right which is still in force or which binds him otherwise (presumably under cascade provisions under paragraph 10), then the operator can set up the occupier as a shield against the landowner.</p> <p>It would seem to follow, however, that if the Code Right no longer binds (because the occupier has operated the Part V machinery?), then the landowner can proceed against the operator.</p> <p>What is odd here is that the occupier cannot proceed in his own name</p>

	<i>unless</i> he is also a “landowner” – meaning that a true licensee who has granted a Code Right (which he can under Part II) can seemingly bring it to an end under Part V but cannot then remove the apparatus under Part VI. I am not sure why this is so.
The Third Condition (Obsolete Kit)	The third condition is that— (a) an operator has the benefit of a code right entitling the operator to keep the apparatus on, under or over the land, but (b) the apparatus is not, or is no longer, used for the purposes of the operator’s network, and (c) there is no reasonable likelihood that the apparatus will be used for that purpose.
The Fourth Condition (Loss of Operator Status)	The fourth condition is that— (a) this code has ceased to apply to a person so that the person is no longer entitled under this code to keep the apparatus on, under or over the land, (b) the retention of the apparatus on, under or over the land is not authorised by a scheme contained in an order under section 117, and (c) there is no other person with a right conferred by or under this code to keep the apparatus on, under or over the land.
The Fifth Condition (Special Regime Ceases to Apply)	The fifth condition is that— (a) the apparatus was kept on, under or over the land pursuant to— (i) a transport land right (see Part 7), or (ii) a street work right (see Part 8), (b) that right has ceased to be exercisable in relation to the land by virtue of paragraph 53(9), and (c) there is no other person with a right conferred by or under this code to keep the apparatus on, under or over the land

53. Assuming that a landowner has managed to pass through the gateway conditions, what then? The answer lies in paragraph 39, which must be used (paragraph 39(1) DECC says so). A further notice must be given:

- (2) The landowner or occupier may give a notice to the operator whose apparatus it is requiring the operator—
 - (a) to remove the apparatus, and

- (b) to restore the land to its condition before the apparatus was placed on, under or over the land.
- (3) The notice must—
 - (a) comply with paragraph 88 (notices given by persons other than operators), and
 - (b) specify the period within which the operator must complete the works.
- (4) The period specified under sub-paragraph (3) must be a reasonable one.

54. Presumably specifying an unreasonable period invalidates the notice. Quite how a landowner, balancing his interests in removal with the unknown interests of the operator, is supposed to assess reasonableness is rather unclear.

55. There is then yet another counter-notice provision, followed by another trip to Court:

- (5) *Sub-paragraph (6) applies if, within the period of 28 days beginning with the day on which the notice was given, the landowner or occupier and the operator do not reach agreement on any of the following matters—*
 - (a) *that the operator will remove the apparatus;*
 - (b) *that the operator will restore the land to its condition before the apparatus was placed on, under or over the land;*
 - (c) *the time at which or period within which the apparatus will be removed;*
 - (d) *the time at which or period within which the land will be restored.*
- (6) *The landowner or occupier may make an application to the court for—*
 - (a) *an order under paragraph 43(1) (order requiring operator to remove apparatus etc), or*
 - (b) *an order under paragraph 43(3) (order enabling landowner to sell apparatus etc).*
- (7) *If the court makes an order under paragraph 43(1), but the operator does not comply with the agreement imposed on the operator and the landowner or occupier by virtue of paragraph*

43(7), the landowner or occupier may make an application to the court for an order under paragraph 43(3).

- (8) *On an application under sub-paragraph (6) or (7) the court may not make an order in relation to apparatus if an application under paragraph 19(3) has been made in relation to the apparatus and has not been determined*

56. Paragraph 39(8) is a little ominous. An operator can seemingly make an application for a CPO to stymie the removal. I cannot see (or have not yet found a provision to the effect) that paragraph 19 is ousted and inoperable once the landowner has gone through Part V. Can an operator really sit tight and deploy the paragraph 19 torpedo late on, at the removal stage?

