

Financial terms of agreements under the Electronic Communications Code

Guidance for public sector bodies

UPDATED 27/08/2020: This updated guidance reflects recent Tribunal determinations on Code agreements

As with any other term of an agreement to host digital communications infrastructure, financial terms should be agreed, wherever possible, on a consensual basis between the parties. However – as with other terms - it is important to note that these agreements are underpinned by a statutory framework, (the Electronic Communications Code – “the Code” - as set out in the Communications Act 2003, amended by the Digital Economy Act 2017).

Amongst other things, the Code sets out how a court should determine the financial terms for rights under the Code (where these cannot be reached on a voluntary basis and the court considers it appropriate for an agreement to be imposed).

Government Departments, other public sector bodies, valuation experts and legal advisers should note Government’s clear hope and expectation that these reforms will lead to significant reductions in the amounts paid for rights to install and maintain digital communications infrastructure. The Regulatory Impact Assessment which was published with the Digital Economy Act 2017, provides further information about this.

Government also encourages departments, other public sector bodies and their valuation experts and legal advisers to familiarise themselves with this statutory framework, particularly when negotiating the financial terms of an agreement.

The Code provides for two forms of remuneration: Consideration and Compensation. Departments, public sector bodies and their valuation experts and legal advisers are encouraged to familiarise themselves with the legislative framework and relevant Tribunal determinations when negotiating financial terms.

The difference between Consideration and Compensation

The Code makes separate provisions for both consideration and compensation and the balance of consideration and compensation elements is likely to vary on a case-by-case basis, reflecting site-specific circumstances and issues. Under the “old Code”⁽¹⁾, new agreements tended to focus on a single payment, combining both elements, in the form of annual rent. Emerging case law suggests that under the “new Code”⁽²⁾, this practice appears to be continuing.

However, it is important that when assessing any payment under the Code, there is full clarity and transparency on how the different components that make up the overall payment are assessed, to avoid double counting. In approaching the assessment of consideration and compensation, it is sensible to explicitly identify the factors that fall under both these headings to (i) avoid double counting and (ii) ensure all claim headings are properly considered.

REMINDER: the assessment of consideration under paragraph 24 of the Code is not an assessment under a compulsory purchase regime. The legislation provides for a separate assessment of consideration and compensation as they are sums payable for different things. Payment under one or both headings may be applicable depending on the circumstances of each case.

- The full definition of Consideration is in paragraph 24 of the Code. Readers are encouraged to familiarise themselves with it as this guidance should not be read in substitution of it, or indeed any other term mentioned here.
- For the purposes of this document, in general terms it is a one-off or periodic payment representing the value of the right to use the land for the term, on the terms that have been agreed or imposed. It represents, as the Code states, the market value of the site provider’s agreement to be bound by the Code rights.
- Compensation, on the other hand, represents loss or damage sustained (or that will be sustained) by the site provider as a consequence of the agreement reached or imposed. It is the monetary equivalent of the loss or damage sustained. For more detail, see paragraph 25 and Part 14 (i.e. paragraphs 83 to 86) of the Code.

Consideration

Key points:

- need to disregard telecoms use

¹i.e. the Code as it existed before it was most recently amended by the Digital Economy Act 2017.

²i.e. the Code as it now exists following its most recent amendment by the Digital Economy Act 2017.

All references to “the Code” in this guidance are, unless specified otherwise, to this version of the Code.

- other / alternative uses to which the land or asset may reasonably be put can be relevant
- nominal consideration may be appropriate where, realistically, the characteristics of the land or asset mean no-one would pay anything for them.

Background

The Government's 2016 response to its consultation on reforms to the Electronic Communications Code announced that 'site providers should continue to receive fair payment (consideration) for the use of their land and that this should be in addition to simple compensation for any damage or loss of value to the land'. Additionally, as a matter of principle, payment should not include a share of any economic value created by demand for electronic communications services.

The statutory basis of the consideration element is found in paragraph 24(2) of the Code. It requires the assessment of market value being:

'the amount that, at the date the market value is assessed, a willing buyer would pay a willing seller for the agreement:

- (a) in a transaction at arm's length
- (b) on the basis that the buyer and seller were acting prudently and with full knowledge of the transaction and
- (c) on the basis that the transaction was subject to the other provisions of the agreement imposed by the order under paragraph 20.'

