
THE PROPOSED ELECTRONIC COMMUNICATIONS CODE: AN OVERVIEW AND A LOOK AT SOME OF THE LIKELY ISSUES

Oliver Radley-Gardner
Falcon Chambers
www.falcon-chambers.com
Twitter: @falconchambers1

The Electronic Communications Code is such a badly-drafted piece of legislation that, as Lewison J noted in Bridgewater Canal v GEO Networks,¹ even its name is open to doubt. Although it was intended that the Telecommunications Code would become “Electronic” after the Communications Act 2003, its name was never formally amended. I will call the existing code ECC in this paper. As we all know, following a Law Commission Consultation Paper² and Report,³ have brought forward a reform of the ECC in the form of a new code, the Draft Electronic Communications Code (“DECC”). This is now to be found in Schedule 1 to the Digital Economy Bill (“DEB”), presently before the House of Lords and estimated to become law in August 2017. There are presently all sorts of amendments to the Bill and DECC which can be followed online for those interested.⁴ In this paper, I will give only the briefest outline of the ECC⁵ and what is wrong with it (though this audience will be familiar with the issues), what the reforms leading to DECC sought to achieve, and whether and how DECC achieves them.

¹ Bridgewater Canal Company Ltd v Geo Networks Ltd [2010] EWHC 548 (Ch) That part of the decision was not reversed on appeal: GEO Networks Ltd v The Bridgewater Canal Company Ltd [2010] EWCA Civ 1348.

² http://www.lawcom.gov.uk/wp-content/uploads/2015/03/cp205_electronic_communications_code.pdf

³ http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc336_electronic_communications_code.pdf

⁴ <https://services.parliament.uk/bills/2016-17/digitaleconomy.html>; Explanatory Notes are here:

<https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0045/en/17045en.pdf>

⁵ The standard text is Reynolds and Clark, Renewal of Business Tenancies, in which the law is grappled with in detail.

ECC

What is wrong with the existing ECC? Is there, as there often is in law reform, a case for “better the devil you know?”

It has to be said that, if the measure of the success of a piece of legislation is “how many reported cases have there been?”, then ECC has been very successful. There are barely any cases. Of course, that may be because largely the ECC requires cases to be issued in the County Court, where they may well be decided without being reported. However, the nature of this kind of work is such that it would seem that many of these sorts of cases simply settle somewhere along the directions. It may therefore be that, though the ECC makes little sense to those who read it cold, those who are familiar with its workings and with the electronic communications business have found a way to make it function.

That said, there are clearly areas in which the ECC has proven to be a deficient piece of legislation. Taking them at a high level of generality, the following seem to be the most glaring issues:

- (1) Firstly, the ECC creates a series of *sui generis* rights which do not fit well with the surrounding law of real property or with the drafting habits of property lawyers. For reasons that are not immediately apparent, ECC rights did not require registration at the Land Registry, leading to all sorts of unwelcome surprises for purchasers of development sites.
- (2) Secondly, transactional lawyers have tended to think of those *sui generis* ECC rights in traditional transactional categories: as either licences (so-called “Site Access Agreements” or “Site Access Licences” which provide rights to enter and install equipment but try to avoid creating leases, with all the usual difficulties that entails) or as full-blown “telecoms leases”, creating the problems that arise when the ECC and Part II of the Landlord and Tenant Act 1954 collide. This

leads to recourse to Street v Mountford [1985] AC 809, questions of formalities for the execution of leases,⁶ and then the question of how the termination grounds under section 30(1) of the 1954 Act dovetail (if they do) with paragraphs 20 and 21 ECC.

