

## It's good to talk - Electronic Communications Code guidance for landowners

Everyone is connected, or so says Kevin Bacon in the EE television ads. EE, the joint venture between Orange and T-Mobile, became the first mobile phone company to obtain permission to offer fourth-generation (4G) mobile services. The other major networks are in the process of rolling out their 4G offerings. Over 90% of adults in the UK own or use a mobile phone and more than half of adults in the UK own a smartphone<sup>1</sup>. Three-quarters of us have broadband in our homes. All of this has increased the need to install, maintain and upgrade telecoms equipment on land across the country. This article considers the issues for landowners who let or are considering letting space to telecoms companies.

First some definitions. In this article, I will talk about “telecoms apparatus”: this is the equipment installed on land as part of a communications network. Examples include mobile phone masts, cabling and equipment cabinets. It might also extend to telephone boxes and internet kiosks. I will also talk about “telecoms operators”, or just “operators”: these are the companies that install or manage the telecoms apparatus and who are licensed by Ofcom to benefit from the Electronic Communications Code.

### The Code

The Electronic Communications Code governs the relationship between telecoms operators and landowners. As is explained below, many of the rights and procedures created by the Code are largely untested in legal terms.

#### Key provisions of the Code

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|---------------------|--|
| <b>Paragraph 5</b>  | Gives telecoms operators the right to apply to court to obtain wide-ranging powers to install, keep and access telecoms apparatus on land owned by others. Contains the overriding principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services. |
| <b>Paragraph 20</b> | Allows landowners to apply to court to request telecoms apparatus be altered or removed from their land where they are planning an improvement to the land.  |
| <b>Paragraph 21</b> | Allows landowners to apply to court to request telecoms apparatus be removed from their land in certain circumstances where no improvement is planned.   |

The installation of telecoms apparatus on private land is usually carried out with the consent of the owner of the land. However, such is the importance to the economy of maintaining communications networks, the Code (at paragraph 5) allows an operator to serve notice and,

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<sup>1</sup> Ofcom Communications Market Report 2013, 1 August 2013

if necessary, apply to court to acquire the necessary rights where they cannot be obtained by agreement (“paragraph 5 rights”). In that respect, telecoms operators have wide-ranging powers similar to those who provide and manage gas, electricity and water infrastructure. The court can set the remuneration payable to the landowner.

### **Removal of apparatus**

Where a landowner has allowed telecoms apparatus onto his land, either by agreement or under the operator’s paragraph 5 rights, he might at some stage want the apparatus to be removed.

Such a landowner has two options if he cannot negotiate removal by consent. If he is carrying out an improvement on the land, he can serve a paragraph 20 notice on the operator. If the operator then serves a counter-notice, the landowner must apply to court. The court will only order the removal of the apparatus if the removal will not substantially interfere with the service provided by the operator. If an order is made for the removal of the apparatus, the court will usually require the landowner to pay the costs of removal works.

If the landowner is not planning an improvement to the land, he must serve a paragraph 21 notice to enforce removal of the apparatus. Under that paragraph, the operator must serve a counter-notice, setting out the steps he proposes to take to secure the right to keep the apparatus. If a counter-notice is served, the landowner must apply to court. On such an application, the operator need only satisfy the court that he intends to take the steps set out in his notice in order to maintain his apparatus on the land.

### **Difficulties**

It may seem tempting for landowners to let their roof tops or disused farm land to telecoms operators for additional income; many have done so already. But there are a number of significant downsides, some of which are discussed below.

Firstly, the Code is weighted heavily in favour of operators. If an operator wants to use land, or continue to use land, for the purposes of its telecommunications network, it will be very hard for a landowner to resist. If the landowner makes a paragraph 20 application, it might be relatively easy for the operator to show that the removal of the apparatus would interfere with the telecoms service and relatively difficult for the landowner to contradict that. If the landowner makes a paragraph 21 application, it is arguably possible for the operator simply to rely on its paragraph 5 rights in order to secure continued use of the land.

Secondly, there is the uncomfortable relationship with other statutory rights which protect business tenants, specifically those created by the Landlord and Tenant Act 1954. As those in the property industry will know, the 1954 Act confers on business tenants a right to continue in occupation of premises after their lease has come to an end. If the 1954 Act applies, there is an argument that the Code rights and 1954 Act rights must each be terminated before the other, making a perfect Catch-22 situation.

There might be ways to circumvent this problem, but the question has never been considered in a reported court case and landowners would be best advised to ensure that leases are contracted out of the protection of the 1954 Act, so that the problem never arises. It is equally important for landowners to ensure that no new lease is inadvertently created at the end of the term by, for example, continuing to demand and accept rent.

## Reform

The Code has been described by a senior judge as “one of the least coherent and thought-through pieces of legislation on the statute book”. Reference is made above to the conflicts with other legislation. For these reasons, the Law Commission undertook a consultation in 2012 and published its report in 2013 setting out recommendations for a new code. The Government is thought to be supportive of a revised code<sup>2</sup>, but its response to the Law Commission report is still awaited at the time of writing.

### **Leaseholders’ right of first refusal: Landlord and Tenant Act 1987**

It is worth briefly mentioning another potential pitfall for those letting space to telecoms operators. The 1987 Act applies to buildings that contain residential flats, and gives the owners of the flats, in certain circumstances, a right of first refusal where the owner of the building wishes to sell or grant a lease of certain interests in the property. The Act is drafted widely and could arguably apply, for example, to a proposed lease of a mobile phone mast on the roof. If the 1987 Act is engaged, the landlord must serve notices on the leaseholders and can only then proceed with the lease if the leaseholders fail to take up their right of first refusal. In practice, landowners can expect this process to cause delays of three to four months and increased legal costs.

## Conclusion

For landowners, letting space to a telecoms operator can be profitable. For a residents’ management company with limited resources, for example, a mobile phone mast on the roof can provide vital funds to help manage a block of flats. But landowners should not enter into an arrangement with a telecoms operator without being aware of the risks. It might be expensive and time-consuming to get the apparatus removed, if not completely impossible. Until a new code is enacted, the legal position will remain complex and uncertain. It is hoped that 2014 will be the Code’s year, but it remains to be seen whether Parliament can fit it into an already packed schedule.

### **Summary**

- The Electronic Communications Code provides telecoms operators with rights to keep telecoms apparatus on land belonging to others
- It can be difficult for landowners to have equipment removed from their land once it is there
- The Code has been criticised as being badly drafted, and there is little judicial guidance
- Before granting a lease to a telecoms operator, owners of buildings containing flats should check whether the Landlord and Tenant Act 1987 applies
- A revised Code is planned, but may not come into force soon

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<sup>2</sup> Law Commission Report No. 336, The Electronic Communications Code, paragraph 1.13

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