

Papers

The Digital Economy Act: What surveyors need to know about changes to the law on telecommunications equipment

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ABSTRACT

This paper suggests that, given the imminent implementation of the new Electronic Communications Code under the provisions of the Digital Economy Act 2017, property owners and their surveyors and valuers should act now to review what telecommunications equipment they have on their property, the legal basis upon which it is installed and whether any action should be taken.

Keywords: *electronic communications code, Digital Economy Act, telecommunications equipment, commercial property, landlord, property owner*

Many buildings nowadays have telecommunications equipment on them, and being able to recognise such equipment will be important in relation to many aspects of the work undertaken by surveyors (see Figures 1 and 2). Identifying telecoms equipment and reporting its existence to a client may be an important element of a survey, whether or not the client has given specific instructions in relation to such equipment. The need to report on such equipment may be implicit, given the impact it may have on the client's intentions for the property.

A building surveyor undertaking an acquisition survey will need to flag up the presence of any such equipment to their client, because it may have a significant impact on their intentions for the property or their ability to maintain the property. For example, their client may be looking to purchase a residential block with a view to adding further accommodation on top. Such a project might require the removal of telecommunications equipment from the roof of the block in order to deliver



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Figure 1: Telecommunications equipment mounted on a tower



Figure 2: Telecommunications equipment sited on a rooftop



Figure 3: Existing telecommunications equipment may need to be removed to enable a property to be extended

the client's intentions for the property (see Figure 3). This should raise questions as to both the practical means by which this might be achieved and also, perhaps more importantly, whether there is in fact a legal basis upon which this can be achieved. Can the agreement for the equipment be terminated so as to facilitate the removal of the equipment and the achieving of the client's objectives?

A valuer instructed to produce a valuation of a property will need to have regard to the presence of any electronic communications equipment, both in terms of the income such equipment might generate and whether it might have any detrimental impact on the value of the property more generally. For example, if a roof is in poor repair and is going to need remedial work in order to facilitate letting, can this be achieved with the electronic communications equipment *in situ*? If not, can the equipment be removed or relocated temporarily and, if so, at what cost and to whom?

Where equipment is present on a property, then it will need to be maintained. This will require access by teams of engineers and raises questions as to whether that will affect the client's intentions for the property. Will access at any time of day or night cause a problem? Will increased access requirements as a consequence of additional telecommunications equipment and users being added cause any concern?

These are all issues that need to be considered by professionals advising their clients in relation to property that already has telecommunications equipment upon it or in circumstances where their clients are considering entering into agreements to permit the installation of such equipment. For buyers, owners or occupiers of property, failure to take competent advice can be a costly mistake. For those providing such advice, it is important the advice is up to date and in terms of telecommunications equipment this includes advising on the impact of the Digital Economy Act 2017.

SURVEY AND DUE DILIGENCE

Surveyors will be at the forefront of protecting their client's interests in relation to property and as telecommunications equipment is something that could have a significant impact on those interests, it is important that they are able to recognise and report on that issue, or at least to identify it in order that further specialist advice can be taken.

The first issue is identifying the existence of such equipment: when undertaking surveys of property, any sign of any electronic communications equipment should give rise to further queries as to what it is, why it is there and, most importantly, by what legal basis. This requires a process of due diligence that can involve detailed physical inspection but also review of the legal documentation granting permission to keep the equipment upon the property. A client intending to acquire a property for redevelopment purposes may be aware of the presence of telecommunications equipment and may indeed be reassured by the fact that the agreement for its installation includes a six-month redevelopment break option. If they proceed to acquire the property on the basis that they can simply serve six months' notice and then will obtain vacant possession in order to proceed with their redevelopment plans, they may be disappointed. In addition to identifying what equipment is physically present on site and the legal basis for it being there, it is important now to consider the implications of the new legislation. Similarly, this needs to be considered in the context of granting any new agreement for installation of telecommunications equipment.

DIGITAL ECONOMY ACT 2017

The Digital Economy Act 2017 is a substantial piece of legislation that seeks to achieve a number of legislative aims, including such diverse matters as billing limits on mobile phones and regulation of online

pornography. It also provides for a new Electronic Communications Code, which is the piece of legislation that gives telecommunications operators statutory rights to install and keep electronic communications equipment on property. This code, found at Schedule 1 to the Act, changes the rights available to telecommunications operators in a number of respects, which should be of particular interest to property professionals who may come across and be called on to advise in respect of property upon which telecommunications equipment is situated. In this paper there is neither space nor need to discuss the detail of each and every provision of the new code, but instead it will review some of its most significant aspects.

