

CAAV – NATIONAL TUTORIAL

21 SEPTEMBER 2023

DETAILED NOTES – ELECTRONIC COMMUNICATIONS CODE

Background to the "New Code"

Code Rights are: "A set of rights that are designed to facilitate the installation and maintenance of electronic communications networks." (Ofcom)

The Telecommunications Act 1984 ("TA") was designed to regulate "landline telephony". It was brought into force before the first website existed (which was 6 August 1991) and was commonly thought to be complicated and outdated. It was famously described in a 2010 case by Mr Justice Lewison (as he then was) as "*...one of the least coherent and thought-through pieces of legislation on the statute book.*"

The Communications Act 2003 is the main source of regulation for communications providers in the UK. This superseded the TA 1984 and introduced Ofcom as a regulator.

A Law Commission review into the existing code under the TA 1984 was published in 2013 – it found that the existing code was "*out of date, unclear and inconsistent with other legislation*"

The findings and recommendations of that law commission review were implemented in the Digital Economy Act 2017 ("DEA"). Section 4 of the DEA inserted the New Code in the form set out in [Schedule 1](#) to the DEA 2017, into Schedule 3A of the Communications Act 2003.

The New Code can therefore be found in Schedule 3A of the Communications Act 2003 and this came into force on 28 December 2017.

Since that date, the New Code has been amended further.

The Telecommunications Infrastructure (Leasehold Property) Act 2021 amended the New Code in quite a specific way (it introduced a new Part 4A) to allow operators to provide electronic communications apparatus to blocks of flats if so requested by a tenant, where the landlord is unresponsive or uncooperative.

Part 2 of the Product Security and Telecommunications Infrastructure Act 2022 ("PSTIA") amends the New Code more generally. Not all of PSTIA is in force yet, and it is being brought into force in a piecemeal fashion by way of various regulations.

Case Law has also significantly shaped the way the New Code is implemented. In summary, the Code is an evolving piece of law and is being developed both by statute and by case law.

Key Terminology

There are various different terms used in the New Code.

- "Operators". There are about 250 Operators registered on Ofcom's register. If the Operator isn't registered on the register, then the Code will not apply to them.

- "Occupiers". These are whoever is occupation of the land. An occupier doesn't need to have a proprietary interest, it could be a licensee. If the land is unoccupied, the occupier is someone who exercises '**management and control**' of the land. This is set out at paragraph 105 of schedule 3A.
- "Relevant Person": A person whom an operator requires to agree to confer a Code right on the operator or to be bound by a Code right exercisable by the operator.
- When agreement is reached with the Operator, the Relevant Person then becomes "Site Provider".

The meaning of "Occupier" has been litigated recently in three Supreme Court cases (2022).

Operators in those cases wanted to clarify the meaning of the wording in paragraph 9:

"a code right in respect of land may only be conferred on an operator by an agreement between the occupier of the land and the operator."

Paragraph 9 enables occupiers to acquire new or additional code rights.

The Court of Appeal in 2020 held that an Operator who had already installed apparatus on a site, was both operator and occupier of the land for the purposes of paragraph 9. On this interpretation, as an entity cannot contract with itself, operators already in occupation of land were prevented from acquiring new code rights under paragraph 9.

However, the Supreme Court has now clarified that under paragraph 9, an "operator" seeking code rights is different from the "occupier of the land". An operator on-site can therefore seek new or additional code rights in respect of the same land. The Supreme Court cited policy reasons to encourage roll-out of new infrastructure.

This means that operators with electronic communication apparatus ("ECA") on-site can obtain additional or new rights under paragraph 9 of the New Code in respect of the same land while their existing code agreement is continuing.

- "Electronic Communications Apparatus" defined in paragraph 5 of sch. 3A. This includes anything related to/designed for use in connection with electronic communications.

Code Rights

There are 12 core rights and these are set out in paragraph 3. These are summarised below:

1. Install ECA onto/under land *AND* keep installed ECA *AND* to carry out any works on the land for or in connection with the installation of ECA
2. To inspect, maintain, adjust, alter, repair, upgrade or operate ECA *AND* to carry out works on the land for the same purposes *AND* to enter land to inspect, maintain, adjust, alter, repair, upgrade or operate any ECA
3. **To share ECA with another operator *AND* to carry out any works on the land for the purposes of, or in connection with, sharing with another operator *AND* To enter the land for the purposes of, or in connection with, sharing with another operator the use of ECA**

4. To connect to a power supply
5. To interfere with or obstruct a means of access to or from the land
6. To lop or cut back, or require another person to lop or cut back, any tree or other vegetation that interferes or will or may interfere with ECA.