- (3) Thirdly, there are then all sorts of issues about what happens during the lifetime of an agreement within paragraph 2 ECC – who, for example, is bound? Paragraph 2 ECC is not an easy piece of drafting to understand in that regard. Does, for instance, a superior landlord who gives licence to share possession or occupation thereby agree in writing to be bound by the sharer’s ECC rights for the purposes of paragraph 2(4)? What is sharing “occupation” anyway if “all” that is happening is that an operator is using part of the electromagnetic spectrum?
- (4) Fourthly, the communications market has changed. Wholesale Infrastructure Providers (WIPs) now provide sites and kit for Mobile Network Operators (MNOs) to use. Is the provision of “kit” within the statutory purposes of the ECC as-is? Should provision be made to encourage mast sharing (as encouraged by OFCOM and planning law) between MNOs, and if so should the right to share be guaranteed as a default by the applicable legislative framework?
- (5) Fifthly, termination of those rights - The ECC uses concepts (“*entitled to require removal ...*”, paragraph 21 ECC) that do not dovetail with any particular concept of property law. The ECC appears to give rise to a rolling redevelopment break that rides roughshod over contractual arrangements (paragraph 20 ECC), though quite what it does, no one really seems to know exactly; though it would seem odd were it not to bring the agreement to an end.

As we can see from many other areas of law, legislation is too slow and cumbersome to keep pace with rapid movements in the market. ECC has, in many respects, been outstripped by market developments and changes in the way electronic communications services are delivered. Although with a bit of shoehorning and ingenuity, ECC has been made to work, I would suggest that it does not provide the legislative framework that

⁶ And in particular sections 52 and 54 of the Law of Property Act 1925, section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

operators or landlords, and their respective advisers, want. Does DECC offer something better? Let us first take a look at what DECC is supposed to achieve, and then at how it seeks to go about achieving that.

The Policies Behind DECC

The ECC can be traced back to the deregulation of the telecommunications market by the Telecommunications Act 1984, which has not been almost entirely repealed, only really leaving ECC behind. A raft of five EU directives in 2002 then led to the reforms of the Communications Act 2003.⁷ We know that the Commission is proposing further deepening of the electronic communications sector as part of its deepening of the “Digital Single Market”,⁸ with a view to a new European code, in relation to which a draft directive has been promulgated.⁹ Post-Brexit, we have of course yet to understand (as is the case with so many things) the extent to which we will be required, indirectly or directly, to comply with those standards.

The Law Commission was therefore moved to propose a reform, which appears as Schedule 1 to the Digital Economy Bill. It is intended clarify the law, and give operators clearer rights and greater flexibility in their enjoyment of them. It is intended to facilitate sharing of network apparatus.

How Does DECC Work?

Core Concepts

“Operator”

⁷ Directive 2002/21/EC of 7 March 2002, Directive 2002/20/EC of 7 March 2002, Directive 2002/19/EC of 7 March 2002, Directive 2002/22/EC of 7 March 2002 and Directive 2002/58/EC of 12 July 2002. They are summarized at paragraph 1.17 of Law Com LC336 as (1) the “Framework Directive”, on a common regulatory framework for electronic communications networks and services; (2) the “Authorisation Directive” on the authorisation of electronic communications networks and services; (3) the “Access Directive”, on access to, and interconnection of, electronic communications networks and associated facilities; (4) the “Universal Service Directive”, on universal service and users’ rights relating to electronic communications networks and services; and (5) the “Privacy and Electronic Communications Directive”, concerning the processing of personal data and the protection of privacy in the electronic communications sector.

⁸ <https://ec.europa.eu/digital-single-market/en/news/proposed-directive-establishing-european-electronic-communications-code>

⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0590&from=EN>

DECC will only protect “operators”. This definition is as before:

The operator

- 2 In this code “operator” means—
- (a) where this code is applied in any person’s case by a direction under section 106, that person, and
 - (b) where this code applies by virtue of section 106(3)(b), the Secretary of State or (as the case may be) the Northern Ireland department in question.