It should be noted, however, that while the Act received Royal Assent in April 2017, the actual implementation of the new code will take place some time later (unconfirmed reports suggest late 2017). Property owners with telecommunications equipment on their property, and those who advise them, should therefore currently be reviewing what equipment is present, on what legal basis it is there, and whether it would be prudent to consider taking action to remove it before the new code comes into operation.

CODE RIGHTS

The new code, like the old, is about code rights and therefore the starting point is to consider the definition of code rights, set out at paragraph 3:

‘For the purposes of this code a “code right”, in relation to an operator and any land, is a right for the statutory purposes:

- (a) to install electronic communications apparatus on, under or over the land,
- (b) to keep installed electronic communications apparatus which is on, under or over the land,
- (c) to inspect, maintain, adjust, alter, repair, upgrade or operate electronic

communications apparatus which is on, under or over the land,

(d) to carry out any works on the land for or in connection with the installation of electronic communications apparatus on, under or over the land or elsewhere,

(e) to carry out any works on the land for or in connection with the maintenance, adjustment, alteration, repair, upgrading or operation of electronic communications apparatus which is on, under or over the land or elsewhere,

(f) to enter the land to inspect, maintain, adjust, alter, repair, upgrade or operate any electronic communications apparatus which is on, under or over the land or elsewhere,

(g) to connect to a power supply,

(h) to interfere with or obstruct a means of access to or from the land (whether or not any electronic communications apparatus is on, under or over the land), or

(i) to lop or cut back, or require another person to lop or cut back, any tree or other vegetation that interferes or will or may interfere with electronic communications apparatus.'

Assignment of code rights

Where property owners have entered into agreements for telecommunications equipment in the past, the ability to control what equipment was placed on their property, and by whom, was often an important element of any legal agreement.

The desire to restrict the ability of telcoms operators to assign their rights or to share them with other operators might be motivated by a need to limit the number of people accessing the site — perhaps of particular importance in relation to a rooftop site where anyone needing access might have to travel through the building, potentially disturbing the occupiers (see Figure 4).



Figure 4: Accessing telecommunications equipment sited on rooftops may cause disturbance to the building's occupiers

Alternatively the site provider might be interested in restricting use of the site in order to extract maximum value from it. It is common for an agreement with a telecommunications operator to include provisions that if they do share use of the site, then a share of the income generated from doing so will be paid to the site provider — an arrangement generally referred to as a ‘payaway’.

This ability to restrict assignment and sharing is swept away by the provisions of the new code, which seeks to effectively grant unrestricted rights to share the use of telecoms sites with other operators and voids any contractual terms purporting to restrict assignment of the rights.

‘This Part of this code makes provision for:

- (a) operators to assign agreements under Part 2,
- (b) operators to upgrade electronic communications apparatus to which such an agreement relates, and
- (c) operators to share the use of any such electronic communications apparatus.’

This provision is significant in that it has the consequence that it is no longer possible for a site provider to enter into a telecommunications agreement with just one operator and to be able to restrict the use of that site to that operator. They may find that in due course that agreement has been assigned to an operator, or operators, whom they would not have chosen to allow onto their property. Where a landowner might previously have taken the view that they could cope with engineers from one telecommunications company having access to their property, they now have to be prepared for the possibility of repeated visits by engineers from all the different operators who take up occupation. Particularly with regard to high-rise properties, this could potentially impose a

significant burden in terms of facilitating and managing access.

IMPOSITION OF AGREEMENTS

Paragraph 19 provides the ability for telecommunications operators to seek code rights over property against the will of the owner.

‘This Part of this code makes provision about:

- (a) the circumstances in which the court can impose an agreement on a person by which the person confers or is otherwise bound by a code right,
- (b) the test to be applied by the court in deciding whether to impose such an agreement,
- (c) the effect of such an agreement and its terms,
- (d) the imposition of an agreement on a person on an interim or temporary basis.’

The previous code incorporated similar provisions which were, in practice, generally rarely used to acquire sites but were more regularly deployed in response to a demand for vacant possession of a site by the site provider. The new code effectively imposes a more benign test for the court to consider in relation to the granting of rights to telecommunications operators; therefore any property owner served with notice by a telecommunications operator of the intention to forcibly acquire rights should be provided with specialist advice as to when and how to respond if they may not want their property to be encumbered by such rights.

