The Product Security and Telecommunications Infrastructure Act 2022: clarifying the current landscape.

The Electronic Communications Code (the "**Code**") came into force in 2017 with the main objective of facilitating the rollout of digital infrastructure across the UK by giving telecommunications operators certain statutory rights when they install and maintain telecoms equipment on privately owned land. However, the Code failed to set out clear enough procedures on various issues, leading to frequent disputes between landowners and operators which have done little to provide a conducive environment for this swift rollout. Is the Product Security and Telecommunications Infrastructure Act 2022 the solution?

This high volume of litigation became one of the main driving forces behind the government issuing a consultation paper in January 2021, setting out its proposals to overcome various issues with the Code and inviting responses from the public.

The result was the Product Security and Telecommunications Infrastructure Bill which finally received Royal Assent on 6 December 2022, bringing (parts of) the Product Security and Telecommunications Infrastructure Act 2022 (the "**2022 Act**") into force[1]. Hot on the heels of this, Regulations came into force on 26 December 2022 to bring into force the new Part 4A process which enables operators to gain Code rights more easily in respect of multi-dwelling buildings (see further details in para 2 below). The 2022 Act is intended to support the rollout of future-proof, gigabit capable broadband and 5G networks, whilst addressing certain issues resulting from the Code.

Ironically, given the context of the Bill, the changes brought in appear to shift the balance yet further in favour of operators, so it remains to be seen whether the 2022 Act will provide sufficient "clarity" to minimise disputes between operators and landowners. Set out below are three of the key changes and a summary of the problem which they seek to solve.

1. Renewal process clarified?

The problem: *Anomaly of two different routes to renewing a Code agreement.*

One key issue flagged during the consultation was the renewal process once a Code agreement comes to an end. Part 5 of the Code introduced procedures for renewing and terminating Code agreements, but these procedures excluded leases which were already protected by other statutory frameworks. This meant that agreements completed prior to the introduction of the new Code ("subsisting agreements"), and under which operators already enjoyed security of tenure under the Landlord and Tenant Act 1954 (the "**1954 Act**") had to be renewed one more time under the 1954 Act, whilst agreements completed after the introduction of the Code were simply renewable under Part 5 thereof. This resulted rather anomalously in two different renewal regimes.

Renewal under the 1954 Act was generally more favourable to landowners than renewal under the Code and this anomaly has led to numerous disputes and recent litigation. For example, the 1954 Act required operators to give six to 12 months' notice to landowners (instead of 28 days under the Code) and was subject to the usual open market rental valuation assumptions for the renewal lease.

The solution: *Harmonisation in favour of operators.*

The 2022 Act introduces changes to the 1954 Act to ensure that the two legal frameworks are more closely aligned where operators are to renew under the 1954 Act but where the main aim of the renewal is to confer Code rights. Renewals of subsisting agreements will be brought within the Code's valuation scheme, likely resulting in lower rents for these Code operators. Jurisdiction for subsisting agreements under the 1954 Act is also to be transferred from the County Court to the First-tier and Upper Tribunal who deal with all other Code disputes.

It remains to be seen whether this harmonisation will have much impact on the status quo, as a number of subsisting agreements were already contracted out of the 1954 Act.

2. New process to tackle unresponsive occupiers

The problem: *Difficulty in accessing undeveloped land for telecoms use.*

Operators have shared that 40% of access requests receive no response.

Under the **Telecommunications Infrastructure (Leasehold Property) Act 2021** (the "**2021 Act**") which has already, on 26 December 2022, come into force (under Regulations bringing in the new Part 4A procedure mentioned in the introduction above), courts can now impose Code rights (limited to a period of 18 months) where tenants in occupation of a **multi-dwelling property** have requested that an operator install telecoms equipment in order to provide electronic communications services to the property, but the landlord is unresponsive to the operator's (multiple, formal) notices. This is known as the Part 4A regime.

[1] Certain provisions came into force on 6 December 2022, with others coming into force on 7 February 2023 and 17 April 2023 pursuant to regulations made on 2 February 2023.

This is helpful to operators, but given its narrow application simply to blocks of flats it continues to be difficult for operators to install equipment in undeveloped areas. Operators are often keen to utilise undeveloped land (e.g. fields) for cost reasons, but this can be challenging without open lines of communication and whilst rural landowners are only too aware of the lower rents likely to be available to them under the Code.

