



**Law
Commission**
Reforming the law

The Electronic Communications Code A Summary

**Law Com No 336 (Summary)
28 February 2013**

THE LAW COMMISSION

THE ELECTRONIC COMMUNICATIONS CODE

EXECUTIVE SUMMARY OF THE REPORT

INTRODUCTION

1. On 28 February 2013 the Law Commission published a Report containing recommendations for a new Electronic Communications Code ((2013) Law Com No 336). The full Report, as well as this Executive Summary, can be downloaded from our website: www.lawcom.gov.uk (A-Z of projects > Electronic Communications Code).
2. The Electronic Communications Code was originally enacted in 1984 to enable telephone companies to place landline telephone equipment on land. Today the Code regulates the legal relationships between landowners and the companies that provide networks to support our everyday use of communications technology, and our interface with an ever-widening digital world. Broadband, mobile internet and telephone, cable television and landlines all depend on this infrastructure.
3. The current Code is complex and confusing, it is inconsistent with other legislation, and it is not up-to-date with modern technology. Our Report recommends a revised Code which sets out the legal position in clear terms and provides an efficient forum for dispute resolution.
4. Our recommendations are for the revision of a well-established system of regulation, not for a new regime, nor for major change. Like the current Code, the revised Code must contain protections for landowners and for network operators, while recognising the public interest in the provision of the network services on which we all depend.
5. To date, the vast majority of arrangements between operators and landowners have been reached by agreement and without compulsion, and landowners have been able to demand a market price for the right to use their land. The revised Code will not affect deals already struck, and we anticipate that arrangements made against the background of the revised Code will continue to be made by agreement, although there will continue to be a basis for the imposition of rights where necessary and appropriate.
6. The project focuses on private property rights between landowners and electronic communications providers; it does not consider planning law.
7. Key points about our recommendations for the revised Code are as follows.
 - (1) The revised Code should be drafted afresh; amendment of the current text will only add to its complexity and to legal difficulties.
 - (2) The revised Code should be technology-neutral, providing a legal framework that is as appropriate to the laying of cables as to the siting of masts.

- (3) Landowners should continue to be paid a market price for the right to use land, but the revised Code should provide a definition of market value that is familiar to valuers and conforms to their professional standards.
 - (4) Where a network operator wants to put equipment on land against the owner's wishes, the legal test for the compulsory siting of equipment should be clear and compatible with human rights.
 - (5) Operators should have limited automatic rights to share and upgrade their equipment, and should be able to assign rights to other operators.
 - (6) There should be clear provisions about what happens to apparatus after an agreement with a landowner has expired; rights under the Code to keep apparatus installed require protection so as to ensure the continuity of networks, but where those rights have terminated, landowners should have clear rights to remove equipment.
 - (7) Disputes arising under the Code should be heard within the tribunal system rather than in the County Court. It will be possible for the tribunal to grant interim access to land on terms that protect the landowner pending agreement or a final order.
8. The revised Code would operate prospectively only: that is, only relating to arrangements put in place after it came into force. It would not change arrangements between Code Operators and landowners which are already on foot, unless and until they were renewed under the revised Code.
 9. The publication of this Report follows a Consultation Paper published in June 2012 (Law Commission Consultation Paper No 205). The recommendations made in the Report have been informed by the response to that consultation, which elicited 130 responses from a cross-section of stakeholders with an interest in the Code.
 10. The Code applies throughout the United Kingdom. The Report, and this summary, refer only to the law in England and Wales.

