
**DIGITAL ECONOMY BILL:
THE NEW ELECTRONIC
COMMUNICATIONS CODE**

The current situation

1. The Electronic Communications Code is contained in the Telecommunications Act 1984 Schedule 2, as amended by Schedule 3 to the Communications Act 2003 (“**the Existing Code**”)
2. The Code gives various powers to certain telecommunications operators (“**Operators**”). In order to have powers under the Code, a (natural or legal) person must have the Code applied to it by a direction given by OFCOM under section 106(3) of the Communications Act 2003.
3. The powers are akin to compulsory purchase powers, but not drafted in such a way that makes that clear.

The proposed new code

4. There were proposals for amendment to the code first made by the law commission, and then taken up by the legal team at DCMS.
5. The government wanted to increase network coverage.
6. The operators were interested in valuation, and the operation of the code rights. They also wanted the definition of land extended to include structures which support their apparatus.
7. Also, operators wanted broader sharing rights.
8. The operators agreed voluntarily to sign up to a new code which imposed on them obligations to extend coverage, at great expense to them, in return for a new code improving their position, in particular in relation to valuation.

9. This led to the Digital Economy Bill, published in July 2016, which contains detailed proposals for a new, replacement, code.
10. The Bill has had its first reading, and it is currently anticipated that it will be enacted sometime in early 2017.
11. The whole of the old Schedule 2 of the 2003 Act is deleted, and new schedule 3A is inserted, which contains “**the New Code**”.
12. There are also transitional provisions in schedule 2 to the Bill.
13. Before turning to its provisions, let’s review the Existing Code.

The Existing Code

14. Para. 2 provides that the agreement in writing of the occupier of the land in question is required if the operator is to acquire the right to install its apparatus on that land. However, para. 5 provides that the operator can give notice of the right it requires, and then apply to the Court for an order conferring that right on it, and “dispensing” with the need for the occupier’s agreement. So such agreement is not required after all.
15. There is another notorious bit of obscurity in the drafting, which is that para. 1(2) provides that “alter” means “move, remove or replace”, so that, for example, the right conferred on the landowner in para. 20 to “require the alteration” of the apparatus, in fact confers the right to require it to be removed altogether.
16. That brings us to the two most frequently discussed parts of the Existing Code, the termination provisions in paras.20 and 21, and the valuation provisions in para. 7.

Para. 20

17. As just mentioned, para. 20 gives landowners the right to give notice, and make an application to the Court, to have apparatus moved “on the ground that the alteration is necessary to enable that person to carry out a proposed improvement on the land ...”.

18. The Court will only make an order for “alteration” if it is indeed necessary for that purpose, and also the alteration will not substantially interfere with the operator’s network service.
19. The main drawback from the landowner’s perspective is that that he has to reimburse the operator’s expenses (para. 20(8)), which can be very substantial.

Para. 21

20. This gives landowners the right to serve notices requiring the removal of apparatus where the landowner “is for the time being entitled to require” its removal.
21. This difficult phrase has given rise to much controversy, because on one interpretation it created an impossible situation because of its failure to mesh with the 1954 Act.
22. Parliament appears not to have given any thought to the interaction between the Existing Code and the 1954 Act when drafting it originally, or when amending it in 2003.
23. The interaction between the 1954 Act and the Code is murky in the extreme. If both forms of statutory protection apply, then it can be difficult to see how the tenancy in question could ever be ended under ground (f) of s.31(1) of the 1954 Act, because:
 - (a) it seems that the paragraph 21 notice cannot be given before the tenancy has been ended (otherwise the landlord is not “for the time being entitled to require the removal” of the operator’s equipment); but in that case
 - (b) the necessity for the whole Code process to be commenced after the tenancy was over would always prevent the landlord from satisfying the Court that it intends to demolish “on the termination of the current tenancy”.
24. Something has evidently gone wrong, but the Courts have not yet had an opportunity authoritatively to resolve this apparent paradox. It was considered by the County

Court in 2015 in *Crest Nicholson v Arqiva*, but that is not a satisfactory or authoritative decision.

Para. 7

25. When an agreement is imposed under para.5, the Court can and inevitably will impose conditions as to consideration, and compensation for any loss or damage sustained by the landowner. However, because the code was not openly drafted as a piece of compulsory purchase legislation, but rather its compulsory purchase nature was somewhat obscured, the draftsmen appear to have failed to apply a normal compulsory purchase valuation principle, namely that the landowner doesn't get compensation inflated by reference to the existence of the very scheme for which the land is being purchased. Instead, para. 7 provides for consideration which "would have been fair and reasonable if the agreement had been given willingly". No mention here of discounting the telecoms use of the land from the valuation.