This ability to seek rights by compulsory acquisition also has a further impact which needs to be considered in the context of the granting of new telecommunications agreements and the renewal of extant ones. This is one for the valuers and relates to the sums to be paid for the rights that the operator(s) seek to acquire. Consideration for the grant

of the rights is dealt with at paragraph 24 of the code, which effectively imposes an 'open market value' regime with some specific assumptions at sub-paragraph 3:

'The market value must be assessed on these assumptions:

- (a) that the right that the transaction relates to does not relate to the provision or use of an electronic communications network;
- (b) that paragraphs 16 and 17 (assignment, and upgrading and sharing) do not apply to the right or any apparatus to which it could apply;
- (c) that the right in all other respects corresponds to the code right;
- (d) that there is more than one site which the buyer could use for the purpose for which the buyer seeks the right.'

At this stage it suffices to say that there is much debate among agents specialising in telecommunications sites as to how this will be interpreted by the courts, with the main focus of discussion being as to precisely what sub-paragraph 3(a) relates to, which on the face of it seems to require that the site be valued as something other than a telecommunications site. In practical terms, again it is important that any site provider contemplating the grant or renewal of an agreement conferring code rights should ensure that they receive specialist telecommunications valuation advice in addition to specialist legal advice on the drafting of the terms to be incorporated in the agreement.

TERMINATION OF AGREEMENTS

The provisions of the new code are likely to be perceived as imposing further burdens on site providers, in terms of both the day-to-day management of their estate and also potentially limiting their options for their properties going forward. Couple this with

the uncertain position as to the determination of rent for the imposition of rights which can reasonably be expected to be set up as a backdrop to negotiation of rents on renewals and the granting of new site agreements, and one might conclude that there is little benefit for site providers in allowing telecommunications equipment on to their property. Site providers might conclude that where equipment is already present upon their property, then their best course of action is to simply seek to remove the equipment. Property owners who already have equipment upon their land and who may be considering some (even remote) possibility of development in the future would be wise to look at whether they should be taking action to remove the equipment before the new code comes into force.

But why is that?

It is because of the regime which is introduced by the new code in respect of the mechanism for terminating agreements of telecommunications sites. This regime is not dissimilar to the security of tenure granted to tenants of business premises under the provisions of the Landlord and Tenant Act 1954. There is a requirement to give notice to terminate the agreement and any such notice must state a specific ground for terminating the agreement, for example, paragraph 31 (4) (c):

'(c) that the site provider intends to redevelop all or part of the land to which the code agreement relates, or any neighbouring land, and could not reasonably do so unless the code agreement comes to an end.'

The fundamental difference, however, is that the notice period required to be given under the 1954 Act is between six and 12 months, whereas under the code it is 18 months. Any site provider who may be contemplating redevelopment needs to be

aware, therefore, that in addition to considering when the contractual terms of their agreement come to an end (or can be brought to an end by operating a break clause) there is this new statutory requirement for a minimum of 18 months' notice to be given to the telecommunications operators on the site.

Once notice has been served by the site provider, there is a mechanism by which the telecommunications operator(s) can serve a counter notice and then make an application to the court to oppose the notice or to seek new rights. In reality, therefore, this may require a protracted period of litigation to achieve the determination of the agreement — something that needs to be factored into the appraisal of any potential development site. For this reason site providers who have a site that may be suitable for redevelopment at some point should give consideration as to whether they may be able to terminate their agreements before the provisions of the new code come into effect.

REMOVAL OF ELECTRONIC COMMUNICATIONS APPARATUS

For any site provider who comes to the conclusion that they wish to remove telecommunications equipment from their property after the new code is implemented, then simply being able to bring about the termination of the agreement does not enable them to actually remove the equipment. For this they need to turn to the provisions of Part 6 of the new code, which deals specifically with the removal of apparatus.

The first step that is required to secure removal is to serve notice on the relevant

operator(s). This notice has to provide for a reasonable period of time for the operator(s) to remove their equipment and to reinstate the property. The code then envisages a period of discussion within which the landowner and the operator(s) agree arrangements for the removal and reinstatement of the land, but if this is not agreed within 28 days of the service of notice, then the site provider can initiate court proceedings seeking an order for the removal.

CONCLUSION

For many years telecommunications equipment has proved to be a welcome additional source of income for many property owners. This was against the backdrop of a regulatory regime that enabled site providers to control the extent of use of their property, by whom their property was used, what they should be paid for the use of their property, and all this in circumstances where they could be reasonably confident of securing the removal of the equipment if they wanted to do something else with their property.

The new code, when it comes into force, will change all of this and will prevent the site provider limiting who uses their property, securing payment for the burden of additional use and the ability to recover possession of their site relatively swiftly and cost-effectively. In the light of these proposed changes, property professionals advising in relation to sites with electronic communications equipment on them, or where the permitting of such installation is contemplated, should ensure that their clients are given full advice on the implications of the Digital Economy Act 2017.