

EXPLANATORY MEMORANDUM TO
THE ELECTRONIC COMMUNICATIONS CODE (JURISDICTION)
(AMENDMENT) REGULATIONS 2023

2023 No. 1220

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Science, Innovation and Technology and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

- 2.1 This instrument expands the jurisdiction for determining certain disputes under the Electronic Communications Code to include the First-tier Tribunal in relation to England and Wales for all such disputes. It also removes the restriction that such disputes must be commenced in the Upper Tribunal. This is to make the administration and resolution of such disputes more efficient.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales and Scotland.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales. The territorial application of this instrument does not include Scotland.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 Part 2 of the Digital Economy Act 2017 introduced, in Schedule 1 to that Act, a reformed Electronic Communications Code (“the code”). The code is set out in Schedule 3A to the Communications Act 2003. Part 16 of the code makes provision for enforcement and dispute resolution. Paragraph 95 provides that the Secretary of State may confer jurisdiction for certain code disputes on prescribed specialist tribunals.
- 6.2 The Electronic Communications Code (Jurisdiction) Regulations 2017 (“the 2017 regulations”) conferred jurisdiction for code disputes, in relation to England and Wales, on the Upper Tribunal, and in relation to Scotland, on the Lands Tribunal for Scotland. The 2017 regulations also conferred jurisdiction on the First-tier Tribunal

for code cases in relation to England, but only if they had been transferred from the Upper Tribunal.

- 6.3 The Telecommunications Infrastructure (Leasehold Property) Act 2021 (“the 2021 Act”) amended the 2017 regulations to confer jurisdiction on the First-tier Tribunal for code disputes in relation to Wales, but only in connection with proceedings under Part 4A of the code. It also inserted a requirement that Part 4A proceedings must be commenced, in relation to England and Wales, in the First-tier Tribunal, and in relation to Scotland, in the sheriff court.
- 6.4 Section 71 of the Product Security and Telecommunications Infrastructure Act (“the 2022 Act”) amended paragraph 95 of the code to give the Secretary of State power to confer jurisdiction on the First-tier Tribunal for all code cases in relation to Wales. The Government indicated its interest in making regulations conferring such jurisdiction during Commons Report stage of the passage of the 2022 Act, which is detailed in Hansard at paragraph 6 and available at: <https://hansard.parliament.uk/Commons/2022-05-25/debates/B0B8BDF4-5154-415D-A8D6-CB8AE8770349/ProductSecurityAndTelecommunicationsInfrastructureBill#contribution-F8D2BD4F-FCF9-462C-8056-28AF62591E8D>.
- 6.5 A relevant application may be made to “the court”. This is defined in paragraph 94(1) of the code to mean, in relation to England and Wales, the county court or a tribunal as prescribed by regulations made under paragraph 95 of the code. These regulations confer jurisdiction on the First-tier Tribunal for all code cases in relation to England and Wales and remove the restriction that relevant code proceedings must be commenced in the Upper Tribunal. The restriction that Part 4A code proceedings in relation to England and Wales must be commenced in the First-tier Tribunal is retained. Part 4A proceedings in relation to Scotland must also still be commenced in the sheriff court.
- 6.6 The 2017 regulations did not extend to Northern Ireland due to the absence of the Northern Ireland Executive. The decision has been taken to defer making equivalent provision for cases in relation to Northern Ireland at this stage. Engagement is ongoing with the Northern Ireland Department of Justice on the supporting instruments required for such provision.
- 6.7 These regulations give rise to the need for minor consequential procedural rule changes in the specialist tribunals. The Ministry of Justice for England and Wales intends to make separate Statutory Instruments to make provision for such rules.

7. Policy background

What is being done and why?

- 7.1 The code governs the rights of network operators to build and maintain digital communications infrastructure on, under and over public and private land. The code was reformed in 2017 by the Digital Economy Act 2017, which was informed by a report by the Law Commission for England and Wales (Law Com No 336). The report recommended (in chapter 9) that the forum for almost all code disputes should, in England and Wales, be the Lands Chamber of the Upper Tribunal, instead of the County Court (as was the case with the previous code).
- 7.2 Since the Upper Tribunal have had jurisdiction to hear proceedings under the code in relation to England and Wales, clear principles have been established in its case law

which mean that more code cases are suitable to be heard by the First-tier Tribunal. These cases are unable to be brought in the First-tier Tribunal, so are - in England - being transferred to it from the Upper Tribunal with increasing regularity. In Wales, there is currently no jurisdiction for the First-tier Tribunal to hear proceedings that have been handed down from the Upper Tribunal and all proceedings, except for those brought under Part 4A of the code which must be commenced in the First-tier Tribunal, must be dealt with by the Upper Tribunal. Engagement with His Majesty's Courts and Tribunals Service, the judiciary and stakeholders has demonstrated that this is causing inefficiencies.