“Code Right(s)”

Paragraph 3 is headed “Code Rights” (*plural*), but then goes on to explain that what is conferred is a “Code Right” (singular) comprising individual sub-rights:

The code rights

- 3 *For the purposes of this code a “code right”, in relation to an operator and any land, is a right for the statutory purposes—*
- (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,*
Digital Economy Bill
 - (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.*

“Statutory Purposes”

It will be noted that the Code Right must be exercised for “statutory purposes”. This is also a defined term:

The statutory purposes

- 4 *In this code “the statutory purposes”, in relation to an operator, means—*
- (a) *the purposes of providing the operator’s network, or*
 - (b) *the purposes of providing an infrastructure system.*

Those are fleshed out in paragraphs 6 and 7, as follows:

The operator’s network

- 6 *In this code “network” in relation to an operator means—*
- (a) *if the operator falls within paragraph 2(a), so much of any electronic communications network or infrastructure system provided by the operator as is not excluded from the application of the code under section 106(5), and*
 - (b) *if the operator falls within paragraph 2(b), the electronic communications network which the Secretary of State or the Northern Ireland department is providing or proposing to provide.*

Infrastructure system

- 7 (1) *In this code “infrastructure system” means a system of infrastructure provided so as to be available for use by providers of electronic communications networks for the purposes of the provision by them of their networks.*
- (2) *References in this code to provision of an infrastructure system include references to establishing or maintaining such a system.*

The significance of these paragraphs is that they are intended to ensure that WIPs are clearly included in the definition of operator.

“Electronic Communications Apparatus”

Electronic communications apparatus, lines and structures

- 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 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.

What repays close reading is paragraph 5(1)(d) in conjunction with (3) and the definition of “structure”. It will be noted that a building is only “apparatus” if its sole purpose is to enclose other apparatus. A roof-top does not therefore become “apparatus” simply because it is a site for electronic communications apparatus. Nor is a pylon, pipeline or land. This may be important because of how operator – operator disputes are supposed to be dealt with. The intention of the Law Commission is that MNO – MNO or WIP - MNO disputes about occupancy should be kicked off to OFCOM and should not trouble the Courts. This is the stated policy of DCMS, how explained in the *Digital Economy Bill fact sheet – Digital Infrastructure* (clause 4-14) that

“physical apparatus is distinct from land, and that the revised Code should therefore not be used to regulate access to infrastructure owned by WIPs. Ofcom is the established independent regulator for market and competition in the digital

communications sector and we would expect them to use their powers to regulate access to all digital communications infrastructure if there is evidence of a problem.”

It is presently not clear that the instant drafting technique is neat enough to achieve that purpose. As has been suggested by others in the sector – surely the easiest thing is to deny operators can exercise DECC rights against other operators?¹⁰

Operating the Machinery: Getting Operators On

Voluntary Agreements

Competent Grantors of DECC Rights

Under DECC, any occupier of land is able to confer a Code Right (see paragraph 9). An “*occupier*” must be understood as being not just the owner of an estate in land, but also the licensee of land (whether or not with exclusivity), but could also be a squatter. As before, if the occupier (“O”) enjoys an interest in land, then the Code Right will bind successors to that interest and also those with interests deriving out of O’s interest and pre-existing occupiers (paragraph 10). This “cascading protection” arises under paragraph 10 will also apply to successors or rights holders of persons agreeing to be bound by the right in question.

Formality of DECC Rights

Under paragraph 11 DECC, it is a requirement that a DECC agreement be in writing, signed by the parties to it, state the term for which the right is granted, and state a notice period (if applicable).¹¹ It is to be assumed that, if the relevant formality requirements are not met, then there will not be a Part II agreement at all. As we shall see, that has ramifications for the operation of the termination and possibly removal procedures.

Exercise of DECC Rights

DECC rights can only be exercised in accordance with the terms of the agreement (paragraph 12), and, if so exercised, will be treated as the exercise of a statutory power,

¹⁰ It is one of the points made by N Taggart in his paper “I Still Haven’t Found What I’m Looking For”.

