Cracking the Code
Will landowners be footing the bill for making the Electronic Communications Code “fit for the digital economy”?

The Electronic Communications Code (the “Code”) was originally written over three decades ago; a time when the internet was not even publicly available. Since then we have seen a mobile revolution and there are reports that the advent of upcoming 5G technology will require at least 500,000 new transmitters in the London area alone. The Government has attempted to address the Code’s failure to keep pace with technological change by reforming it in the Digital Economy Bill 2017, which received Royal Assent on 27 April 2017. The government estimates that the new Code will deliver a 20-year net present value benefit to operators of more than £1 billion, but at what cost to landowners? The odds certainly seem stacked in favour of operators, and three key issues to watch out for are set out below:

Greater clarity over operators’ rights – but at what cost?
Rights akin to security of tenure acquired under the Code currently sit uncomfortably with similar protections afforded under the Landlord and Tenant Act 1954 (the “1954 Act”) and, under the current regime, it is possible for operators to have the benefit of both. The new Code excludes the 1954 Act such that where the primary purpose of a lease is to grant Code rights statutory rights for operators will clearly be dealt with only under the Code. Whilst landowners will have rights to terminate Code agreements early, and/or to require operators to remove apparatus, these will be available only in specified circumstances and on extensive prior notice (e.g. 18 months’ prior notice where there is intention to redevelop). Operators may seek to exploit the long notice periods when landowners try to negotiate an early termination of Code rights. In addition, Code rights will continue to bind successors in title (i.e. to new tenants on leasehold) during fault periods when landowners try to negotiate an early termination of Code rights. Operators will be given new automatic rights to upgrade and share equipment with other operators. Landowners will not be permitted to charge for this – or to renegotiate existing terms – so long as there is a “minimal adverse visual impact or burden”. The parameters of “burden” and “visual impact” will likely be tested in new specialist tribunals which the Government plans to introduce in order to speed up dispute resolution and encourage faster installation of telecoms infrastructure. The Government views the new Code as being so important in supporting network growth that “contracting-out” will be prohibited. Furthermore, landowners will not be able to negotiate new terms for existing contracts when assets are sold or acquired by operators; potentially leaving landowners unaware of who might be owning and operating apparatus on their property at any given time.

Limit on operator rents
The new Code sees a shift to a “no scheme” regime for valuing land, meaning the value of the site to the operator (i.e. the amount of money an operator can generate from its equipment being on that land) cannot be taken into account in the rent the landowner charges that operator. Instead, the rent will be limited to the underlying value of land, similar to the calculation that takes place under the compulsory purchase regime. Whilst the new Code will not apply retrospectively to existing contracts, this will clearly have future financial consequences for landowners negotiating renewals or new agreements with operators.

What’s next?
- The new Code will come into force on a date yet to be set by regulations.
- An industry consultation is underway until 2 June 2017, after which Ofcom will release a Code of Practice and template notices and agreements.
- Operators face extensive 4G coverage obligations and are likely to test the limits of the new Code.
- The Government is already looking ahead: in its recently published white paper, Next Generation Mobile Technologies: a 5G strategy for the UK, it recognised the volume of infrastructure required for 5G networks and that further changes to the planning and regulatory systems will likely be necessary, so watch this space…

Operators hold the cards with more flexibility control and entrenched rights
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