


The importance of understanding the transitional provisions under the Electronic Communications Code

10 January 2023  Dominic Swift

The current Electronic Communications Code underpins the government's objective to promote the UK as a high-speed digital economy and to meet the public's increasing demand for connectivity.

Before the code came into force, there was a five-year consultation involving the Law Commission and other stakeholders. Despite recommendations arising from the consultation, the telecoms code favours the rights of the telecoms operators over landowners. This resulted in the creation of an unprecedented set of 'code rights' designed to support the installation and maintenance of electronic communications networks; these code rights include (amongst others) rights to:

- install electronic communications apparatus on, under, or over land (including upgrading equipment and or sharing its apparatus with other telecoms operators)
- keep installed apparatus
- inspect, maintain and operate apparatus
- carry out works on the land to enable apparatus to be installed and maintained
- gain access to land for the purpose of maintaining or operating apparatus
- connect to a power supply
- interfere with or obstruct a means of access to or from the land.

Draconian powers

Many landowners remain unaware — until they are approached by a telecoms operator — of just how draconian the powers conferred by the code are. There is now little opportunity for the landowner to negotiate the terms of the occupation of any telecoms operator, as the code prescribes much of what goes into the lease.

In addition to the introduction of these rights, the code also fundamentally changed the way in which the rent for a site is calculated. Under the terms of the previous code, a landowner could negotiate rent with a telecoms operator based on the value of the site to the telecoms operator as part of its communications network, but the code specifically provides that it must be assumed, in calculating the rent, that the transaction "*does not relate to the provision of electronic communications equipment*".

Rent can fall by as much as 90%

In short, in assessing the rent to be paid on any site, the parties must exclude any element of value relating to the telecoms operators' intention to use the site as part of its network. The practical effect of this 'no scheme' assumption is that rent payable by telecoms providers has fallen very significantly, sometimes by as much as 90%.

In the context of the valuation challenges presented by the new telecoms code, it is worth making sure you understand the transitional provisions, as these can provide some relief from the impact of reduction in rental values.

In particular, it is worth noting that in [Vodafone Ltd v Hanover Capital Ltd \[2020\]](#) the County Court determined that an existing lease which was protected by the Landlord and Tenant Act 1954 was not bound by Part 5 of the code.

Renewing subsisting agreements

In **EE Ltd v Moriss and others [2022]**, the telecoms operator was holding over under a lease protected by the Landlord and Tenant Act. Again, the County Court noted that Part 5 of the New Code did not apply when renewing subsisting agreements protected by the Landlord and Tenant Act 1954.

Importantly, they went on to say that the rent payable under any new tenancy granted was to be determined under section 34 of the Landlord and Tenant Act 1954, noting that there was no reason to assume the site would not be used for the purpose of an electronic communications network.

In short, if the existing lease is protected by the Landlord and Tenant Act 1954, then renewal will be under the Landlord and Tenant Act 1954 and the 'no scheme' assumption set out in the code will not apply to you.

New rent will be calculated based on the use of the property as part of the telecoms operator's network, meaning the landowner will be able to seek a significantly higher rent than would be achievable under the code. Sadly, once this new lease is granted, that new lease will become subject to the code, so any subsequent renewal will be at a rent based in the 'no scheme' assumption set out in the code.

Further examples of cases involving the Electronic Communications Code can be found in our previous articles:

The Electronic Communications Code →
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