CODE RIGHTS AND CODE OPERATORS

11. Not all network operators are able to use the provisions of the Code. We refer in the Report to the "Code Operators" who are within the scope of the Code; the decision as to which companies are Code Operators rests with Ofcom (the Office of Communications).
12. Code Operators do not have automatic rights to place equipment on land. Instead, the current Code sets out a list of rights which landowners can confer by agreement. We call these the "Code Rights"; the revised Code would have an updated list, clearly drafted and consistent with modern technology.
13. Occasionally Code Operators may seek to have Code Rights imposed on land. The current test for the imposition of Code Rights is unclear. In particular, it is apparently possible for a landowner's consent to be dispensed with on no other basis than that he or she can be adequately compensated in money; this may not be compatible with the landowner's human rights. And it is not clear how the

public benefit of siting the apparatus on the land is to be brought into the equation, and in what circumstances an application for Code Rights can be denied when the installation of the apparatus would give the public better access to the electronic communications network.

14. We make a recommendation for a new test which will enable Code Rights to be imposed where the prejudice to the landowner can be compensated in money and, in addition, the public benefit outweighs the prejudice to the landowner. In carrying out that balancing exercise, the tribunal will bear in mind the public interest in access to a choice of high quality electronic communications services.
15. In addition, the tribunal will not be able to grant Code Rights if the landowner can show that he or she intends to redevelop the site, and could not reasonably do so if Code Rights were ongoing.

PAYMENT FOR CODE RIGHTS

16. How much should be payable for Code Rights? In our Report we recommend that the price for Code Rights should be market value, and that it should be assessed by reference to definitions and assumptions which are more familiar to valuers than the provisions of the current Code.
17. We have been enabled to make this recommendation by the evidence put forward by consultees who have argued that the current market generally functions adequately, and that a change to a different basis of payment would be disruptive, would generate resistance and litigation, and could not be shown to produce sufficient public benefits to justify the change.
18. Aside from the price for Code Rights, the revised Code must also deal with cases where compensation for loss is needed: for example, where the presence of apparatus causes depreciation in the value of an interest in neighbouring land. The current provisions on compensation are needlessly complex and we recommend a simple list of those who would be entitled to it.

THE FORUM FOR DETERMINATION OF DISPUTES UNDER THE CODE

19. Consultees expressed wide agreement with our proposal that the Lands Chamber of the Upper Tribunal should have jurisdiction over disputes under the Code (which are currently usually directed to the county court). We make a recommendation accordingly, which we expect will make the determination of these disputes simpler and more efficient by directing them to a body which has the most appropriate expertise.
20. We also make a recommendation designed to support the grant, by the Tribunal, of interim access for a Code Operator to begin the installation of apparatus on land before Code Rights have been formally agreed, or imposed by the Tribunal. Such rights can only be granted if the landowner is properly protected by the right to remove the equipment in the event that terms are not subsequently agreed or ordered, and only in cases where it is likely that the Code Operator would be successful in obtaining access at a final hearing. The possibility of interim access should help reduce delay in cases where the only issue in dispute is the price; and price, in turn, should be more readily resolved under the clearer definition of market value that the revised Code would provide.

WHILE CODE RIGHTS ARE RUNNING: DETAILS OF THE REGULATED RELATIONSHIP

Leases and wayleaves

21. When Code Rights have been granted, or imposed by the Tribunal, it is important that all involved should have a clear understanding of what is entailed by those Code Rights, how long they will last, and the interaction of the Code and the terms of the arrangement conferring the Code Rights.
22. A major problem with the current Code is that where rights to keep apparatus on land are granted by a lease, its interaction with Part 2 of the Landlord and Tenant Act 1954 is unclear. We recommend that a lease granted primarily for the purpose of conferring Code Rights upon a Code Operator should not fall within the scope of Part 2 of the 1954 Act; and that other leases should not attract the provisions of the revised Code for the continuity of Code Rights. However, a number of the provisions we recommend for the revised Code, and in particular for bringing Code Rights to an end, are modelled on Part 2 of the 1954 Act. Those provisions are well-understood by businesses and their advisers.
23. Some Code Rights are granted by wayleaves – these are rights to do something or keep something on land which do not amount to leases, but are instead licences or permissions. For example, a right to run a cable across a field would usually amount to a wayleave. The revised Code will also continue to protect Code Rights which are granted by wayleaves.

