



Important changes to the Electronic Communications Code – the Government launches a new consultation

In February 2013 the Law Commission published its report on the Electronic Communications Code ("the Code") which they described as "confusing and unduly complicated". In January 2015 a draft replacement Code was unexpectedly put before Parliament as part of the then Infrastructure Bill and withdrawn two weeks later amid concern that insufficient time had been set aside for thorough scrutiny of the proposals. This week the Government launched a 9 week-long consultation exercise on the new Code.

The Code is part of the Telecommunications Act 1984 which was enacted in the wake of the privatisation of BT. It was intended to regulate the provision of landline telephones and to facilitate the onset of digital technology. The Code was updated in 2003 to accommodate technological changes, but still suffers from 3 main problems: (1) its complexity and unclear relationship with other statutory systems such as land registration and statutory security of tenure, (2) its outdated reliance on the concept of telephone wayleaves, and (3) the confusing regime governing the relationship between landowners and operators which, it is feared, is hampering the rollout of electronic communications.

The Law Commission's findings

The Law Commission reported in February 2013 on the outcome of their consultation exercise (the "Report"), and recommended wholesale replacement of the Code. Their suggestions (which can be found here: <http://lawcommission.justice.gov.uk/areas/electronic-communications-code.htm>) included the following:

- **a reformulation of the Code Rights from which Code Operators will benefit**

Landowners and those operators on which Ofcom has imposed the Code ("Code Operators") should be bound by a consensual regulated relationship to include the payment by Code Operators of a market price and the enforcement of various protected rights ("Code Rights") and ancillary rights (such as the right to assign Code Rights between Code Operators) where appropriate.

- **the test for the imposition of Code Rights**

A new test should be introduced that overtly balances the public interest with that of the landowner, and takes into account the need for choice and quality in the provision of electronic communications services.

- **payment for Code Rights**

The distinction between compensation (available to a wide range of landowners) and consideration (payable only to those who confer Code Rights or have them imposed upon them) should be retained, and the calculation of consideration should utilise a modified version of the Red Book definition of market value.

- **moving and removing apparatus**

A new system should be introduced to govern the removal of apparatus, dispensing with the current overlap between the Code and Part 2 of the Landlord and Tenant Act 1954, under which:

- Code Rights would endure despite their contractual expiry while landowners would be entitled to have equipment removed when they redevelop or where the Code Operator is in breach of its obligations; and

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- Those landowners who are not bound by Code Rights would be enabled to give notice to Code Operators to require them to remove apparatus, which Code Operators could oppose with an application to keep it on the land.

- **disputes resolution and procedural issues**

The forum for almost all Code disputes should be the Lands Chamber of the Upper Tribunal, which has more specialist expertise than the County Court. Also, Code Operators should be able to apply to get early interim access (without Code Rights) to sites where all terms are agreed other than price.

The consultation exercise

The proposed new Code is drafted in plain English and uses a question–and–answer format. Click here to read it: <https://www.gov.uk/government/consultations/consultation-on-reforming-the-electronic-communications-code>

The consultation document (also available at the above link) invites submissions on all issues relating to the Code with a focus on the following questions which emerged as key concerns during the January discussions about the new Code between the Government and various interested groups:

- How should land and ownership of property be defined in the new Code?
- How should consideration be calculated?
- To what extent should operators be able to upgrade and share apparatus?
- Should parties be able to contract out of the revised Code?
- How should Code Rights be treated under the land registration system?
- What transitional provisions will be required?

If you would like advice in this area or to discuss a response to the consultation please contact one of the partners named below or your usual contact at Travers Smith.

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