The solution: *New notification process.*

The Product Security and Telecommunications Infrastructure Act 2022 introduces a new procedure by which the courts may grant temporary Code rights (for a maximum period of six years rather than the 18 months limit available to them under Part 4A) to operators dealing with unresponsive occupiers of 'relevant land', (this is known as the Part 4ZA regime under the Code). The new process is open to all operators seeking Code rights to install electronic communications apparatus under or over (but not on) the relevant land to provide an electronic communications service.

It follows the same underlying principle as has been put in place previously under the 2021 Act but excludes land which already falls within the Part 4A regime under that legislation.

Similar to Part 4A, operators must follow a structured notification procedure (serving 4 separate notices, each 14 days apart) without receiving any response from the landowner in order for the new Part 4ZA order (imposing an agreement between the operator and landowner) to be made.

Exceptions and limitations

The Part 4ZA regime does not apply to land used as a garden, park or recreational area except where expressly specified by the Secretary of State through regulations. In the future it is therefore possible that the regime will be expanded by secondary legislation, to include developed land, e.g. land with offices on it, bringing owners of those assets within its scope.

Part 4ZA Code rights will cease when the six-year specified period ends. Rights can end earlier if a replacement agreement comes into effect or if the court refuses the operator's application for a replacement agreement. On expiry of the rights, grantors can require operators to remove electronic communications apparatus. Therefore, the rights granted by the Part 4ZA order are temporary and limited to six years, just as Part4A rights are temporary and limited to 18 months duration.

The coming into force of the 2021 Act and the granting of royal assent to the 2022 Act both serve as warnings (and incentives) for landowners to reinforce or prepare procedures for receipt of operator notices which are robust and ensure timely responses. Delay or failure to respond to such notices can expose landowners to the application of code rights against their properties with little or no further reference to them. Furthermore, there has been discussion during the consultation process about potentially widening the scope of these easier access procedures to commercial premises such as retail and business parks, so all landowners need to keep an eye on these developments.

3. Enhanced sharing and upgrading rights

The problem: *Limited rights to share existing apparatus.*

Prior to the 2022 Act, the automatic right for operators to upgrade and share apparatus did not apply to subsisting agreements. This meant that a new agreement would have to be put in place for operators to benefit from these rights.

This would impact particularly on operators who rely on a model of telecoms infrastructure sharing to reduce the cost of building new infrastructure. This difficulty for operators to share apparatus would also harm efforts to minimise their environmental impact, as operators would be pushed to install multiple sets of apparatus in the same area.

The solution: *Enhanced sharing and upgrading rights.*

Under the 2022 Act, the rights to upgrade and share apparatus will apply to subsisting agreements and equipment installed before the Code came into force. Such upgrading or sharing must not have an adverse impact on the land and must not impose a burden on any person with an interest in the land and, further, the rights will only apply to apparatus installed under the land.

4. Conclusion: Does the 2022 Act strike the right balance?

The 2022 Act sets out to further break down some of the barriers in place to the speedy and efficient rollout of digital infrastructure and to deal with some of the issues between landowners and operators that have seemingly dominated tribunal cases since the Code came into force.

Clearly some of the changes have been pared back with the rights of landowners in mind; the cap on the life of a Part 4ZA order, the requirement that sharing and upgrading rights do not adversely impact landowners being two examples. But, ultimately, the priority for the government, as shown through the provisions of the Code and the legislation that has followed, is to put the wider public interest in access to electronic communications ahead of private landowner rights.

Interestingly, certain proposed amendments were discarded during the consultation and approval process for the 2022 Act, including one to revisit the Code and subsequent legislation within three months of the 2022 Act coming into force. So, whilst we're unlikely to see any further official government discussion of this legislation in the short term, we suspect the tribunals will not be in a position to put their feet up on these issues just yet; if a good compromise is one that leaves both sides dissatisfied…

Contacts

Imogen Jones

Counsel, Real Estate
Tel: +44 20 7456 3663
imogen.jones@linklaters.com

Ela Oluwole

Trainee Solicitor, Real Estate
Tel: +44 20 7456 2159
ela.oluwole@linklaters.com

Tracey Kennedy

Senior Associate (Knowledge), Real Estate
Tel: +44 20 7456 4717
tracey.kennedy@linklaters.com

Kevin Tan

Associate, Real Estate
Tel: +44 20 7456 4294
kevin.tan@linklaters.com

Maheen Shoaib

Trainee Solicitor, Real Estate
Tel: +44 20 7456 3464
maheen.shoaib@linklaters.com

February 2023

linklaters.com

GC27507A_F/02.23