Those bound by Code Rights

24. The current Code includes provisions about the owners and occupiers of land; it enables occupiers to grant Code Rights but sets out unnecessarily complex and unclear provisions about the effect of that on the freeholder and others with an interest in the land. We have recommended simpler provisions, following rules that are familiar from the law of landlord and tenant. For example, if a tenant with a 3-year lease grants a Code Operator a wayleave to place a cable in the land, and the Code Operator does not also obtain agreement from the owner of the land to do so, the Code Operator's rights will not be exercisable against the landlord after the tenant's lease has expired.

Upgrading and sharing apparatus, and assigning Code Rights

25. We have recommended that Code Operators who have apparatus on land pursuant to Code Rights should be entitled to upgrade or share it without making further payment, but only within a physical space of which the Code Operator has exclusive possession, and which cannot be seen from outside that space. This captures only those situations where the landowner is entirely unaffected by the upgrade or by the presence of, say, another operator's fibre within a conduit.
26. The rights we have recommended do not give Code Operators the right to add extra antennae to masts, or to carry out upgrades which place additional burdens on the landowner. Nor, so far as sharing is concerned, will they give additional Code Rights to further operators; only the original Code Operator will be protected by the Code.

27. As to assignment, we recommend a right to assign which would enable a Code Operator to transfer all its rights under a lease or a wayleave to another Code Operator. But landlords will be able to require the original Code Operator to guarantee the assignee's performance of the tenant covenants in the lease.
28. We do not intend that the existence of these rights to upgrade, share or assign should raise prices; we recommend that they should be ignored when the Tribunal assesses the price of the grant of Code Rights. Nor will these recommendations affect existing contracts.

BRINGING CODE RIGHTS TO AN END, AND REMOVING APPARATUS

29. Under the current Code, equipment can be left on land after the expiry of a temporary arrangement, with no rent payable and without any incentive for the Code Operator to remove it or to agree new terms. This can deter landowners from agreeing to allow Code Operators access to their land in circumstances where they would otherwise be willing to deal.
30. In the current Code, the onus is on the landowner to take proceedings to have the apparatus removed, and the landowner does not have clarity as to the circumstances in which the Code Rights will be brought to an end and the apparatus removed. So the current Code does not encourage Code Operators to resolve the situation definitively (either by obtaining fresh Code Rights or by removing the apparatus) and enables them to take advantage of the uncertainty and lack of resolution to remain on land indefinitely.
31. We have recommended provisions similar to those in Part 2 of the Landlord and Tenant Act 1954 so that Code Rights, and the obligations that go with them – in particular, payment obligations – will continue until they are brought to an end. If a landowner has granted a 5-year lease of a site to a Code Operator to install and operate a mobile phone mast, the lease will continue in force even at the end of the five years just as would a business lease under Part 2 of the Landlord and Tenant Act 1954, until it is brought to an end under the provisions of the Code (discussed below) or a new lease is granted. We have not recommend that the parties should be able to contract out of these provisions.
32. This will ensure the continuity of electronic communications networks – but it is also important to ensure that landowners are able to bring Code Rights to an end in circumstances where their need to do so outweighs other considerations.
33. Under the revised Code, the landowner will be able to give the Code Operator 18 months' notice to bring the Code Rights to an end, stating the ground or grounds on which termination is sought. The Code Operator can then give a counter-notice within three months if it does not want the Code Rights to come to an end; if it does not do so, the Code Rights will expire at the appropriate date. If the Code Operator does serve a counter-notice, the rights will still expire unless the parties reach an agreement before the notice expires, or the Code Operator applies to the Tribunal for new Code Rights to be imposed. In contrast to the current situation, therefore, if the Code Operator does nothing the landowner can remove the equipment when the Code Rights expire.

