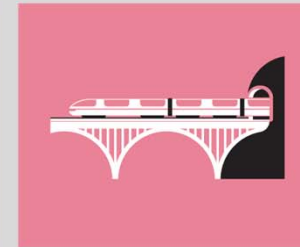
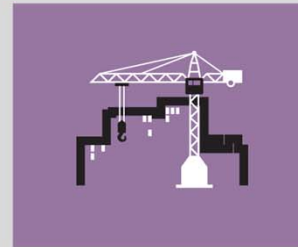


THE DRAFT ELECTRONIC COMMUNICATIONS CODE (“DECC”): What is coming our way?

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WHAT WAS WRONG WITH THE OLD ECC: BETTER THE DEVIL YOU KNOW?

- “In my view it must rank as one of the least coherent and thought-through pieces of legislation on the statute book. Even its name is open to doubt. Although section 106 of the Communications Act 2003 says that the code set out in Schedule 2 to the Telecommunications Act 1984 is referred to as "the electronic communications code" in "this Chapter", the amendments made by the 2003 Act did not include changing the title to Schedule 2, so that in Schedule 2 itself it is still called "The Telecommunications Code". I have simply called it the Code.”

Lewison J (now Lewison LJ)

Bridgewater Canal Company Ltd v Geo Networks Ltd [2010] EWHC 548 (Ch), paragraph 7.

SHORTCOMINGS

- Poor drafting: e.g. paragraph 21: when is one “entitled” to “require removal”?
- Poor “fit” with the rest of the law: (a) what does paragraph 20 in fact “do”; (b) how (if at all) does ECC fit with the Landlord and Tenant Act 1954?
- Staleness: legislation is slow, technological development is fast: ECC is not able to keep pace with industry innovation, such as the use of WIPs, network sharing, and the continual need to review and upgrade apparatus.
- That said, the legal and industry sector has worked with it for over 30 years, and we have found practical a way to rub along. Was there a case for letting sleeping dogs lie?

DRIVERS FOR REFORM

- More efficient procedures needed for securing and terminating rights.
- “No scheme” compensation to restrict the ability of private landowners to “profit” from “public” electronic communications infrastructure.
- Assignment, upgrading and sharing rights
- Protection of Wholesale Infrastructure Providers (WIPs)
- Clarification of the relationship between Mobile Network Operators (MNOs)
- A more coherent legislative framework

FUNDAMENTAL CONCEPTS OF DECC

- This talks will necessarily be an overview but I will try and alight on the most immediately interesting points that will need to be chewed over before DECC comes into force. There are other points: see paper.
- “OPERATOR”: **para 2 DECC**
- “CODE RIGHT”: **para 3 DECC**
- “STATUTORY PURPOSES”: **para 4 DECC, and paras 6 & 7**
- “ELECTRONIC COMMUNICATIONS APPARATUS” **para 5 DECC**
- All are necessary elements for a “voluntary” agreement within **Part 2 of DECC**, or and “involuntary agreement” imposed under **Part 4 of DECC**.

A CLOSER LOOK AT SOME OF THOSE CONCEPTS “CODE RIGHTS”

- **Para 3 DECC**
- Single, composite right (not as suggested in the plural title to para 3)
- Install
- Keep
- Inspect, maintain, alter, repair, upgrade or operate
- Installation works
- Repair etc works
- Entry to inspect or carry out works
- Connect to power (the “Taggart Amendment”)
- Interfere with access
- Lop trees
- **IMPLEMENTS (SUBJECT TO paras 13, 15 & 16) SHARING AND UPGRADING POLICIES; SEE BELOW**

A CLOSER LOOK AT SOME OF THOSE CONCEPTS “STATUTORY PURPOSES”

- The Code Right must be enjoyed for “statutory purposes”
- **Para 4 DECC**
- Twofold purposes:
 - Provision of the operator’s (own) network
 - Provision of an infrastructure system
- **Paras 6 & 7 DECC**
- **Para 6:** “network” of operator
- **Para 7:** system of infrastructure as is available for providers of (third party) electronic communications networks
- **IMPLEMENTS THE POLICY TO PROTECT WIPS**

A CLOSER LOOK AT SOME OF THOSE CONCEPTS “APPARATUS”: PART 1

- **Para 5 DECC**
- Defines apparatus by reference to a list of four – on the face of it broad: apparatus for a communications network, transmission equipment, lines and “other structures or things” ancillary to network.
- BUT! “Structures” *“includes a building only of the sole purpose of that building is to enclose other electronic communications apparatus”*
- I.e. an equipment room or a cabin.
- NOT open land, or rooftops, or other structures that can be used to site apparatus.

A CLOSER LOOK AT SOME OF THOSE CONCEPTS “APPARATUS”: PART 2

- Key issue here is the potential undercutting of the policy that MNOs should not be able to assert rights against other MNOs or WIPs
- Achieved by drafting technique in **para 9 DECC**: Code Right can only be conferred in relation to “land” (**not** apparatus).
- If an MNO obtains a right to use apparatus, not a Part 2 right and not protected.