This assessment is subject to the following specific provisions of paragraph 24(3):

'The market value must be assessed on these assumptions:

- (a) the right that the transaction relates to does not relate to the provision or use of an electronic communications network [i.e. the "no network assumption"]
- (b) paragraphs 16 and 17 (assignment, and upgrading and sharing) do not apply to the right or any apparatus to which it could apply
- (c) the right in all other respects corresponds to the code right and
- (d) there is more than one site which the buyer could use for the purpose for which the buyer seeks the right.'

What is consideration and what is being valued?

The key point is that the asset to be valued is the relevant person's 'agreement to confer or be bound by the Code right (as the case may be)', noting that the definition explicitly refers to both parties being willing.

It is therefore necessary for the key terms of the agreement to be identified first because these will have a bearing on the market value of consideration. The

appropriate agreement terms will normally reflect the current practice in the market within which the property is situated. For example, matters such as the duration of the agreement, the frequency of rent reviews (if any) and the responsibilities of the parties for maintenance and outgoings can all affect the market rent assessed under the consideration principles.

A practical consequence of the fundamental change to the statutory definition of consideration introduced by the 2017 reforms is that there is presently a relative lack of available empirical data on which to base a valuation judgment. In these circumstances, transparency plays an important role in smoothing the process of negotiating new agreements in an embryonic market. Therefore, in the absence of any overriding commercial or legal requirement, thought could be given to limiting the use of confidentiality clauses, as their inclusion would constrict the availability of comparable evidence.

Possible approaches

The valuation exercise to be undertaken follows conventional lines with the inclusion of the assumptions of a willing buyer and of a specific transaction on a particular date and terms, in the open market with all the features present in that market. There are, though, some factors specific to the Code such as the no-network assumption, which are critical to the outcome.

Recent case law⁽³⁾ acknowledges that **other uses** to which the asset/property might be reasonably put may be considered even though the only permitted use under the proposed agreement relates to electronic communications use.

When considering potential alternative uses, there is a need to assess the strength of the market for that potential alternative use or commodity and to recognise that the notional willing buyer embodies the actual level of demand.

Additionally, the fact that there may be only one bidder in the market does not mean that the price agreed will necessarily be a nominal one. Nevertheless, if the characteristics of the asset/property mean that in reality nobody would pay anything for them, a possible conclusion may be that their market value is nominal. The value of the land to the willing buyer will depend in every case on its characteristics and potential uses, and not simply on the number of potential bidders in the market.

Evidence of transactions for similar rights but granted for non-telecommunications purposes (such as parking compounds, weather stations etc) has the advantage of

³ *EE Ltd and Hutchison 3G UK Ltd v The Mayor and Burgesses of the London Borough of Islington* (2019) and *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* (2019).

not requiring adjustment to reflect the no network assumption. It is **likely to prove useful if it can be shown:**

- **that the subject property may realistically be of interest to those types of user; and**
- **there is also a realistic prospect of forthcoming planning permission for that use.**

As emerging case law appears to be acknowledging⁽⁴⁾, the valuation assumptions required to be made when assessing the amount of consideration payable may be impacting on the site provider's ability to maximise the value of the land. This is because the site provider is prevented from realising that portion of the value of its land that is attributable to its suitability for use in connection with the provision of an electronic communications network. However, whilst acknowledging that position, the case law has also appeared to confirm that this **does not** give rise to a loss for which compensation is payable.

Compensation

Key points:

- need to avoid double counting
- need to mitigate loss / avoid incurring unreasonable expenses

Paragraph 25 of the Code sets out the relevant provisions for allowing the court to order the payment of compensation. Case law has confirmed that the three general conditions appropriate for supporting a claim for fair and adequate compensation are:

- there must be a causal connection between acquisition and loss
- the loss must not be too remote and
- the claimant is expected to **behave reasonably to mitigate the loss and avoid incurring unreasonable expenses.**

The application of these principles and any assessment of compensation should be conducted with specific regard to the Code activity in hand. In this respect, the disregard of electronic communications use found within paragraph 24 relating to the assessment of consideration does not apply in relation to the assessment of compensation.

Recoverable expenses and fees will be those incurred in seeking to agree terms for a Code agreement. **They do not include costs incurred in resisting the imposition of the agreement in principle, or in attempting to compromise the agreement itself.**

⁴*EE Ltd and Hutchison 3G UK Ltd v The Mayor and Burgesses of the London Borough of Islington* (2019).

You are encouraged to note that the risk of double counting should be guarded against. For example, in relation to wear and tear to the common parts as part of the operator's presence, use of safety equipment and contribution to future repair costs, these would appear to be unlikely to form separate claims under compensation if such matters had already been factored into the consideration payment in lieu of a service charge contribution.

