

Ending the code deadlock

12 October 2018

The new Electronic Communications Code was supposed to bring clarity on digital infrastructure. Sue Doane and Mark Talbot examine where it is not working and explain why there is a need for RICS guidance

The [Electronic Communications Code \(ECC\)](#) regulates the relationship between network operators and site providers in the UK, providing a statutory framework for agreements covering the installation and maintenance of communications apparatus on land and property. Introduced in the [Telecommunications Act 1984](#) and extended in the [Communications Act 2003](#), the code was reformed as part of the [Digital Economy Act 2017](#) and came into force on 28 December last year, being incorporated as [Schedule 3A to the 2003 act](#).

Reform had been necessary to reflect the profound changes in digital communications since 1984, with the sector witnessing dramatic evolution in technology and in the demand for services. The government has acknowledged this shift in the way digital communications are deployed, accessed and used. People now expect access to fast broadband anywhere, including at home, irrespective of where they live. The government's aim therefore was to give full support to the installation and maintenance of high-quality digital communications infrastructure.

The new code applies currently to the networks that support fixed broadband connections to premises, mobile broadband, voice and text services, and cable television, as well as landlines. It also looks to ensure the provision of future services to the 5th generation ? 5G ? and beyond (see box, below). It provides the legal framework for the roll-out and maintenance of physical networks that support these electronic communications services across the UK. Importantly, the code focuses on underpinning consensual commercial relationships with regulation.

Reforms

There are provisions that aim to ensure property owners are fairly remunerated for use of their land, but that also explicitly acknowledge the economic value of investment in digital infrastructure for everyone. With this in mind, the reforms seek to make it easier for communications providers to deploy and maintain their infrastructure through new rights to upgrade and share apparatus. From the property owner's perspective, there is recognition that obtaining vacant possession at the end of a contractual term is imperative, particularly where redevelopment is to take place.

A 5G and full-fibre future

The government's [Future Telecoms Infrastructure Review](#) sets out plans for 5th-generation (5G) mobile technology to be available in the majority of the UK by 2027, and for homes and businesses nationwide to have access to full-fibre broadband networks by 2033, aiming for 15m in place by 2025. The government says it is clear that a mix of full-fibre and 5G broadband networks is the long-term answer to ensuring that the speed, resilience and reliability demanded by consumers and businesses are all provided.

In addition, robust changes to court processes and jurisdictions aim to improve dispute resolution, ensuring that disagreements between communications providers and landowners do not hold up investment and create uncertainty. This has been achieved with more clearly defined processes that closely mirror those found in landlord and tenant legislation, and by the engagement of the Lands Chamber of the Upper Tribunal.

The government concluded that the reforms struck the right balance between the interests of site owners, communications providers and, most importantly, the public, supporting enhanced investment in digital infrastructure.

Payment

Unfortunately, government hopes that the new code would offer greater clarity have not been realised, particularly in relation to paying site providers for the granting of agreements. This was 1 of the key points of contention under the original code, and a substantial portion of the stakeholder consultation focused on addressing the concerns of both site providers and operators about this.

In justifying the new policy, the government stated that site providers should continue to receive fair payment – a consideration – for the use of their land, and that this should be in addition to simple compensation for any damage or loss of value. The definition of both consideration and compensation was helpfully set out by the Law Commission in its report [The Electronic Communications Code, Law Com No 336](#), February 2013 at paragraph 5.4, which states that compensation is a payment compensating for a loss, and paragraph 5.5, which explains that consideration is something more than compensation that can be best described as a price for the grant of rights.

However, in recognition of the priority the government attached to the role of digital communications in economic growth, productivity gains and social interaction, the commission also expressed concern that the cost for ‘rents’ in the telecommunications industry was significantly higher than those enjoyed by utilities and providers of essential services. The Impact Assessment published by the Department of Digital, Culture, Media & Sport (DCMS) in 2016, [RPC-3329\(1\)-DCMS](#), sets out the evidence for its view, and cites the Nordicity Report, [Modelling the Economic Impacts of Alternative Wayleave Regimes](#), and [Financial impact of ECC changes](#), produced for the DCMS in October 2013 and May 2016 respectively. Consequently, the government felt that, while site providers should get fair value for the use of their land, this should not as a matter of principle include a share of the economic value created by high public demand for services that the operator provides.

Middle ground

The government therefore sought to achieve a balance in the new code by defining a basis for payment that would sit somewhere between a pure compensation-based regime akin to

compulsory purchase on the one hand, and the potentially higher levels of rents under the previous version of the code on the other.

In aiming for a middle ground, the basis of payment defined in paragraph 24 of part 4 of the new code shares similarities with the market value defined in the RICS Valuation and Professional Standards ? [the Red Book](#) ? but with very distinct disregards, in particular the assumption that the right to which the transaction relates is not concerned with the provision or use of an electronic communications network. It is also important to understand that this is not a compulsory purchase regime; nevertheless section 118, [Schedule 4 of the Communications Act 2003](#) does provide for a route for compulsory purchase.

Paralysis

As such, a new hypothetical scenario, the new valuation basis and the dearth of evidence of agreements transacted on the new basis appears to have led to a paralysis in activity. Understandably, representatives of all parties directly involved in negotiating electronic communication agreements want to ensure that such transactions correctly reflect the new code?s rules and achieve a fair outcome in this respect.

However, the legal interpretations of paragraph 24 vary extensively in what is currently an absence of evidence that reflects the new code, and this has a direct impact on the potential valuation parameters. In turn, this has resulted in parties taking widely divergent positions, which are then exacerbating delays in reaching agreement thanks to a reluctance to set a market precedent.

Need for guidance

RICS recognises the need for substantive best practice guidance to support the government?s vision for the digital economy. Reflecting the public interest principles of the RICS charter, a guidance note would redress the current absence of any neutral professional advice on the valuation principles and best practice under the new code. Such a professional interpretation of the valuation elements by RICS would benefit its immediate membership as well as other professionals.

In bringing some clarity to this issue, the interests of all stakeholders would be addressed. The legal interpretation will be developed by case law and precedent where there is a fundamental requirement to so do. Development of the guidance note has begun and information about the consultation and publication dates will be provided through the RICS Telecoms Forum when the time comes.

Apart from this, RICS always supports professional discussion of emerging and challenging matters by members representing all parties involved. In this respect, [Ofcom](#) has emphasised the importance of positive, productive engagement and, as a complement to the new code, it has published a [Code of Practice](#) . This provides a framework to support landowners and operators in establishing, developing and maintaining effective working relationships across a range of issues, roles and responsibilities.

It is important to note that, while Ofcom?s code provides some examples of best practice, these are not intended to be exhaustive. As such, there is an expectation that members will always act in accordance with RICS? ethical and professional standards, and that conduct during the negotiation process will reflect the principles of the *Code of Practice*.

Sue Doane FRICS is a consultant chartered surveyor and RICS Telecoms Forum Board Member

Mark Talbot FRICS is Partner, Head of Telecommunications, [Carter Jonas LLP](#) and Chair, RICS Telecoms Forum Board

Further information

- Related competencies include [Legal/regulatory compliance](#) , [Smart cities and intelligent buildings](#) , [Valuation](#)
- This feature was taken from the [RICS Land journal](#) (October/November 2018)
- Related categories: [Telecoms](#)