57. Once the Court is seized of the matter, there is, again, a menu of orders it can make:

What orders may the court make on an application under paragraphs 39 to 42?

43(1) An order under this sub-paragraph is an order that the operator must, within the period specified in the order—

- (a) *remove the electronic communications apparatus, and*
 - (b) *restore the land to its condition before the apparatus was placed on, under or over the land.*
- (2) *An order under this sub-paragraph is an order that the operator must, within the period specified in the order, restore the land to its condition before the code right was exercised.*
- (3) *An order under this sub-paragraph is an order that the landowner, occupier or third party may do any of the following—*
- (a) *remove or arrange the removal of the electronic communications apparatus;*
 - (b) *sell any apparatus so removed;*
 - (c) *recover the costs of any action under paragraph (a) or (b) from the operator;*
 - (d) *recover from the operator the costs of restoring the land to its condition before the apparatus was placed on, under or over the land;*

-
- (e) *retain the proceeds of sale of the apparatus to the extent that these do not exceed the costs incurred by the landowner, occupier or third party as mentioned in paragraph (c) or (d).*
- (4) *An order under this sub-paragraph is an order that the landowner may recover from the operator the costs of restoring the land to its condition before the code right was exercised.*
- (5) *An order under this paragraph on an application under paragraph 39 may require the operator to pay compensation to the landowner for any loss or damage suffered by the landowner as a result of the presence of the apparatus on the land during the period when the landowner had the right to require the removal of the apparatus from the land but was not able to exercise that right.*
- (6) *Paragraph 83 makes further provision about compensation under sub-paragraph (5).*
- (7) *An order under sub-paragraph (1) or (2) takes effect as an agreement between the operator and the landowner, occupier or third party that—*
- (a) *requires the operator to take the steps specified in the order, and*
 - (b) *otherwise contains such terms as the court may so specify.*

PART II: TRANSITIONALS

58. Schedule 2 to DEB contains the transitional provisions (“TPs”). I appreciate that “transitional provisions” is not a phrase that usually immediately precedes a rush of dopamine and serotonin to the brain. But these are quite important, and we are going to be dealing with ECC agreements for some considerable time to come.⁷

59. The starting point in paragraph 2 of the TPs

Effect of subsisting agreement

2 (1) A subsisting agreement has effect after the new code comes into force as an agreement under Part 2 of the new code between the same parties, subject to the modifications made by this Schedule.

(2) A person who is bound by a right by virtue of paragraph 2(4) of the existing code in consequence of a subsisting agreement is, after the new code comes into force, treated as bound pursuant to Part 2 of the new code.

60. So: on the face of it, an ECC agreement gets treated as a DECC agreement. But only if it is “subsisting”. That might mean “an agreement that is unexpired or an agreement that is expired but is being continued by ECC, paragraph 21”, or it might mean “an agreement the contractual term of which is unexpired”. I am not quite sure. Whatever the answer to that, the agreement is treated as Part II agreement under DECC, save that the “Code Rights” are those conferred under paragraph 2 ECC (paragraph 3 of the TPs). Anyone bound by an agreement by reason of paragraph 2(4) ECC continues to be bound. Upgrading and sharing rights are not read into the agreement: paragraph 5 of the TPs.

Termination Procedure under the TPs: Modified Part V DECC

61. Paragraph 6 of the TPs states that:

Termination and modification of agreements

6 (1) This paragraph applies in relation to a subsisting agreement, in place of paragraph 28(2) to (4) of the new code.

⁷ Note that there is a power to make further transitions under clause 5 of DEB.

(2) Part 5 of the new code (termination and modification of agreements) does not apply to a subsisting agreement that is a lease of land in England and Wales, if—

(a) it is a lease to which Part 2 of the Landlord and Tenant Act 1954 applies, and

(b) there is no agreement under section 38A of that Act (agreements to exclude provisions of Part 2) in relation the tenancy.

(3) Part 5 of the new code does not apply to a subsisting agreement that is a lease of land in England and Wales, if—

(a) the primary purpose of the lease is not to grant code rights (the rights referred to in paragraph 3 of this Schedule), and

(b) there is an agreement under section 38A of the 1954 Act in relation the tenancy.