A CLOSER LOOK AT SOME OF THOSE CONCEPTS “APPARATUS”: PART 3



A CLOSER LOOK AT SOME OF THOSE CONCEPTS “APPARATUS”: PART 4

- MNOs often require not just the use of apparatus, but of surrounding land. What happens if an agreement is reached entailing use by MNO “B” of an MNO “A”’s apparatus under a sharing agreement (not within Part 2), but necessitating the use of land in the vicinity demised to MNO A (which would be “land” and to that extent within the definition).
- This seems an imperfect implementation of the policy

PART 2 AGREEMENTS

- An **agreement (writing, signed, term length, termination provision)** with an “**occupier**” conferring a **Code Right** in relation to **land** on an “**operator**” gives rise to a Part 2 Agreement.
- Presumably if does not comply, does not and agreement is outside DECC.
- Confers access to land (**para 13**), assignment rights (**para 15**) and a right to upgrade or share apparatus (**para 16**)
- Time does not allow for consideration of CPO powers under Part 4 DECC- see paper or see you at PLA in March!
- Right to require operator to disclose existence of Code Rights (**para 38 DECC**)

A CLOSER LOOKS AT PART 2 AGREEMENTS: SHARING & UPGRADING POWERS

- Implements the policy that MNOs should be allowed to share and upgrade as a matter of default.
- Renders exclusions or restrictions void
- **Para 16(1) DECC** imposes conditions on the exercise of both powers
- Condition 1: “no adverse impact, or no more than a minimal impact, on appearance”
- Condition 2: “no additional burden” (meaning adverse impact on enjoyment or additional loss, damage or expense)
- Over to the lawyers: what do the two conditions mean?

ENDING THE AFFAIR: A TALE OF TWO PARTS

- Part V (termination) and Part VI (removal)
- Part V must be complied with if (**para 28**)
- There is not a lease but a licence or sui generis agreement; or
- There is a lease, and that lease is intended to be primarily an “electronic communications” (“e-coms”) lease outside the 1954 Act (unless it is only out because it has been contracted out under section 38A of the 1954 Act).
- After DECC comes into force, a lease which is primarily a telecoms lease will always be outside the 1954 Act, due to the amendment in Schedule 3 of the DEB to section 43 of the 1954 Act.
- When is a lease not “primarily” a e-coms lease? Law Com 336 at 6.85 *et seq.*

PART 5 TERMINATION PROCEDURE

- Termination under Part V: a notice procedure
- Statutory continuation of Code Rights under **para 29 DECC** until determined
- The giver of the notice is the “site provider” defined as the person on which the right is binding (**para 29(1)(a) DECC**).
- **Para 30 DECC** notice must be given in prescribed form, and must specify a date (a) 18 months post notice and (b) after the date on which could terminate
- **Part 30 DECC** notice must state a statutory ground of termination, reminiscent of section 30 of the 1954 Act from which Law Com drew inspiration. Essentially “tenant default” or development intended.
- Operator has 3 months to give counter-notice and then three months after that to apply to the Court for an order under **para 33 DECC**.
- That application will trigger consideration of whether the Code Right should be terminated under the specified ground in the **para 30** notice.

TERMINATION OUTSIDE PART 5

- If Part 5 does not apply (i.e. that it was a lease which was not within Part 5), but the agreement relates to apparatus and is a Part 2 agreement, then the contractual or common law termination procedures have to be complied with.

PART 6 REMOVAL PROCEDURE: GROUNDS

- Part 6 allows removal
- There are **several gateways** into Part 6:
- This time, removal lies in the power of the “landowner” (defined as a person with an interest in land; contrast “occupier” under Part 2 and “site provider” under Part 5).
- Ground 1: Never bound
- Ground 2: Code Right is at an end
- Defence to Grounds 1 & 2 land is still occupied by a person who conferred the right in question or landowner is otherwise bound, and the Code Right was lawfully conferred.
- Ground 3: Obsolete kit that won't be re-used
- Ground 4: Ceasing to be an operator
- Ground 5: transport land or street works ground (outside scope of talk)

PART 6 REMOVAL PROCEDURE: NOTICES

- Must give “reasonable” (!?) notice under **para 39 DECC**
- No agreement as to time, mode or removal within 28 days, right to go to Court.



ADVISING DEVELOPER LANDOWNERS

- Clearly, the days of the “rolling redevelopment break” under para 20 ECC are over.
- So too are the days of the single para 21 notice with a 28 day response period.
- Much more future planning and estate planning will be necessary.
- An 18 month notice period to **terminate**
- Plus Court to establish grounds
- Plus a removal notice under Part 6
- Plus Court if no agreement to remove
- Lead in times may be substantial.

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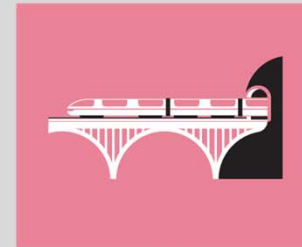
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