Reconciling the Code with “Best Value” and “Value for Money” obligations

All valuations are professional opinions on a stated basis of value, coupled with any appropriate assumptions or special assumptions. A valuation is not a fact. Like all opinions, the degree of subjectivity involved will inevitably vary from case to case, as will the degree of certainty. Most valuations will almost inevitably be subject to a degree of variation, e.g. based on differences in professional opinion.

Local Authorities are under a general “Duty of Best Value”, for allowing their land / assets to be used. That duty is set out in section 3 of the Local Government Act 1999. Similarly, Departments and Arms Length Bodies have a duty to obtain Value for Money, in accordance with Managing Public Money Guidance and the HMT Green Book.

But it is important to note that neither duty is limited to obtaining the maximum rent (or consideration) payable.

In relation to the duty of best value Local Authorities are required to consider overall value, including economic, environmental and social value, rather than simply price, when reviewing service provision, which in this instance is the provision of site provider services to operators. This includes the economic and social benefits of investment in digital connectivity. The same factors should be taken into account by Departments and Arms Length Bodies in relation to obtaining Value for Money.

If there are no potential uses of the asset other than that for electronic communications, or the potential alternative uses are ones for which there is little or no demand, this may come to be reflected in a low or nominal assessment of market value. But if this assessment reflects the best price that can be reasonably obtained under the New Code, it might be argued that Best Value / Value for Money has been achieved in terms of pure monetary terms.

Recent case law has affirmed that a duty to obtain Best Value cannot override the assumption that the seller is willing to deal at market value.⁵

⁵ *EE Ltd and Hutchison 3G UK Ltd v The Mayor and Burgesses of the London Borough of Islington* [2019].

Renewal of agreements protected by the Landlord and Tenant Act 1954

In some cases, Departments and other public bodies may have agreements with electronic communications providers which were concluded prior to the new Code being introduced. In some circumstances, such agreements may be protected under the Landlord and Tenant Act 1954 (“LTA 1954”).

A recent Tribunal determination⁽⁶⁾ found that where such an agreement is in place, the Tribunal has no jurisdiction to impose an agreement under the Electronic Communications Code. In such cases, where a consensual agreement cannot be reached, the operator must apply to the County Court for a new tenancy under the LTA 1954. At the time of this guidance update, a request for leave to appeal this Tribunal decision has been made. This guidance will be updated to reflect any outcome of that appeal, but sets out the approaches that can currently be taken to progress renewal negotiations.

Notwithstanding the above determination, **it is open to any site provider, including the public sector**, to agree to a termination of the "holding over" LTA 1954 lease and to enter into a new Code agreement consensually. In deciding whether it is appropriate to take this course, rather than seeking renewal under the LTA 1954, public sector bodies should have regard to the **wider definition of Best Value / Value for Money principles (as appropriate)** and the policy aims and objectives of the 2017 reforms, as outlined below.

How does this approach align with the duty to obtain Best Value?

A key aim of the new Code was to reduce operator costs by virtue of the no network valuation assumption. Market evidence along with emerging case law demonstrates that that is happening. It was also intended that operators would have greater freedom in upgrading, sharing etc.

The definition of Best Value and the concept of Value for Money are ones of **overall value** - including social value⁷. This aligns with the government's infrastructure deployment objectives and the very reason why the old Code was revised. Indeed in its 2016 response to the consultation on Code reform, the Ministerial foreword states: "This infrastructure is vitally important to citizens right across the UK, as digital communications become an ever more essential part of the economic and social fabric of this country." Now, more than ever, that continues to be the case.

⁶*Cornerstone Telecommunications Infrastructure Ltd v Ashloch Limited (1) and AP Wireless II (UK) Ltd (2019)*.

⁷ See the Social Value Act 2012 and the aims and objectives in the context of telecoms

From a purely financial perspective, taking account of income only and no other factors, we recognise that higher rents and income may result from a lease renewal under the LTA 1954 than from termination of that lease and the completion of a new Code agreement. However, from a policy perspective, it is important to note that the old Code was replaced by the new Code because the government recognised that a new Code was needed to “improve on the existing legislation.. (to) support the provision of digital communications infrastructure across the UK.”

When deciding on the appropriate approach to take on expired or expiring LTA 1954 leases, public sector bodies should be mindful that an effect of renewing on LTA 1954 lease terms - rather than entering into a new Code agreement – is that it would be likely to extend the drawbacks present under the old Code. In many cases this will not result in overall benefit to the taxpayer, including when taking into account the wider social value context of Best Value.