- 7.3 These regulations allow the First-tier Tribunal to hear all code cases in relation to England and Wales. This will allow cases to be dealt with more efficiently. The 2022 Act updated the code to enable the Government's digital connectivity ambitions to be realised. The reforms comprised three main categories: issues relating to requests for new agreements and dispute resolution; rights to upgrade and share apparatus; and expired agreements.
- 7.4 As noted above, the 2017 regulations conferred jurisdiction for code cases on the First-tier tribunal in relation to England only, provided they had been transferred from the Upper Tribunal.
- 7.5 The experience of the judiciary in handling code cases since the 2017 Act has shown that the overall burden of handling code proceedings could be reduced by code proceedings in relation to England and Wales being dealt with by the First-tier Tribunal, allowing cases to be dealt with more efficiently.
- 7.6 These regulations make changes to the jurisdiction of specialist tribunals in England and Wales but not in Scotland and Northern Ireland. Jurisdiction for code proceedings in relation to Scotland and Northern Ireland will remain unaltered.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.7 Prior to these regulations, code cases in relation to England (with the exception of Part 4A cases) were required to be commenced in the Upper Tribunal, but could be – and increasingly were – transferred to the First-tier Tribunal, which has more capacity to handle higher volumes of cases.
- 7.8 Code cases in relation to Wales (with the exception of Part 4A cases) similarly had to be commenced in the Upper Tribunal, but could not be transferred to the First-tier Tribunal.

Why is it being changed?

- 7.9 The development of a body of case law for code proceedings in relation to England and Wales in the Upper Tribunal has made it suitable for more cases to be handled by the First-tier Tribunal. This will allow cases to be dealt with more efficiently. The judiciary, the Office for the Secretary of State for Wales and the Welsh Government have agreed that code cases in relation to Wales can be handled by the First-tier Tribunal. Allowing this will ensure code disputes in relation to Wales are dealt with as efficiently as those in relation to England.

What will it now do?

- 7.10 These regulations enable code cases in relation to England, which are not just those brought under Part 4A of the code or those transferred by the Upper Tribunal, to be commenced in and heard by the First-tier Tribunal.
- 7.11 They also enable code cases in relation to Wales, which are not just those brought under Part 4A of the code, to be commenced in and heard by the First-tier Tribunal.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 There are no plans to consolidate legislation amended by this instrument.

10. Consultation outcome

- 10.1 The changes to jurisdictions brought about by these regulations are part of the package of measures informed by the “Consultation on changes to the Electronic Communications Code”, published in January 2021 and available at: <https://www.gov.uk/government/consultations/consultation-on-changes-to-the-electronic-communications-code>.
- 10.2 Responses were sought from consultees in relation to which tribunals should deal with code cases in England and Wales in a section of the above consultation on a ‘fast track’ court application process. Specifically, Question 7(b) asked “Should fast-track court cases be dealt with by the Upper Tribunal or by a different court/tribunal, for example, the First-tier Tribunal.” Responses highlighted that in cases where a point of law had previously been dealt with by the Upper Tribunal, the First-tier Tribunal could deal with the case, informed by the precedent set by the Upper Tribunal.
- 10.3 A requirement to consult with Scottish Ministers is set out at paragraph 95(5)(a) of the code, but as this instrument does not apply to Scotland, the requirement is not engaged. Nonetheless, engagement with the Scottish Government on the policy has been undertaken, including sharing a summary and rationale of the Government’s plans for these regulations.
- 10.4 No equivalent requirement to consult exists in respect of Wales. Nonetheless, engagement with the Welsh Government on the policy has been undertaken, including sharing a summary and rationale of the Government’s plans for these regulations.
- 10.5 The Department for Science, Innovation and Technology (DSIT) has engaged with officials in the Department of Justice in Northern Ireland about the policy objectives for the code in Northern Ireland, including sharing a summary and rationale of the Government’s plans for these regulations.

11. Guidance

- 11.1 DSIT will not be issuing guidance associated with this change. Ofcom publishes a Code of Practice regarding code agreements which is available at: <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/policy/electronic-comm-code/private-land-access-code-of-practice>.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument because the changes delivered by these regulations were considered as part of the De Minimis Assessment for Part 2 of the 2022 Act, named “Reforms to the Electronic Communications Code” and available at:
<https://www.gov.uk/government/publications/product-security-and-telecommunications-infrastructure-bill-documents>.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The instrument does not include a statutory review clause. During passage of the 2022 Act, the Government committed to regular engagement with stakeholders affected by the Act to monitor its effectiveness. Officials will engage with the judiciary to monitor the impact of these regulations on case numbers passing through courts. That engagement will also provide insight into the impact of these regulations. DSIT considers that to be most effective to monitor the effect of these regulations. A dedicated review clause for this instrument was deemed disproportionate.

15. Contact

- 15.1 Daniel Apps at the Department for Science, Innovation and Technology Telephone: 07525919070 or email: daniel.apps@dsit.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Rebecca Molyneux, Deputy Director for Broadband Regulation and Investment, at the Department for Science, Innovation and Technology can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 John Whittingdale MP, Minister of State (Minister for Data and Digital Infrastructure) at the Department for Science, Innovation and Technology can confirm that this Explanatory Memorandum meets the required standard.