

The New Telecoms Code:

January 2018

The new Code, which is part of the new Digital Economy Act that came into effect on 28 December 2017 has some unwelcome features for Landlords that we strongly recommend you take advice on.

The Act received Royal Assent in April, and the subsequent delay caused a degree of consternation across the property industry. This is at a time when the Network Operators are poised on rolling out 5G, and their reliance on the property industry has never been greater.

The new Code completely replaces the existing Code, and will affect almost all aspects of telecom occupations and tenancies.

Under the new Code, Operators may refer any disputes to Court at a much earlier stage. Once referred, the Courts must first consider that the telecommunications system is to provide 'a *choice* of high quality electronic communication services', which contrasts with the previous lighter test of simply having 'access to a public telecommunications system'.

It is worth stressing that there is no ability to contract out of the new Code: if you have telecoms on your property this will affect you!

The Previous Code

The previous Code was introduced as part of Schedule 2 of the Telecommunications Act 1984, which had itself been subject to much criticism over the years.

In the case of *Bridgwater Canal Company Limited v GEO Networks Limited* (2010), Lewison LJ said the Code was '*one of the least*

coherent and thought-through pieces of legislation on the statute book'.

Whilst few would disagree, it must be recognised that many types of communication networks (2G, 3G & 4G) have been rolled out over the past 25 years, and the position between Landlord and Network Operator has at least been understood.

Rationale of the New Code

The new Code is in response to the Government's desire to promote the UK as a high-speed digital economy, ('Digital Britain'). This policy was understandably widely backed, and had been subject to a five year consultation period involving the Law Commission, interested stakeholders including the Mobile Network Operators themselves.

Despite the consultation, the Government has ignored key recommendations made by the Law Commission favouring the rights of the Network Operators, over and above those of Landlords.

Some of the key areas of the new Code, and how it will affect Landlords, are summarised below.

Part 1: Code Rights

Part 1 defines who and what will be covered by the new Code. A Code right is defined in Part 1, para 3 and permits an operator to install electronic communications apparatus on, under or over land, and to inspect, carry out works, maintain, adjust, alter, repair, upgrade or operate that apparatus. The rights also give the Operator the right to lop or cut back, or require another person (the

landowner) to lop back any tree or vegetation that interferes or even may interfere with the apparatus (which will be a concern for more rural landlords).

Electronic Communications Apparatus is defined in Part 1, Para 5, as any apparatus designed or adapted for use in connection with an electronic communication network, and includes apparatus designed or adapted for the sending or receiving of communications or other signals, lines and other structures and other structures or things designed or adapted for use in connection with the provision of an electronic communication network.

Part 3: Assignment, Upgrading and Sharing

Unlike the previous Code, any limitation on assignment, including the payment of money, is void under the new Code (para 16). The only condition that Landlords can now insist upon is an Authorised Guarantee Agreement (AGA).

The new Code also provides Operators the right to upgrade or share their apparatus (para 17) as long as there is no adverse impact or additional burden on another party to the agreement. 'Additional burden' is defined as any additional adverse effect on the other party's enjoyment of the land and anything that will cause additional loss, damage or expense to that party. Like assignment, any agreement that purports to restrict upgrading or site sharing will again be void.

This is clearly one area of the Code that has not properly been thought through and where disputes are anticipated. The prospect of

additional Operators being on site, with their own equipment and attending contractors, will place a costly access burden on Landlords.

Part 4: Power of Court to Impose Agreement

This is a cause for concern, as it details what will happen in instances where new agreement terms are not reached by the parties. In such an event, the Operator may serve a Code Notice on the Landlord, who then has 28 days to respond. The Operator can then apply to the Court to impose a Code Agreement.

The Courts are given guidance on when an agreement can be imposed (para 21), firstly, that the prejudice to the Landlord can be adequately compensated, and secondly, that the public benefit outweighs the prejudice to the Landlord. For the second condition, the Court must observe the overriding principle that the public has 'a choice of high quality electronic communication services' – a significantly higher threshold, which prejudices the Landlord's position from the outset.