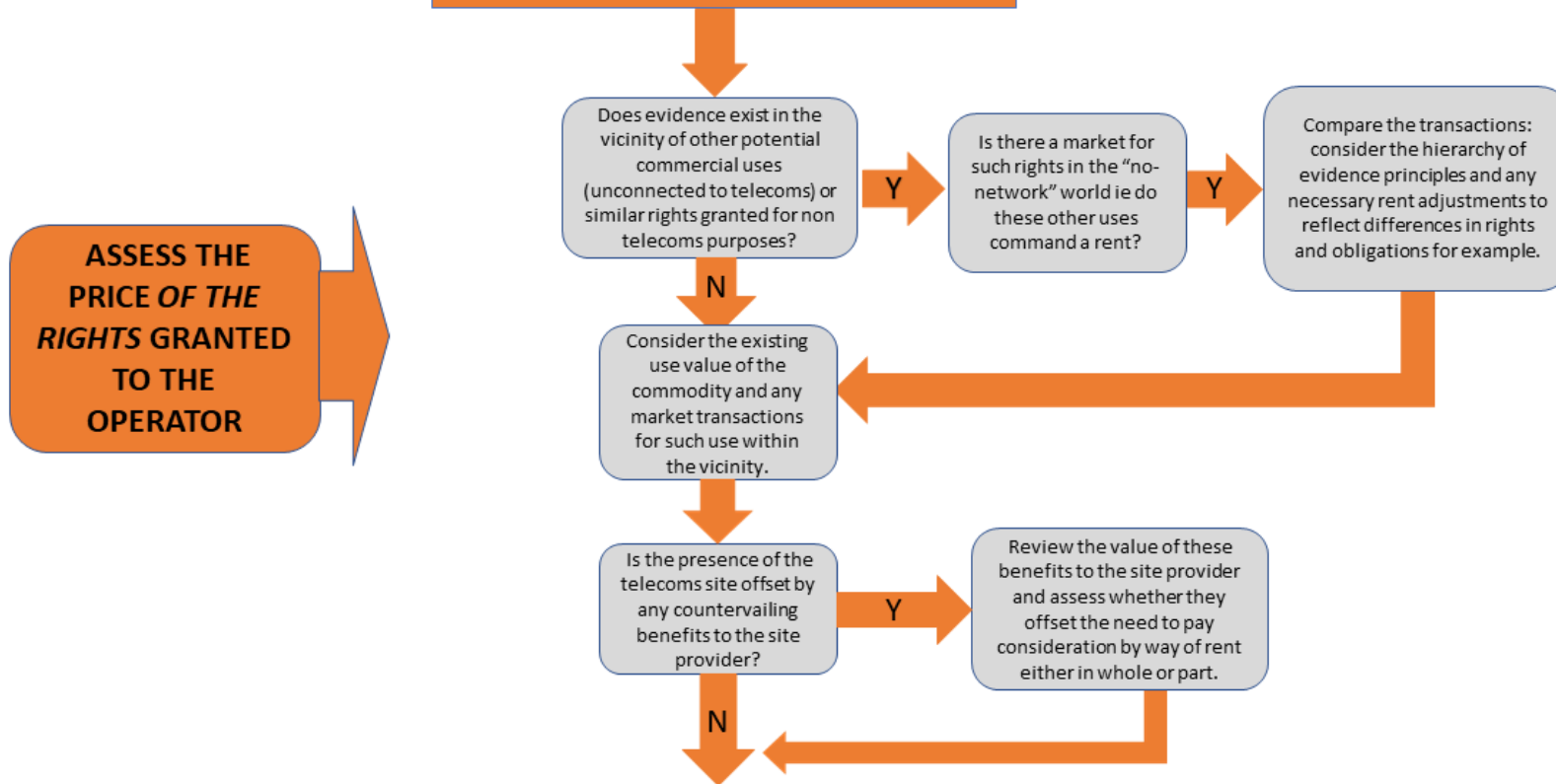
Note re: Business Rates

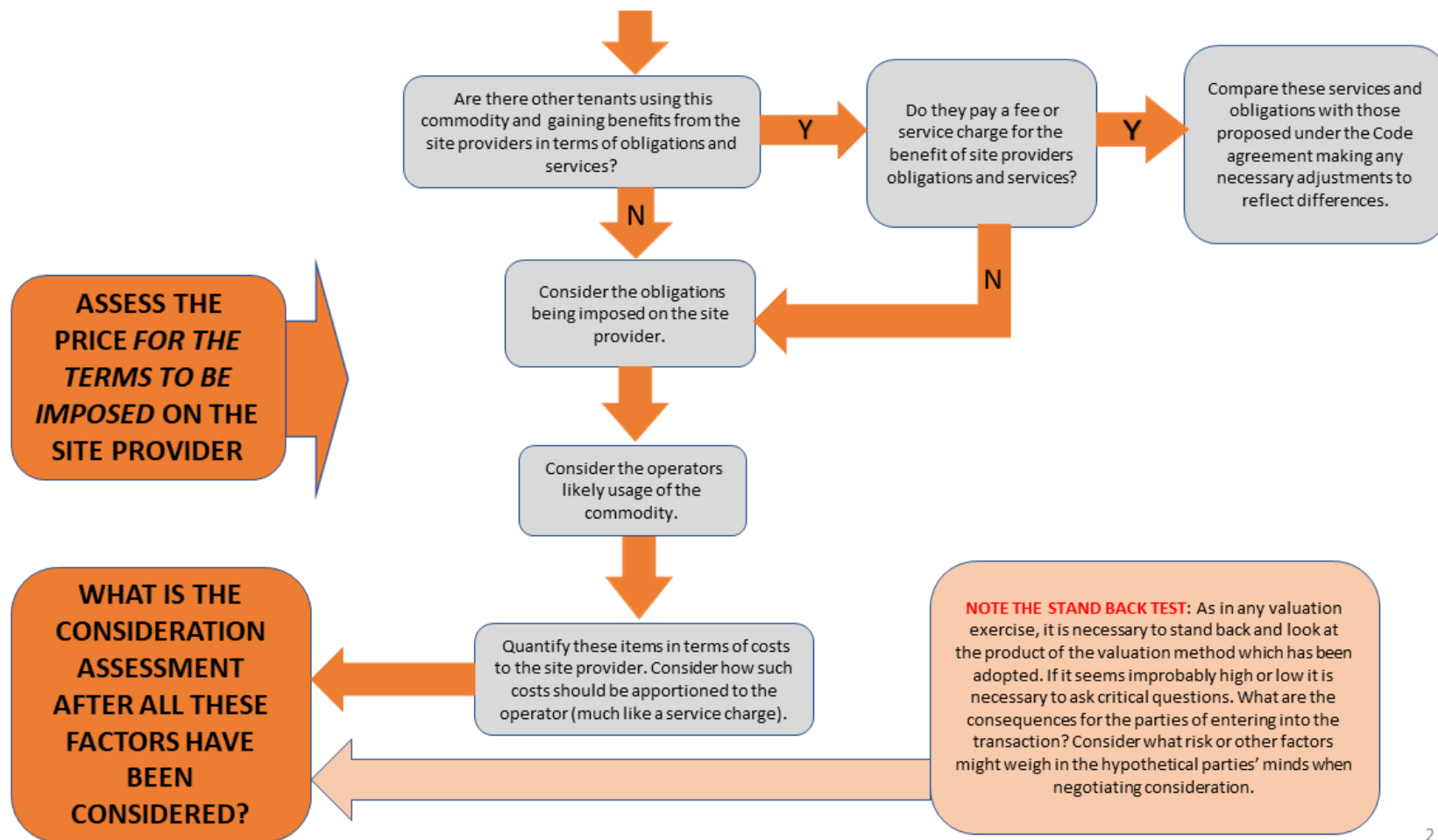
Departments, other public sector bodies, advisers and operators should note that installation of infrastructure will create a separate assessment for business rates payable on the property. Additional business rates consequently payable will be the responsibility of the operator.

Annex A: ELECTRONIC COMMUNICATIONS CODE: AN APPROACH TO ASSESSING CONSIDERATION AND COMPENSATION UNDER

PARAGRAPHS 24 AND 25

STAGE 1: ASSESSING CONSIDERATION





STAGE 2: ASSESSING COMPENSATION

NOTE ANY CLAIM FOR COMPENSATION MUST COMPLY WITH THESE THREE CONDITIONS: (1) there must be a causal connection between the acquisition and the loss in question; (2) that loss must not be too remote; (3) the law expects those who claim compensation to behave reasonably, to take the steps a reasonable person would to eliminate or reduce the loss, and to avoid incurring unreasonable expenditure.

