GUIDANCE NOTE : The Telecommunications Code

BACKGROUND

All telecommunications equipment owned by Code Systems Operators (companies licensed by OFTEL) is covered by the Telecommunications Code, which covers their statutory rights and responsibilities.

The Code is poorly drafted, and there is little case law to assist in its interpretation. The guidance below is provided by way of a layman's guide to the main provisions, but where any disputes arise, given the complexity of the drafting and the uncertainty of interpretation, members are advised to seek the advice of a solicitor who is expert in this area.

THE LEGAL BACKGROUND

The Code is included as Schedule 2 to the Telecommunications Act 1984. Not all telecommunications operators are subject to its provisions, and members are advised to check where there is any doubt.

THE TELECOMMUNICATIONS CODE

Most of the matters that affect landowners are included in Schedule 2 of the Telecommunications Act 1984, called the Telecommunications Code. This includes the provisions relating to the acquisition of rights in land but these rights are only available to some operators as the scope of each licence varies. Where they apply the companies are known as “Code Systems Operators”.

The Telecommunications Act is considered by many practitioners to be poorly drafted. Some sections of the Code appear to contradict others, and even Code Systems Operators do not agree amongst themselves how to interpret it. At the same time, any disputes under the Code are dealt with in the first instance by the County Court, which does not create binding case law. The CLA is not aware of any Telecommunications Act cases that have been appealed, and have thereby created precedents. Nor have we come across cases where the freehold of sites has been purchased under the compulsory acquisition procedures in the Act.

However, in order to provide an overview, the provisions of the Code which are most important to landowners are summarised together with commentary below. The paragraph numbers used below relate directly to the paragraph within the Code.

(2) Before taking any right in land, an operator is required to obtain the written consent of the occupier. Where the occupier gives consent, the agreement does not bind the landowner (or superior leaseholder) and in such cases a separate agreement must be obtained. Once given, such consents bind the successor to those equivalent interests but not to superior interests.

The consent covers the installation, maintenance, repair and alteration of apparatus with rights to keep it on the land and to inspect it.

The occupiers’ consent may be enough to enable the company to enter the land to lay cables. This is the case even where the owner has reserved the power under an agricultural tenancy agreement to grant such rights over the land. Moreover, the consent does not have to be under deed or a registrable interest in order to be binding. This means it is particularly important for the owner to make an agreement with the operator before entry, as the company might obtain rights to remain on the basis of the occupier’s consent.

In practice, companies have sought formal agreements from the landowner, rather than rely on the consent of the occupier, but members should be aware of the potential to be wrong footed in negotiations. Further, the CLA has seen wayleaves that have been
offered to members which do not offer the terms necessary for the protection of the owner's interests. Such wayleaves clearly have the power to bind the landowner that signs them under the Code, and termination is proscribed by other clauses (below).

(3) There is no right to obstruct any access to other land when erecting new apparatus without the consent in writing of the person concerned unless the occupier for the time being of the other land is otherwise bound by a right to interfere with or obstruct the access. This may be relevant where a landowner is affected by the laying of landlines on neighbouring land. If an operator blocks an access it will be in breach of the Code, and can be both taken to court and reported to Oftei.

The operator can apply for the court to grant consent against the wishes of the occupier, but in doing so the court may also order payment on a willing landlord willing tenant basis (see paras 5-7 of the Code below).

(4) Any rights acquired by agreement shall be deemed to have been taken in the exercise of a statutory power and compensation is to be paid to reflect the diminution in value of land caused by the apparatus. This provision does not sit well with the provisions of (5-7) below. The best-argued and reported case on the terms to be set by the court is "Mercury Communications V London & India Dock Investment Co". In that case the judge decided that the terms, including rent, of any agreement made by order of the court should be on the basis of a willing landlord/willing tenant, having regard to the telecommunications use to be made of the land and comparable evidence from other similar market transactions. This is very different to the payment of compensation for the diminution of value under statute (see Part 1 above), and landlords have consistently and successfully held out for commercial terms for rights to site telecommunications cables in private land.

However, it should be noted that whilst the occupier is entitled to willing landlord willing tenant payments, this paragraph may be interpreted as granting the residuary owner of any interest in the land entitlement only to compensation under the compensation code as described in Part 1 above.

(5-7) Where there are difficulties in securing an agreement with an owner or occupier, the company can submit an agreement requesting that it be returned within 20 days. If no consent is given the company can apply to the county court for an order and, if the court considers that the installation is more important to the company's public system than the loss to be suffered by the owner or occupier, an order can be made to grant rights in the land.

The court will specify the terms on which the right is to be exercised, ensuring that payment is made, on the basis that it is fair and reasonable and that the right has been granted as between willing landlord and willing tenant. In addition payment will be ordered for any loss or damage suffered.

There are few Telecommunications Act court hearings, as companies prefer to come to mutual agreements with landowners. However, this procedure should be noted as it comes into effect under (21) below, and it remains to be seen whether companies will seek to invoke their rights under the Code when, for instance, an existing agreement expires at the end of the term granted.

(17) After above ground apparatus, which is new or substantially different from the previous installation, is installed an owner or occupier either of the land on which it stands or of land which is nearby, can make a formal objection seeking its relocation or alteration on the basis that the enjoyment of that property is substantially affected. If pursued through the court the company can be ordered to make changes.

It is believed that this power is only applicable in exceptional circumstances.

(19) Where a tree obstructs or interferes with apparatus the company can require the tree to be felled or trimmed. If it is not, the company can do the work itself but must do so in a proper and workmanlike manner. Where the owner or occupier does the work he can claim for the cost incurred and any other losses.

(20) An owner or occupier has power to seek the alteration of apparatus where it interferes with any improvement, change of use or new development scheme. The company can serve notice resisting the request and it is then for the county court to decide. Where alternative arrangements can be made which do not substantially affect the public telecommunications system the alteration should be ordered.

Unlike the electricity industry, this opportunity applies equally to rights that have been granted for a capital sum as to those for which an annual wayleave
payment is made. However, the cost of such alterations can be reclaimed from the owner or occupier who makes the request, and may be substantial. This argues the need for care on siting of telecommunications apparatus, and a redevelopment clause in any wayleave agreement placing the costs of relocation on the company in cases where it is considered apparatus may interfere with the future development plans for the holding.

(21) Where an agreement permits the owner or occupier to terminate (and paragraph 20 does not apply) the company can nonetheless apply to the court for an order to retain the apparatus against the will of the owner. If the company is successful in court a permanent right in the land will be created but full compensation will be due.

It remains to be seen how the courts are likely to interpret the restrictions on the removal of telecommunications equipment available to companies under the Code. It is open to the occupier to argue for willing landlord willing tenant payments and other terms if the court agrees the apparatus may remain in situ.

(22) Where apparatus is abandoned and is not likely to be used again, the company must remove it. In the case of underground apparatus it is open to the owner to allow the apparatus to remain and agree a payment in lieu of its removal.

While this gives a statutory right for removal to the landowner, members are advised to ensure any agreement is made on the basis that reinstatement is to be to the satisfaction of the landlord, for the avoidance of doubt.

(28) This code applies to all apparatus whether installed before or after the Act came into force.

This summary provides only a brief guide and reference should be had to the full Code and to solicitors with experience in its interpretation where specific guidance is required.

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COUNTRY LAND & BUSINESS ASSOCIATION