34. If the Code Operator applies for new Code Rights, the Tribunal will refuse them if:
- (1) the Code Operator has been in substantial breach of its obligations under the current agreement;
 - (2) the Code Operator has been persistently late in paying rent under the current agreement;
 - (3) the landowner can show that it intends to develop the site in a way that requires the termination of the Code Rights;
 - (4) the test for the imposition of Code Rights (see above) is not satisfied.
35. We have recommended a similar procedure, involving 6 months' notice, when either party is content for the equipment to stay on the land but wants a change in the terms and conditions on which Code Rights are held.

Those who are not bound by Code Rights

36. When Code Rights are granted, they only bind the person who granted them, successors in title and those whose interests in the land are derived from that person's interest. So, if a tenant with a 10-year lease grants a 5-year lease of a plot to a Code Operator to place and operate an equipment cabinet, the Code Rights generated by that agreement with the Code Operator do not bind the freeholder.
37. We recommend that this principle should be carried through to rights to remove apparatus, so that the Code should no longer restrict the rights of a person who is not bound by Code Rights in respect of apparatus to have it removed from land.
38. This is a change from the current Code, under which the landowner's rights to possession of the site are restricted even if he or she was not involved in the grant of Code Rights, or the required Code Rights were not validly granted at all: for example, where a mistake was made as to where the apparatus was to be placed, or a tenant purported to grant Code Rights in breach of a leasehold covenant.

OTHER RIGHTS FOR CODE OPERATORS TO PLACE APPARATUS ON LAND

39. Under the current Code, Code Operators have rights to site apparatus on land independently of an arrangement with the landowner. This applies to the placement of apparatus on streets maintainable at public expense and certain tidal waters and lands; and to apparatus used to cross railways, canals and tramways. It also applies to some installations of overhead lines crossing land.
40. We recommend that these rights should generally be retained in the revised Code, because of the importance of enabling the use of these areas of land to build and maintain the electronic communications network. For example, it is appropriate for Code Operators to have the right to make short crossings of railways, canals and tramways, which could otherwise present a barrier to the network, and are also providing a public service. We make recommendations for some minor amendments.

41. We also recommend the retention of the current rules which restrict Code Operators' rights to install apparatus in certain circumstances: in particular, where a Code Operator wishes to place apparatus in a conduit, such as a sewer placed under a street, the Code Operator must obtain consent from, for example, the sewer authority controlling that conduit.

Rights to object

42. Because the revised Code will still contain instances where Code Operators have rights to site apparatus on land without making an arrangement with the landowner, it will also continue to include some rights to object to apparatus. For example, the private owner of an area of tidal land on which apparatus has been placed may wish to object to the siting of the apparatus, perhaps in connection with redevelopment plans.
43. We also recommend the retention, on a more limited basis, of the current right to object to apparatus which is over 3 metres high. This will not be available to those who are bound by Code Rights in respect of the apparatus, but it will be available where the apparatus was installed without using Code Rights (for example, under the right to install overhead lines continued from the current Code) or where it adversely affects neighbouring land (in which case the neighbour will not have had the opportunity to be involved in negotiations for the placement of the apparatus).
44. We make recommendations as to the grounds on which objections can be made; more restrictive grounds for objection will apply once a year has passed from the installation of the apparatus.
45. The current Code also contains a more general right for landowners to require equipment to be moved at their own expense and where it does not prejudice the network. We have recommended that that more general, but very restricted, right should not be reproduced under the revised Code. It will not be needed because our recommendations remove the scope for freeholders to be bound by agreements made, for example, by occupiers without their consent.

OTHER RECOMMENDATIONS

46. We also make a range of technical recommendations to improve the usability of the Code. These include removing the procedure intended to enable applicants to compel Code Operators to use their powers under the Code against third party landowners, which is little-used and gives rise to unnecessary complexity. We also make a recommendation to bring greater coherence to the registration requirements for instruments conferring Code Rights, within the existing land registration system established by the Land Registration Act 2002.