The Code rights in bold above were inserted by [section 57](#) of the Product Security and Telecommunications Infrastructure Act 2022, which came into force on 7 February 2023.

Those code rights in bold do not apply retrospectively to existing agreements.

The code rights are divisible, so they do not all need to be granted in a Code Agreement, meaning a Relevant Person can grant specific rights (which does not need to include all of them) to an Operator.

For example, the site provider may not wish to include the right to obstruct access, if this will affect other occupiers or the right to lop trees if there are none.

Key Requirements of Code Agreement

The key requirements for a code agreement are set out in Paragraph 11 and include:

- In writing
- Be validly signed
- Specify a duration - must state for how long the code right is exercisable
- Specify notice period for termination

A code agreement doesn't need to be by deed and doesn't need to be registered at Land Registry (para 14)

Code Agreements

These can be entered into by agreement between the parties under Part 2 of the Code or they can be imposed by a Court under Part 4 of the Code.

The Operator starts the process of seeking new or additional Code Rights by serving a paragraph 20 notice. This sets out all of the code rights they are seeking and all the proposed terms of the deal and seeks agreement from the landowner. If the landowner does not respond within 28 days or the landowner serves a counter-notice setting out that they do not agree to grant the code rights sought, then the Operator can apply to Court to determine the matter.

Paragraph 21 Test

For a Court to impose Code Rights, they must be satisfied that the paragraph 21 test is met.

The paragraph 21 test will be met if both conditions are satisfied:

Para 21 test

1. Any prejudice caused to the Relevant Person by imposition of the code agreement can be adequately compensated by money; AND

2. The public benefit outweighs the prejudice caused to the Relevant Person.

When considering the second point, the court must give regard to the public interest of access to a choice of high quality electronic communications services (para 21(4)).

The Court may NOT make an Order if:

The Landowner can show that they have a 'redevelopment' ground: an intention to redevelop land or neighbouring land and they could not reasonably do that if order was made.

The principle of redevelopment for this ground is the same as under Ground F of the Landlord and Tenant Act 1954 and as clarified in *S Franses Ltd v Cavendish Hotel (London) Ltd [2018] UKSC 62* - the same principles apply – i.e the landowner must have a "firm and settled intention" to carry out the re-development.

The other ground on which the Court could refuse to impose a code agreement is for reasons of National Security. This was inserted by section 66 of the Product Security and Telecommunications Infrastructure Act 2022.

Alternative Rights

An Operator could apply to the Court for interim, temporary or full Code Rights.

Interim Rights (under Para 26) can be applied for where more permanent arrangements are being negotiated. These would impose Code Rights for a set period of time or until a particular event occurs (i.e full code agreement is in place). In order to apply for interim rights, the Operator must have the agreement of the Occupier and there must be a "good arguable case" that the paragraph 21 test is satisfied.

Temporary Rights (under para 27) can be used where an Operator has existing apparatus on site and a paragraph 20 notice has been served, but the landowner has a right to remove the apparatus under para 37/40 (no right to retain it) but has not yet done so. The objective for temporary rights is that, until the paragraph 20 proceedings (for new/additional code rights) are determined, the service provided by the operator's network is maintained and the apparatus is properly adjusted and kept in repair.

Consideration

The terms of a court-imposed agreement must include consideration (rent) under paragraph 24.

This is worked out as: "the market value of the relevant person's agreement to confer or be bound by the code right" (para 24).

It is based on what a willing buyer would pay a willing seller for the agreement:

- (a) in a transaction at arm's length;
- (b) on the basis that the buyer and seller were acting prudently and with full knowledge of the transaction; and
- (c) on the basis that the transaction was subject to the other provisions of the agreement imposed by the order under paragraph 20 (taking into account all provisions to be imposed)

However, market value must also be assessed on a "no-network" assumption. The assumptions are set out at paragraph 24(3). The key one is that the parties must assume that

the right that the transaction relates to does not relate to the provision or use of an electronic communications network. i.e: to exclude from the assessment of consideration any element of value attributable to the intention of the operator to use the site as part of its network.

This differs from the Old Code, which did not have this "no network" assumption, and the practical effect of this is that rent has fallen drastically under the new Code.

The Court has previously found that useful comparables when considering what market value should be might include transactions in respect of rights granted for purposes which were not telecommunication purposes, but were similar purposes – weather stations, air-traffic control stations and the like.

