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New Electronic Communications Code

The new Code is appended to the Digital Economy Act 2017, which received Royal Assent on 27 April this year. Although the new Code is largely based on the old version, landowners and operators of digital services alike need to be aware of some key differences.

BACKGROUND

The current 1984 Code has been long overdue a reform. Initially enacted to govern the installation, maintenance and removal of communications equipment on land, it has struggled to keep up with the pace of change in digital communications - not least the widespread proliferation of the internet. Despite an attempt at modernisation in 2003, it remains famously ill-drafted and has confused many (including the judiciary) in its conflict with the security of tenure provisions of the Landlord and Tenant Act 1954. Has the new Code provided long-awaited clarification?

KEY CHANGES

Many will be relieved to see that the new Code has removed the overlap with and ambiguity in respect of the 1954 Act. Under the new Code, an operator can have either 1954 Act protection or Code protection but not both. The downside to landowners is that statutory notice periods for landowners to obtain vacant possession are longer under the Code than under the 1954 Act. However, this should be weighed against an increase in certainty and transparency of process and, in reality, a significant number of cases are still likely to be settled out of Court by way of negotiated compensation.

Other headline changes include: reform of the 'public benefit' test; who is covered by the Code; how compensation to landowners works; how operators can share equipment; and how a landowner can require equipment to be altered or removed. A summary of these changes is set out in the quick-reference table below.

THE DIGITAL ECONOMY ACT 2017

A wide ranging Act, including provisions for:

- a legal right to faster broadband of at least 10 mbps;
- the construction of new digital infrastructure under the new Electronic Communications Code;
- civil penalties for online pornographers who don't verify their customers' ages;
- protecting online intellectual property on the same level as physical intellectual property;
- regulating direct marketing in an attempt to reduce spam and nuisance calls; and
- enabling data-sharing for a wide variety of public sector purposes.

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Old Code	New Code	What does it mean?
1. Guiding principle:		
"No person should unreasonably be denied access to an electronics communication network or to electronics communications services."	Public to have "access to a choice of high quality electronic communications services".	Used by a Court to determine whether there is public benefit (see 'Obtaining Code rights' below). Arguably a lower bar for an operator to meet, if a landowner is contesting installation of equipment.
2. Obtaining Code rights:		
Two schemes: - voluntary (landowner and operator agree the Code applies); or - involuntary (operator requires a Court order). Court must be satisfied that the landowner can be adequately compensated in money OR that there is sufficient public benefit.	Same two schemes, but Court must be satisfied that the landowner can be adequately compensated in money AND that there is sufficient public benefit.	Two tests rather than one BUT because the public benefit bar is lower under the new Code, in practice, operators should find it easier to install equipment.
3. Compensation calculation if a Court imposes an agreement on the landowner:		
Based on the anticipated use of the property by the operator.	Based on market value for an arms-length transaction not related to use by an operator.	Could decrease the compensation a landowner receives, compared to the old Code.
4. Sharing by operators:		
Not permitted under the Code, although landowners and operators could contract otherwise – in practice, usually prohibiting sharing or assignment.	Automatic rights for operators to assign agreements and to share the use of electronic communications equipment so long as they don't impose an additional burden on the landowner. Any agreements to the contrary are void.	This is an increase in operators' rights in respect of their equipment, but is a potential concern for landowners, who could now face different and/or additional occupiers on their property whom they had not originally bargained for or vetted from a financial or security perspective.
5. Altering equipment:		
Notices can be served by a landowner on an operator under paragraph 20 of the Code, to alter equipment if a landowner requires this to carry out an improvement to land. An operator has 28 days to object, at which point a Court order would be required. If granted, compensation is payable to the operator.	No similar provision to require operators to alter or move equipment (as opposed to removing it). Additional rights for operators to upgrade their equipment, with agreements to the contrary void.	Rights to alter and move equipment will need to be contractually agreed. These are known as 'lift and shift' provisions.
6. Removing equipment:		
Notice can be served by a landowner on an operator under paragraph 21 of the Code, to remove equipment. An operator has 28 days to object, at which point a Court order would be required. Conflict with the 1954 Act security of tenure provisions:	Cannot benefit from Code rights and 1954 Act rights simultaneously, and parties cannot contract out of the Code if it applies. Under the Code, a landowner must give 18 months' notice (or longer if contractually agreed), stating a ground for repossession (i.e. redevelopment, breach of payment	Welcome clarification and removal of the overlap with the 1954 Act, however the period between receiving a notice and an operator serving a counter-notice has increased from 28 days to 3 months.

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<p>- 1954 Act removal: requires the landowner to have an intention to possess or redevelop, which requires an operator's equipment to have been removed.</p> <p>- Code removal: needs a landowner to show they are entitled to possess the land, which they cannot do if the operator is in possession under the 1954 Act.</p>	<p>or other obligations, or test for obtaining Code rights no longer met).</p> <p>An operator can serve a counter-notice within 3 months requiring a Court order to be obtained before its right can be terminated.</p>	<p>Any landowners considering redevelopment will have to plan accordingly or be prepared to negotiate potentially higher settlement amounts with operators for earlier removal.</p>
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REACTION TO THE NEW CODE

The overarching aim to increase access for the public to electronic communications equipment permeates the drafting of the new Code. This is good news for consumers, but what has the reaction been amongst landowners and operators – the ones who will be dealing with the Code in practice?

Initial reaction amongst landowners has been dismay at the increased timescales and potential costs to be incurred in removing equipment – either by way of statutory compensation payable to an operator or by negotiated settlement. An operator may well seek to benefit from the longer notice periods a landowner will be bound by if the statutory process is required. There has also been much speculation at the extent to which a landowner's income for letting to communications operators will be reduced by the 'market value' compensation valuations.

From the operators' perspective, the amendments seem to provide a welcome opportunity for those wishing to expand their networks, to obtain certainty of occupation, or simply to gain flexibility to share with other providers.

WHAT NEXT?

The new Code is not yet in force – we are waiting for its enactment – and once enacted there will be a complicated raft of transitional provisions governing subsisting agreements. For a period, potentially a lengthy one, we will see landowners left dealing with some operators under the new and some under the old Code rights.

FOR FURTHER INFORMATION, PLEASE CONTACT

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