The New Code

Power to impose agreements: Part 4

26. Perhaps the first point to note is that the Court retains the power to "impose agreements" on land owners and occupiers: sch.3A, Part 4, para. 19.

27. The operator gives a notice and then applies to the Court. The test which the Court applies is set out in para. 20, which requires two conditions to be met:

- (a) First, the prejudice to the owner must be capable of being adequately compensated by money.
- (b) Second, the public benefit, including the public interest in "access to a choice of high quality electronic communication services", is likely to outweigh the prejudice in question.

- (c) Also, there is a bar to such an order if the owner “intends to redevelop all or part of the land” or neighbouring land and could not reasonably do so if the order was made.

Exclusion of 1954 Act: “primary purpose” agreements

28. Perhaps the next point to note is that the New Code excludes from the protection of the 1954 Act tenancies “the primary purpose of which is to grant code rights” (schedule 3 para. 1, and sch. 1 para 28(2)(a)). There is no definition of “primary purpose”.
29. For these “primary purpose” tenancies, there is a new species of statutory continuation: para. 29 provides that where the code agreement in question ceases (or the landowner “may bring the code agreement to an end”), then “the code agreement continues ...”.
30. This appears to be much like 1954 Act continuation (though that remains to be seen).

Determination of code agreements: Part 5

31. Para. 30 then provides the mechanism for the determination of such an agreement. It provides for the service of a notice complying with certain conditions such as being on a prescribed form, and also:
- (a) Specifying a date more than 18 months away (and after the tenancy would or could have been ended anyway); and
 - (b) Stating one of the statutory grounds. These are:
32. In outline, the statutory grounds are (para. 30(4)):
- (a) Substantial breach;
 - (b) Persistent delay in making payment;
 - (c) Intention to redevelop;
 - (d) Para. 20 test “is not met”.

33. Operator can give a counternotice within 3 months, and then applies to the Court within a further three months (para. 31), for an order under para. 33. This gives the Court broad powers to continue, modify and renew code agreements, having regard to all the circumstances including:

- (a) The operator's business and technical needs;
- (b) The owner's use of the land, statutory duties, and the existing consideration paid.

34. However, provided that the Court is satisfied that the landowner establishes his ground, it *must* order that the code agreement comes to an end: para 31(4).

Removal of apparatus: Part 6

35. Para 36 sets out the conditions on which a landowner has the right to require the removal of kit. They are alternatives:

- (a) He's never been bound by a code right (nor has anyone holding under him, except where that was a breach of covenant).
- (b) The code agreement has come to an end eg under a para 31(4).
- (c) The kit is redundant.
- (d) The code has ceased to apply to the operator.

36. If a landowner has the right to require removal under para. 36, he can give a *further* notice giving a reasonable period for removal, following which either the landowner can apply to the Court, which can finally lead to an order for removal (para. 39).

37. So in many cases there will be a two stage process:

- (a) Determination of the statutory continuation under Part 5; then
- (b) An application under Part 6 for enforcement of removal.

Non-“primary purpose” agreements?

38. It appears that although Part 5 will not apply, Part 6 will do. This could well lead to complications not unlike the paradox created by the Current Code. That remains to be seen.

Valuation

39. Getting the value of the land as it is currently used ... para. 23(3) provides that market value:

- (a) must be assessed on the basis of the value of the right or agreement to the relevant person; and
- (b) must not be assessed on the basis of the value to the operator of the right or agreement or having regard to the use which the operator intends to make of the land in question.

40. And 23(4) imposes the assumptions that:

- (a) The operator could use more than one site (even if he couldn't); and
- (b) The operator *doesn't* have the assignment, sharing and upgrading rights that it in fact does have.

41. So the valuation mechanism is more favourable to operators, and closer to the way in which other compulsory purchase valuations are carried out: Part 14 provides that s.5 of the Land Compensation Act 1961 (for E&W) applies to the assessment of compensation for diminution in value, and other existing compulsory purchase legislation applies too.

Sharing: Part 3

42. The bill makes void agreements which prevent assignment (or makes assignment subject to conditions) and which prevent upgrading or sharing (para. 16(5)).

Jurisdiction

43. The New Code envisages applications being made to the Court, meaning the County Court (para. 90), though the Secretary of State can confer power on the FTT or UT in relation to the code.

Transitional provisions

44. Applies to subsisting agreements: sch. 2 para 2;

45. But Part 3 (sharing) doesn't apply (sch.2 para 5).

46. It makes detailed and complex provisions for various situations where notices have already been served under the Existing Code.

47. These are likely to be subject to tweaks on its transition through Parliament.

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