Compensation

This is set out in paragraph 25(1) and is defined as:

"Any loss or damage that has been sustained or will be sustained by that person as a result of the exercise of the code right to which the order relates".

It includes elements set out at paragraph 84(2) including expenses, diminution in value and costs of reinstatement.

When assessing diminution in value, rules 2 – 4 of Section 5 of the Land Compensation Act 1961 apply.

In the case of *EE Limited and Hutchison 3G UK Limited v London Borough of Islington [2019] UKUT 53 (LC)*, Islington Council Claimed for:

- i. disturbance during the installation works,
- ii. for noise and nuisance
- iii. for additional wear and tear on the roof
- iv. for the purchase of certain safety equipment
- v. periodic payments for a variety of safety checks and management costs
- vi. a contribution towards the general maintenance and repair of the building

and interestingly, they also argued that the site provider ought to be compensated for the effects of the no-network assumption in calculating consideration. Unsurprisingly this argument was rejected by the Upper Tribunal.

Subsisting Agreements

This term refers to agreements already in place before 28 December 2017, so that they were in force at the time of the new code coming into effect.

Schedule 2 of DEA 2017 contains transitional provisions which apply to subsisting agreements – in summary these agreements are subject to the New Code but with modifications.

For example, Part 3 of the New Code allows Operators to share/assign Code agreements without landowner consent. Schedule 2 provides that Part 3 does not apply to subsisting agreements, so any provisions in a subsisting agreement which restrict or prohibit assignments, upgrading or sharing will be enforceable. However, section 58(4) of the Product Security and Telecommunications Infrastructure Act 2022 has stepped in so that operators under subsisting agreements can now upgrade or share the use of ECA with other operators as long as certain conditions are met (a more limited upgrading/sharing right than Operators with new Code agreements enjoy). Section 58(4) came into force on 17 April 2023.

If a subsisting agreement is a lease protected under the Landlord and Tenant Act 1954 (which was not contracted out of the security of tenure provisions) then Part 5 (termination) of the Code does not apply, and the rights under the existing lease must be renewed under the 1954 Act renewal procedure. The "no-scheme" assumption for rent does not apply to 1954 Act renewals, which theoretically means a higher rent might be achieved in those circumstances. However, once the new lease is granted, that will then be subject to the Code and any subsequent renewal of the lease will be at the no-scheme rent.

Termination of Code Agreement

The termination of Code rights is governed by Part 5 of the Code.

Code agreements will statutorily continue unless and until determined in accordance with the Code (para 30).

A Site provider can end a code agreement by serving a paragraph 31 notice on the Operator.

If the site provider is terminating a new Code Agreement: the paragraph 31 notice must allow at least 18 months' notice (to end after code agreement term ends)

If the site provider is terminating a Subsisting Agreement:

with an unexpired term of **less than** 18 months as at 28 December 2017: the notice period must be the greater of (a) three months' notice; or (b) a notice period equal to the unexpired term; or

with an unexpired term of **more than** 18 months as at 28 December 2017: the notice period must be no less than 18 months' notice such notice periods expiring no sooner than the expiry of the agreement / any break date exercised by the site provider.

The Paragraph 31 notice must specify one of four grounds on which the site provider is relying to end the Code Agreement:

1. Substantial breaches by the operator of its obligations in the Code agreement;
2. Persistent delay by the operator in making payments to the site provider under the Code agreement;
3. The site provider intends to redevelop all or part of the land, or neighbouring land, and could not reasonably do so unless the Code agreement ends; or
4. The operator does not meet the paragraph 21 test.

As a reminder, the paragraph 21 test is that: (i) Any prejudice caused to the Relevant Person can be adequately compensated by money AND (ii) the public benefit outweighs any prejudice caused.

The Code Agreement will end after the date set out in the paragraph 31 notice unless (i) an agreement for a new code is reached between the parties, or (ii) the Operator serves a counter-notice under paragraph 32 stating that they want the code agreement to continue or they require new Code rights.

The Operator must serve their counter-notice under paragraph 32 within 3 months of receiving the paragraph 31 notice.

Further, the Operator must also apply to court within 3 months of serving the counter-notice (Paragraph 34)

If site provider makes out one of the grounds specified above, then the Code Agreement will end, otherwise the Court will make an order as to the requested code rights.

It is important to remember that the removal of the apparatus from the land is a distinct procedure to the termination of Code Rights.