¹¹ The rights can be varied.

though it is not to be treated as being such an exercise vis-à-vis a freeholder or lessee who is not bound by the Code Right under the provisions of paragraph 10 DECC. Rights of access are also limited under paragraph 13 DECC.

Involuntary Agreements

Under Part 4 DECC, as under paragraph 5 ECC, an agreement can be “imposed” by the Court. This is done under paragraph 19 DECC.¹² A notice is given by the operator to the relevant person under paragraph 19(2) DECC. If faced with silence for 28 days, or refusal at any time, the operator can ask the Court for help. The Court can then impose the “agreement”¹³ and/or say that the conferred Code Right is binding on the relevant person. Once imposed, the agreement takes effect as if regulated by Part II DECC (see paragraph 21). It is interesting to note that the agreement imposed is simply to be one that gives effect to the Code Rights sought by the operator with such modifications as the Court thinks appropriate. “Modification” can mean “cutting down”, but it can also mean “adding to”. There are certain terms that must be included – payment, compensation (to anyone suffering damage), length of term and termination of lift and shift (paragraph 22). Again, a number of questions of interest arise here. What is the scope of the Court’s powers. Could the Court be persuaded to impose a lease, for instance where the operator wishes to secure an equipment room or a locked and enclosed compound? Presumably what the Court would always be granting in such a case is a “primary purpose DECC” lease, that is, one that would fall within Part V.

The test for imposing an “involuntary agreement” is set out in paragraphs 19 and 20, which are pretty self-explanatory:

When can the court impose an agreement?

- 19 (1) *This paragraph applies where the operator requires a person (a “relevant person”) to agree—*
- (a) *to confer a code right on the operator, or*

¹² Interim DECC rights can be conferred under paragraph 25. Temporary DECC rights are dealt with by paragraph 26.

¹³ This does seem something of a misnomer given the circumstances

- (b) *to be otherwise bound by a code right which is exercisable by the operator.*
- (2) *The operator may give the relevant person a notice in writing—*
 - (a) *setting out the code right, and all of the other terms of the agreement that the operator seeks, and*
 - (b) *stating that the operator seeks the person’s agreement to those terms.*
- (3) *The operator may apply to the court for an order under this paragraph if—*
 - (a) *the relevant person does not, before the end of 28 days beginning with the day on which the notice is given, agree to confer or be otherwise bound by the code right, or*
 - (b) *at any time after the notice is given, the relevant person gives notice in writing to the operator that the person does not agree to confer or be otherwise bound by the code right.*
- (4) *An order under this paragraph is one which imposes on the operator and the relevant person an agreement between them which—*
 - (a) *confers the code right on the operator, or*
 - (b) *provides for the code right to bind the relevant person.*

What is the test to be applied by the court?

- 20 (1) *Subject to sub-paragraph (5), the court may make an order under paragraph 19 if (and only if) the court thinks that both of the following conditions are met.*
- (2) *The first condition is that the prejudice caused to the relevant person by the order is capable of being adequately compensated by money.*
- (3) *The second condition is that the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person.*
- (4) *In deciding whether the second condition is met, the court must have regard to the public interest in access to a choice of high quality electronic communications services.*
- (5) *The court may not make an order under paragraph 19 if it thinks that the relevant person intends to redevelop all or part of the land to which the code right would relate, or any neighbouring land, and could not reasonably do so if the order were made.*

Of more interest, and a real mess (which Parliament is, and must be, looking at again) are under paragraph 23:¹⁴

¹⁴ For mode of payment of consideration and compensation, see paragraphs 23(5) and 24 DECC respectively.

How is consideration to be determined under paragraph 22?