Part 4, Para 23: Consideration

Consideration is based upon Market Value ('willing parties'), yet the new definition also assumes that; the sites' use is disregarded (ie. does not form part of a communications network), that more than one site is available, and that open assignment and upgrading rights apply!

There has been much in the way of Operator 'hype' regarding telecoms rents, particularly

for standalone mast sites in rural areas (which typically generate £5,000 - £10,000 per annum) falling by up to 90%. Urban rooftop rents are also expected to be affected, but given Landlord cooperation will inevitably be required, the decrease in value will be less dramatic.

Part 4, Para 24: Compensation (also Part 14)

The Court may also order the Operator to pay compensation for loss or damage that has or will be sustained as a result of the Code rights being imposed. Compensation includes expenses (including legal and valuation), diminution on value of land and the cost of reinstatement. This will likely be either a lump sum, or periodical payments. Compensation is to be calculated in accordance with the Land Compensation Act 1961, a lowly basis for recompense.

Part 5: Termination and Modification ('Renewal') of Agreements

What does a Landlord now need to do to obtain vacant possession of a site?

This is now a two-stage process.

The first stage of removal is the termination of the Code agreement. This is defined in para 31 and the Landlord must serve a written 18 months' notice in a form prescribed by OFCOM, stating the reason for bringing the Code agreement to an end.

The grounds for termination must be one of the following:

- 1) Substantial breach of obligations by the Operator

- 2) Persistent delays by the operator in making payments
- 3) The Landlord intends to redevelop all or part of the land or any neighbouring land
- 4) The Operator is not entitled to the Code Agreement because its failed the test for Part 4, para 21 (imposition of a Code agreement)

Once received, the Operator has a period of three months to serve a counter notice, and then must apply to court to initiate proceedings within the following three months. The Courts will then be able to either impose a new agreement, modify the existing agreement or terminate.

Under the new regime, there is greater certainty for Landlords as the test for redevelopment is clear-cut and the costs of initiating proceedings are now borne by the Operators. Will this mean the Operators challenge fewer notices served on them?

Part 6 – Rights to require removal of Apparatus

The right to move the apparatus is the second part of this two-stage process and can only follow once the 18 months' Code Notice period has expired.

The Landlord ('relevant person') must then provide the Operator with 'reasonable' Notice (in a form prescribed by OFCOM) for removal of the Operator's equipment, on any of the following grounds;

- 1) The Landlord has never been bound by a Code Agreement
- 2) The Code Agreement has come to an end
- 3) The apparatus is no longer used for the operator's network

- 4) The Operator in question no longer has Code protection

If agreement isn't reached within 28 days from service of the notice to remove equipment, the Landlord can apply to the court for removal.

Schedule 2: Transitional Provisions

What happens to current agreements as the new Code is introduced?

The new Code will apply to all current/ subsisting agreements between an Operator and Landlord ('relevant person'), with the following transitional provisions applying;

- 1) that Part 3 of the New Code regarding assignment of Code Rights and the upgrading and sharing of Operators will not apply to subsisting Code agreements.
- 2) the termination provisions of the new code will not apply to a 1954 Act protected subsisting agreement (but will apply to all other agreements, new or subsisting).

- 3) the unexpired term is less than 18 months on a subsisting agreement, the notice period will be the unexpired term with a minimum of three months.
- 4) where Code notices have been served but no application made to the court, the application will be treated as if given under the New Code.

Should you as a Landlord, or any of your tenants receive any Notices, or any form of written consent from an Operator our recommendation would be to take professional advice as soon as possible.

Failure to do so could result in the Code rights being imposed, which you would inadvertently be bound by.

The team at Arc Partners are on hand to help.



Tom Parrish MRICS
07818 438 635
tparrish@arcpartners.co.uk



Katherine Anderson LLB
07577 476 085
katherine.anderson@arcpartners.co.uk



Tristan Davis MRICS
07961 398 980
tdavis@arcpartners.co.uk