

2017 Electronics Communications Code

May 2018

A new electronics communications code ("**New Code**") came into force on 28 December 2017. It contains comprehensive reforms in favour of telecoms operators, intending to make it easier to roll out infrastructure such as mobile phone masts. The previous electronic communications code ("**Old Code**") was widely criticised for being difficult to understand and cumbersome to operate. The government's aim in the New Code is to strike a balance between the competing interests of those who own and occupy land and the telecoms industry and consumers who are demanding increasing connectivity and access to telecoms services.

The government is keen to promote investment in new communications technologies and allow operators to expand and enhance their networks with fewer restrictions. The practicalities of putting the New Code into practice are still being worked out but it is clear that the New Code favours operators and may leave landowners with less income and even less control than before.

What is the New Code and how does it work?

Any agreement with an electronic communications operator relating to electrical communications apparatus entered into after 28 December 2017 will be governed by the New Code. A full list of operators to whom the New Code applies is available on Ofcom's website.

The New Code is also partly retrospective. Agreements entered into before the new legislation came into force will be subject to the New Code but with certain modifications (see below).

What are the key changes introduced by the New Code and how does it affect agreements made prior to 28 December 2017 ("Existing Agreements")?

- Security of tenure and termination

The Old Code did not address issues with security of tenure under the Landlord and Tenant Act 1954 ("**1954 Act**"). In practice this meant that operators benefitted from both statutory security of tenure protection under the 1954 Act as well as rights under the Old Code. The New Code removes this duality so that an operator can no longer benefit from protection under both the 1954 Act and the New Code.

Where the primary purpose of an agreement is to grant New Code rights then the security of tenure provisions in the 1954 Act will not apply. Instead the parties will be bound by the termination procedures set out in Part 5 of the New Code. In most cases termination will involve a two-stage process:

- The landowner must give a minimum of 18 months' notice to the operator to terminate the operator's rights. The notice must cite one of four prescribed statutory grounds, one of which is redevelopment. The notice must expire after the fixed term of the agreement or the break date if a break option has been exercised. If the operator objects, the landowner will have to obtain a court order before it can recover possession. One practical effect of the new rules is that a New Code agreement must have contractual termination provisions, otherwise the landowner will not be able to use the statutory termination process.

- If the operator does not remove its apparatus once its Code rights have been terminated, the landowner must go through a further notice procedure to compel the operator to remove it - this may add to the time it takes a landowner to regain control of the site.

The new termination provisions apply in a modified form to some Existing Agreements. The detail is complex but broadly, the new rules will apply unless the Existing Agreement is a lease with 1954 Act protection. If at 28 December 2017 an Existing Agreement had an unexpired term of less than 18 months, the statutory notice period to terminate will be 3 months or the unexpired residue of the term, if that is longer.

- **Valuation**

The basis for assessing consideration paid by operators to landowners has changed significantly. Under the Old Code, this was assessed by reference to the *value of the rights to the operator*. Under the New Code, it is calculated by reference to the *open market value of the land from the landowner's perspective only*. This means that revenue streams from sites – such as roof spaces – which may have little value to landowners but could be of critical strategic importance to operators, could be significantly down.

- **Assignments**

The New Code allows operators to assign Code rights between themselves, with no right for the landlord to impose restrictions. Any contractual terms imposing conditions on assignment – even requiring the landlord's consent not to be unreasonably withheld - are void. A landlord may require the outgoing operator to guarantee the obligations of its immediate assignee, but this will fall away on any subsequent assignment. The landlord's only real protection is that Code rights may be assigned only to another operator recognised by Ofcom. Otherwise, operators can assign freely, regardless of the assignee's financial standing.

This aspect of the New Code is not retrospective, so restrictions on assignments in Existing Agreements are still valid.

- **Sharing and upgrading equipment**

The New Code allows operators to share equipment with other operators or upgrade it, as long as any changes to the equipment have only minimal adverse impact on the equipment's appearance and no additional burden (including damage or expense) is placed on the other party to the agreement. The government views this as important to safeguard future connectivity and access to wide network coverage and landowners may not impose additional restrictions on sharing or upgrading.

Prohibitions on assignment, sharing and upgrading in Existing Agreements remain valid and enforceable – this is another aspect of the New Code that is not retrospective.

- **Altering and moving equipment**

The New Code does not include any "lift and shift" provisions. If a landowner wants flexibility to get equipment altered or removed, this must be expressly negotiated and set out in the agreement.

- Removal of equipment

The New Code has a mechanism for landowners to get equipment removed in specified circumstances.

These include:

- the Code rights agreement having come to an end; and
- the equipment being obsolete, because it is no longer used for the purpose of the operator's network and there is no reasonable prospect of it being so used in the future.

Ofcom's code of practice (which accompanies the New Code) states that, as a general principle, redundant sites should be decommissioned by operators within a reasonable period after use ceases and notes that where apparatus such as ducts or cables lie underground then it may be preferable for them to be left in situ and just made safe. In any event operators and landowners are encouraged to discuss decommissioning proposals to agree an appropriate way forward.

Provisions relating to the removal of equipment installed prior to 28 December 2017 continue to be governed by the Old Code (allowing the landlord to seek removal of the equipment when the agreement comes to an end or on the basis that the landlord is going to redevelop).

What next?

We are in a "bedding in" period for the New Code, with landowners and operators working out what their New Code agreements should say. A "market" position should eventually emerge but for now, the New Code seems to have raised as many questions as it has answered.

Clare Sivill/Fiona Larcombe
May 2018