[...]

62. Note the subtle change from paragraph 28 DECC. If the agreement is a lease within the 1954 Act and the security of tenure provisions are not excluded, DECC Part V will not apply. Nor will Part V apply if the lease is not primarily for the purposes of conferring Code Rights which has been contracted out of the 1954 Act.

63. Paragraph 7 then modifies the operation of Part V where it applies:

7 (1) Subject to paragraph 6, Part 5 of the new code applies to a subsisting agreement with the following modifications.

(2) The “site provider” (see paragraph 29 of the new code) does not include a person who was under the existing code bound by the agreement only by virtue of paragraph 2(2)(c)⁸ of that code.

(3) Where the unexpired term of the subsisting agreement at the coming into force of the new code is less than 18 months, paragraph 30 applies (with necessary modification) as if for the period of 18 months referred to in sub-paragraph (3)(a) there were substituted a period equal to the unexpired term or 3 months, whichever is greater.

(4) Paragraph 33 applies with the omission of sub-paragraph (13)(d).

⁸ The deemed binding provision where an agreement under ECC was entered into by the occupier for the provision of electronic communications services to that occupier.

64. It will be noted that under the TPs, the 18 month notice is, where the “unexpired term” of the “subsisting agreement” is less than 18 months when DECC comes into force, the notice period is the longer of 3 months or the unexpired term. What is the contractual term has in fact expired, and there is no “unexpired term”, only a holding over? Does this part of the TPs reinforce the fact that a subsisting agreement for the purposes of paragraph 6(1) must still be one with a contractual term left to run? Does that mean holdover rights are dealt with under Part V DECC without a transitional gloss?

Notices Given Under ECC Prior to DEB Schedule 2 Coming Into Force

65. The TPs deal with paragraph 20 and 21 notices under ECC in different way.

16 (1) Subject to the following provisions of this paragraph, the repeal of the existing code does not affect paragraph 20 of that code as it applies in relation to anything whose installation was completed before the repeal comes into force.

(2) A right under paragraph 20 is not by virtue of sub-paragraph (1) exercisable in relation to any apparatus by a person who is a party to, or is bound by, an agreement under the new code in relation to the apparatus.

(3) A subsisting agreement is not an agreement under the new code for the purposes of sub-paragraph (2)

66. Paragraph 20 is therefore preserved in relation to apparatus installed before repeal of ECC, unless a new DECC agreement is then put in place. It does not matter whether a paragraph 20 notice has in fact been given or not.

Right to require removal of apparatus

20 (1) This paragraph applies where before the repeal of the existing code comes into force a person has given notice under paragraph 21(2) of that code requiring the removal of apparatus.

(2) The repeal does not affect the operation of paragraph 21 in relation to anything done or that may be done under that paragraph following the giving of the notice.

(3) For the purposes of applying that paragraph after the repeal comes into force, steps specified in a counter-notice under sub-paragraph (4)(b) of that paragraph as steps which the operator proposes to take under the existing code are to be read as including any corresponding steps that the operator could take under the new code or by virtue of this Schedule.

The effectiveness of a paragraph 21 ECC notice if served before DECC is in force is not affected provided it was given before ECC is repealed.

CPO Powers under Paragraph 5 ECC

67. Paragraph 5 notices under ECC are treated differently depending on whether or not there are pending Court proceedings in relation to the terms of the notice:

Court applications for required rights etc

11 (1) This paragraph applies where—

(a) before the time when the new code comes into force, a notice has been given under paragraph 5(1) of the existing code, and

(b) at that time no application has been made to the court in relation to the notice.

(2) The notice has effect as if given under paragraph 19(2) of the new code.

12 (1) This paragraph applies where before the time when the new code comes into force—

(a) a notice has been given under paragraph 5(1) of the existing code, and

(b) an application has been made to the court in relation to the notice.

(2) Subject to sub-paragraph (3), the existing code continues to apply in relation to the application.

(3) An order made under the existing code by virtue of sub-paragraph (2) has effect as an order under paragraph 19 of the new code.