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Code of conflict for data centres

Electronic Communications Code As the Law Commission publishes proposals for reform of the Code, Michael Hutchinson and Richard Tilbrook consider the law that allows operators to install and maintain telecoms apparatus on public and private land

In today's technological era, increasing volumes of data need to be stored, and the overwhelming reliance on data centres is becoming greater and more critical to the operation of business and government.

The Electronic Communications Code (Code) is applied by Ofcom to certain network operators who, as "Code operators", have rights to install and maintain their telecoms apparatus on public and private land. The Code regulates the legal relationships between landowners and operators and enables those operators to acquire rights over land.

The fact that Code-protected entities frequently outsource their data centre requirements and that the equipment installed within data centres is likely to qualify for protection pursuant to the Code means that this asset class is arguably the most likely to see Code issues causing conflict between landlords and tenants. This leads to uncertainty for both parties and is of particular concern to the data centre industry as its growth depends on its ability to acquire land and infrastructure.

Getting possession

There is a particular tension between the Code and the Landlord and Tenant Act 1954 (the 1954 Act) in that the rights of the Code can, in certain circumstances, override express contractual agreements between parties.

To take an example, an operator has its apparatus on the landlord's land pursuant to a lease that is protected by the 1954 Act and the Code. The lease term expires and the landlord wants to redevelop. It must therefore serve notice under the 1954 Act to oppose the renewal of the tenancy and terminate the operator's rights under the Code.

Paragraph 20

There are two ways to terminate an operator's rights under the Code. Paragraph 20 allows the landlord to give notice to the operator that it requires the removal of its apparatus. However, it must be able to satisfy the court that such removal is necessary and will not interfere with any service that is likely to be provided by the operator. The court can order the landlord to reimburse the operator for any expenses incurred in connection with the removal of its apparatus. This could, of course, be a



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substantial liability, possibly including the cost of relocating the operator to another site.

When relocating a data centre, this will usually mean setting up a new, parallel facility before it will be possible to commence the decommissioning of the previous facility. As such, there is typically a very large cost associated with such a move as it will not be possible for the tenant to re-use existing equipment. While it is unlikely that a landlord would be held liable for the whole of any such costs, there is sufficient uncertainty as to the extent of its liability for costs to make this route unattractive to a landlord.

Paragraph 21

The alternative is para 21 of the Code, which provides that a landlord cannot require removal of the apparatus without going through the correct Code procedure. This involves the landlord serving a notice on the operator asking it to remove its apparatus. The operator can then serve a counter-notice protecting its right to retain the apparatus and if the parties cannot reach agreement, the landlord can go to court for the issue to be determined.

However, before a landlord can get to this stage, it must be in a position to serve a valid notice, and this is where the conflict between the Code and the 1954 Act becomes apparent. This is because such a notice is only capable of being validly served by a person who is "entitled" to require the removal of the operator's apparatus. It has been argued that a landlord of a 1954 Act-protected lease is

not so "entitled" where the operator has a renewal right and that right has not been disposed of.

This suggests that a landlord will have to serve notice under the 1954 Act first and wait until that is finally disposed of by the court, before giving notice under para 21 of the Code. However, there is an argument that a landlord will not be able to prove his intention to go into occupation or redevelop the land in the 1954 Act proceedings because there is a subsisting Code protected occupier on site. Landlords are therefore trapped between two different security of tenure regimes.

The solution?

The Law Commission has recently published proposals for reform of the Code.

A key suggestion is to limit the interaction between the Code and the 1954 Act. In short, it proposes that a lease granted primarily to confer Code rights should not fall within the scope of the 1954 Act. If a lease is not granted for this purpose, the act could apply and the Code could not.

The Law Commission's attempt to clarify the procedure for terminating Code rights is to be welcomed. With any luck it will give the necessary comfort to data centre landlords to grant more agreements to operators in the knowledge that there is now a clear termination mechanism.

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