- 23(1) *The amount of consideration payable by an operator to a relevant person under an agreement imposed by an order under paragraph 19 must be an amount or amounts representing the market value of the relevant person's agreement to confer or be bound by the code right (as the case may be).*
- (2) *For this purpose the market value of a person's agreement to confer or be bound by a code right is the amount that, at the date the market value is assessed, a willing buyer would pay a willing seller for the agreement—*
- (a) in a transaction at arm's length,*
 - (b) on the basis that the buyer and seller were acting prudently and with full knowledge of the transaction, and*
 - (c) as if the transaction were subject to the other provisions of the agreement imposed by the order under paragraph 19.*

So far, so good. But it then gets quite interesting:

- (3) *The 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 (singular) of the right or agreement or having regard to the use which the operator intends to make of the land in question.*
- (4) *The market value must be assessed on the assumption that—*
- (a) there is more than one site which the operator could use for the purpose for which the operator intends to use the land in question (whether or not that is actually the case); and*
 - (b) paragraphs 15 and 16 (assignment of code rights and upgrading and sharing of apparatus) do not apply to the code right or any electronic communications apparatus to which the code right could apply.*

The Explanatory Notes explain paragraph 23 thus:¹⁵

Market value must not take into account the use the operator intends to make of the land. This means valuation is on a “no scheme” basis. Valuation must be based on two assumptions. The first is that there is more than one site available to the

¹⁵ <https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0045/en/17045en.pdf> at p. 45.

operator, to ensure that a market valuation is applied even if in fact the land has unique features, The second is that the rights in paragraphs 15 and 16 (assignment of code rights and the upgrading and sharing of apparatus) are not included in the value of the code right.

This gives rise to the following position:

- (1) Paragraph 23(3) is intended to create a “no scheme” valuation.
- (2) There is a “value to occupier” assumption (as that is the “relevant person” for paragraph 23 purposes), and not a “value to operator”. Given that many of these sites have, apart from perhaps some development value in the future, in all likelihood, little or no alternative use, telecoms agreement rents look like they are in for a torrid time.
- (3) Or are they? The disregard is the value to “the” operator and the use “the” operator intends to put the site to – does that mean that the value to *other* operators is to be taken into account for market value purposes? That argument does not seem to me to work on the basis that it is the value to the “site provider” that is to be looked at. However, I have to say that, as things stand, it is quite difficult to understand how the valuation question is to be approached.
- (4) Why should the right to assign, upgrade and share be excluded from the valuation?

At the moment, although the Law Commission have been clear about what it is that is intended, it is frankly quite hard to work out how the valuation formula in paragraph 23 is going to function in the real world. We await the draftsman’s amendments with interest.

Assignment, Alienation and Operation

Assignment

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).¹⁶ 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

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 share¹⁷ 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 the 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.

Ending Relations¹⁸

Part I: Part 5

DECC uses a two part process for the ending of DECC rights. It follows that, if there has never been a DECC Part II agreement, the Part V process does not need to be gone

¹⁶ 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>

¹⁷ Including the right to carry out works necessary to facilitate sharing: paragraph 16(6).

¹⁸ An operator will also be able to vary terms, on notice: see paragraph 32 DECC.

through. However apparatus held otherwise than under a Part II agreement will still need to go through the Part VI process, at least on one reading of Part VI. The DECC Part V process will have to be otherwise gone through.

Part V (termination) deals with how to bring the underlying rights to an end. The drafting of the qualifying conditions for getting into Part V are a little unfortunate, as there are a series of double negatives. However, in essence, after DECC comes into force if there is a licence conferring Code Rights, then that is within Part V no matter what. If there is a lease primarily conferring Code Rights then the 1954 Act is disapplied and it has to be dealt with under Part V. Schedule 3 to DEB provides at paragraph 4 that

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.”

