

Electronic Communications Code – one year on

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Nearly a year after the new Electronic Communications Code (the “Code”) came into force, the property industry is still working out how some of its provisions will apply in practice. The government’s aim of improving connectivity is in danger of being undermined by a lack of clarity in the Code itself, made worse by the fact that Code operators and landowners do not always seem to understand each other’s viewpoints.

Against this background, two recent decisions by the Upper Tribunal (the “Tribunal”) make interesting reading. In each case, a Code operator applied to the Tribunal for interim Code rights, on the basis that they needed to move quickly to maintain their service. In each case, the Tribunal found in favour of the operator. In taking this approach, the Tribunal is upholding the public policy behind the Code, which is to serve the public interest by making it quicker and cheaper for operators to deliver communications networks.

In the first of the Tribunal applications, Cornerstone Telecommunications Infrastructure Ltd (“CTIL”) was seeking a right to go onto a site to survey its suitability for installing communications apparatus. From a Code operator’s point of view, a site survey is an essential part of deciding whether or not a site is suitable for installing equipment but this is not explicitly included in the statutory list of Code rights which a court can order. In deciding on CTIL’s application, the Tribunal has established that surveying a site is a Code right and falls under either installation or works in connection with installation. This seems to remove a landowner’s ability to avoid Code operators’ equipment being installed by simply refusing access for an initial survey. The Tribunal commented that if landowners could do this, they would have a “ransom” over Code operators, which would defeat the intention of parliament.

The second Tribunal decision was about the grant of temporary rights. EE and Hutchison 3g UK Ltd had been asked to remove apparatus from a building that was being redeveloped and was seeking temporary rights (for 3-4 months) to put it on a different building, owned by the London Borough of Islington. The Tribunal found in favour of the Code operator, on the basis that temporary rights were needed to maintain network. The grant of rights seems to have been done by a very simple document, the Tribunal commenting that a grant for 3-4 months did not need to be elaborate.

In deciding whether to make an order for the grant of Code rights, the Tribunal must be satisfied that any prejudice to the landowner:

- can be adequately compensated by a monetary payment; and
- will be outweighed by the likely public benefit.

The Tribunal has given a clear signal that in applying these tests, it intends to adopt a pragmatic approach, upholding the spirit of the Code, and will cut through legalistic attempts to frustrate it. At the same time, the government is consulting on proposed changes to the Code, to make it easier and cheaper for Code operators to get access to property. The two key suggestions are:

- to require landowners to “facilitate the deployment of digital infrastructure” on their properties; and
- to give the magistrates’ court the right to order access to property where the landlord does not engage with a Code operator seeking to install equipment. The government believes that this would encourage Code operators currently put off by the expense of applying to the Tribunal to pursue attempts to get their equipment into suitable buildings where landowners do not co-operate.

Where does all this leave landowners? Simon Webb, Head of Professional Services at flexible office provider Workspace, offers this perspective:

“The question to ask is, why are so many landowners now averse to having telecoms equipment on their property? We all want improved connectivity, so co-operation between operators and landowners is key to achieving this efficiently and cost effectively.

Unfortunately, the new Code does not seem to encourage this relationship and many aspects of the new legislation do not work in practice from a property perspective. Despite the social benefits, the new Code is often viewed as placing a burden on property, especially where future development or refurbishment is a possibility. There are instances where operators and landowners are co-operating, but until such time as the legislation is improved or a greater understanding of each other’s needs is reached, we should expect to see the Tribunal called on again.”

The key point here is that landowners really do want to ensure great connectivity for their buildings but they have to be able to operate their letting business effectively. There seems to be a tension between a Code operator’s desire to ensure a continuous service and the practical problems that a landowner may face if, for example, it needs to get equipment moved to allow for repair, or the riser ducts in its building are at capacity and it cannot get equipment removed to allow space for a new Code operator’s installation.

The clear message is that landowners and Code operators need to keep talking, so that they get a better understanding of each other’s business drivers. Better connected buildings should be a win-win situation for everyone but a year on, we are not there yet.

Fiona Larcombe

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