If the Operator does not remove the electronic communications equipment from the land on the termination date specified in the paragraph 31 notice, then the landowner must serve notice on the Operator requiring them to remove the apparatus and restore the land within a specified period (which is a "reasonable time") under paragraph 40 of the Code.

If agreement cannot be reached between landowner and the Operator on a date for removal of the apparatus within 28 days, then the Land Owner has to apply to the Tribunal for them to determine a date for removal.

This extra step can mean that obtaining vacant possession of a site could be significantly extended beyond the termination date set out in a paragraph 31 notice.

Case Law

Turning to three significant and fairly recent Supreme Court decisions, which were heard together due to their interrelatedness.

All three Appellants were operators that had installed ECA on the Respondents' land pursuant to agreements under the Old Code.

All three Appellants wanted to apply for new code rights under para.9 of the New Code.

As a reminder:

"a code right in respect of land may only be conferred on an operator by an agreement between the occupier of the land and the operator."

We touched on this case earlier, the court concluded that, under paragraph 9, the "operator" seeking code rights is different from the "occupier of the land". An operator on-site can therefore seek **new or additional** code rights in respect of the same land.

An operator already party to a code agreement may only apply to the Tribunal to **modify** the terms of its existing code rights when the agreement granting these existing rights comes to an end (ie. when paragraph 5 of the New Code applies) Although, they could seek a consensual variation under paragraph 11 of the New Code.

Compton Beauchamp – New Code Rights sought but notice served on Wrong Occupier

Cornerstone Telecommunications Infrastructure Ltd (Appellant) v. Compton Beauchamp Estates Ltd (Respondent) [2022] UKSC 18 - New Code Rights sought but notice served on Wrong Occupier

In **Compton Beauchamp**, Vodafone placed a telecommunications mast on a field under a 10 year, contracted-out tenancy.

In due course, the tenancy at will which arose was terminated.

Cornerstone served notice on Compton Beauchamp under paragraphs 20 and 27 of the new Code (seeking respectively, permanent and temporary rights) envisaging that a “sweetheart” deal could be done with Vodafone).

The Upper Tribunal (Lands Tribunal) held that it had no jurisdiction to impose a new code agreement because (with paragraph 9 in mind) the person in occupation of the site (“Occupier”) was not Compton Beauchamp, but Vodafone. The Court of Appeal upheld that decision.

The Supreme Court held that it is only any occupation of the *operator which is seeking code rights* that must be disregarded.

Where a third-party operator happens to be in occupation, it is not open to a claimant operator to argue that the third party’s occupation must be disregarded so as to allow the landowner to grant rights to the claimant.

Ashloch – Subsisting Agreement protected under 1954 Act

Cornerstone Telecommunications Infrastructure Ltd (Appellant) v. Ashloch Ltd and another (Respondents) - Subsisting Agreement protected under 1954 Act

In this case, Cornerstone had a tenancy protected by the LTA 1954, which was continuing under s.24(1) of the 1954 Act. It was a subsisting agreement.

Cornerstone wanted to apply for a new code agreement.

The Supreme Court concluded that the transitional provisions meant that an operator with a subsisting agreement protected under the 1954 Act does not have the option of renewing the rights under the New Code. The Operator must instead exercise its rights under Part 2 of the 1954 Act to renew its *existing* rights.

An operator is not, however, prevented from seeking entirely new code rights under the Code, but these must be NEW or ADDITIONAL rights, and not simply a dressing-up of the existing rights the Operator has.

On Tower – No Existing Code Rights

On Tower UK Ltd (formerly known as Arqiva Services Ltd) (Appellant) v. AP Wireless II (UK) Ltd (Respondent) [2022] UKSC 18 - No Existing Code Rights

In *On Tower*, On Tower's protected leases (under LTA 1954) expired before 28 December 2017, and so they were occupying under unwritten periodic tenancies.

At first instance in the tribunal, Judge Cooke indicated any periodic agreement arising by conduct or inference, such as here, is not an “*agreement in writing of the occupier*” – the requirement for such an agreement to be subject to the transitional provisions which apply to the Code.

So, On Tower did not have a subsisting agreement as at 28 December 2017 (as the periodic agreement was not in writing – a requirement for a code agreement under paragraph 11) and had not subsequently acquired Code rights by agreement.

As On Tower did not have existing Code Rights, it could not use part 5 of the Code (which allows for renewal and continuation of expired code agreements). The Court held that the occupation by an operator of a site with no Code rights should be discounted, such that it can

obtain new Code rights under paragraph 9, by serving a paragraph 20 notice, to regularise its occupation.