It follows that any licence and any lease primarily conferring a Code Right must be terminated under Part V.¹⁹ There are, however, interesting questions often encountered. What happens, for example, if a licence is entered into, or a periodic or short-term market rent tenancy is evidenced in writing (and we should remember that short leases need not be by deed if the conditions in sections 52 and 54 of the Law of Property Act 1925 are met), but is only signed by the grantor. The answer to that seems to be that, in those circumstances, its lack of formality, though sufficient to create a binding contractual relationship, is insufficient to create a Part II agreement (due to the failure to comply with the formal requirements for a Part II agreement). It therefore seems that such agreements *do not* require termination under Part V to be gone through, and one is then dealing with a standard possession action against a person who, though an operator, is not operating within Schedule 1. The Law Commission has explained:²⁰

¹⁹ I will leave the transitional provision, as they merit detailed separate consideration and require a suitably cooled and darkened room.

²⁰ See Law Com 336 at para. 6.122 – 6.123.

Our recommendations achieve this by making provision for the continuation of Code Rights until they are validly terminated in accordance with the provisions of the revised Code. But those recommendations have no effect upon landowners who are not bound by Code Rights, nor on cases where there have never been any Code Rights (for example, the apparatus has been installed on land by mistake due to uncertainty about a boundary).

6.123 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.

However, wherever there is an agreement under Part II²¹ which ceases to bind the site provider²² or which expires is continued unless terminated under Part V (see paragraph 29). This is, again, an adoption of the 1954 Act template.

How, then, can the Code Right be terminated? The termination provisions are under paragraph 30, which puts in place a termination mechanism whereby the site provider

²¹ Except for an interim or temporary right under paragraphs 25 and 26 DECC.

²² That is, any person bound by a DECC right under one of the mechanisms set out above, see paragraph 29(1)(a) DECC.

must give notice (complying with paragraph 88 DECC), specifying a date at which the agreement must come to an end and stating a ground for ending it.

As to the date:

30(3) The date specified under sub-paragraph (2)(b) must fall—

- (a) after the end of the period of 18 months beginning with the day on which the notice is given, and*
- (b) after the time at which, apart from paragraph 29, the code right to which the agreement relates would have ceased to be exercisable or to bind the site provider or at a time when, apart from that paragraph, the code agreement could have been brought to an end by the site provider.*

The notice period is therefore longer than under the 1954 Act. One is therefore looking at an 18 month lead-in period *to terminate*. That is before one gets to removal. Secondly, one has to identify a statutory ground (again as under the 1954 Act):

(5) The ground stated under sub-paragraph (2)(c) must be one of the following—

- (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.*

Gone, then, are the days of a 28-day paragraph 21 ECC notice without any need for grounds, leading to County Court possession proceedings or a claim for a removal order. We now have 18 month notices leading to a need to establish a statutory ground under

paragraph 30(4) – the 1954 Act on steroids.²³ The operator is required to respond²⁴ – failure leads to termination. The response must be given within 3 months from receipt (paragraph 31(1)(a)), and must be followed in another three months with a Court application under paragraph 33 for a continuation right. Gone too are the days of the endlessly intimated paragraph 5 ECC application that never quite makes it to Court.

The initial counter-notice must explain either that the operator does not want a right, or that it wants to continue to relationship on different terms, or that it wants a new formal relationship (paragraph 31(3) DECC). If the operator wants a new right and applies to Court, it can only be defeated if one of the statutory grounds under paragraph 30(4) is made out. That will be tested by the Court at the same time as the making of the application by operator: paragraph 32(4) and (5) DECC, and 33. Unless a termination order is made, an order must be made under paragraph 33 DECC, which contains a “menu” of orders for the Court to make.²⁵

If the lease is not primarily a lease to confer a Code Right, then what? First of all, how do I know whether I have a non-primary purpose lease? The Law Commission explain at 6.86 that:

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.

²³ The analogy with the 1954 Act was intentional: see Law Com 336 at paragraph 6.105.

²⁴ Unless otherwise agreed, paragraph 31(2) DECC.

²⁵ Interim payments are catered for in paragraph 34 DECC.

The upshot therefore is that, if the lease is not primarily for Code Rights, then it is, unless contracted out, protected by the 1954 Act instead. That position does seem intelligible, but it may have been a good idea simply to require, as a formal prerequisite for an agreement pertaining to apparatus, for the parties to elect whether one or other regime would apply.

Part II: Part 6

If you have terminated the operator relationship, their apparatus does not simply come off the site. Gone are the days of the one-stop-shop paragraph 21 ECC removal order. Instead, we have a two stage approach as under the 1954 Act, under which the termination order does not give you an instant right to possession, a matter which does seem to cause trouble from time to time. Nonetheless, that approach has been adopted.

To actually clear the site requires the operation of the Part 6 procedure. Under paragraph 36 DECC, removal can occur certain conditions are met (in other words, there are “gateways” to removal, and the “landowner” must pass through one of them):

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

36 (1) *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.*

(2) *The first condition is that 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. This is subject to sub-paragraph (4).*

(3) *The second condition is that 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—*

(a) *as mentioned in paragraph 25(7) and (8),*

(b) *as the result of paragraph 31(1), or*

(c) *as the result of an order under paragraph 31(4) or 33(4) or (6), or*

(d) *where the right was granted by a lease to which Part 5 of this code does not apply.*

This is subject to sub-paragraph (4).

(4) *The landowner does not meet the first or second condition if—*

(a) *the land is occupied by a person who—*

- (i) conferred a code right (which is in force) entitling an operator to keep the apparatus on, under or over the land, or
- (ii) is otherwise bound by such a right, and
- (b) that code right was not conferred in breach of a covenant enforceable by the landowner.

[...]

- (6) 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.
- (7) 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.
- (8) 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.
- (9) This paragraph does not affect rights to require the removal of apparatus under another enactment (see paragraph 40).

A “landowner” who can show an “interest in land” can operate Part 6, but, it seems, not a mere occupier (who can nonetheless grant a Part II protected right and who can, as a “site provider”, initiate the Part V termination process). What that seems to mean is that, though a licensee is able to grant a Part II protected right, and can probably (wearing its “Site Provider” hat under Part V) terminate, what it can't do (a point reinforced by Part VI and the definition of “landowner” and the “defence” to Conditions 1 and 2 in paragraph 36(4)) is seek a removal itself. For that, the licensee will need to find someone with an interest in

land to trigger the process. At the moment, I am not quite sure why that should be the case. Why should the licensee of a car park (perhaps with rights tantamount to exclusive possession),²⁶ with a serious financial stake in its land, but without an estate vested in it, not bring a claim for removal if required? And what interest is required anyway? A beneficial interest under a trust? A proprietary estoppel? An easement? A restrictive covenant? It also occurs to me that, contrary to LC336 at 6.123, apparatus installed otherwise than under a Part II agreement, and maybe even trespassing, will not be capable of being removed by a possession order – it may well be that such kit requires compliance with Part VI because of the First Condition under paragraph 36 (with paragraph 36(4) perhaps even coming into play and causing unforeseen further difficulty).

What then follows is *another* notice procedure under paragraph 39 DECC:

39 (1) The right of a landowner or occupier to require the removal of electronic communications apparatus on, under or over land, under paragraph 36 or 37, is exercisable only in accordance with this paragraph.

(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.

(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

²⁶ Manchester Airport v Dutton [2000] 1 QB 133.

(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.

All of this, then, amounts to a real headache for developers trying to clear their sites, and for operators, who will face the not inconsiderable task of keep track of notices and time limits.

This paper and the presentation can only scratch the surface – what we can easily see, however, is that there will still be difficulties under DECC, some of which already exist under the existing ECC. It remains to be seen whether DECC will yield the clarificatory case law so sorely missing under ECC. With every read, it is easy to see new issues that will arise. And that is even before we have looked at the transitional provisions – but that is another story, for another day.

**OLIVER RADLEY-GARDNER
FALCON CHAMBERS**