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# Policy making without legislating; the self-regulation of commercial property leasing

**Cathy Hughes+ and Neil Crosby**
University of Reading
Whiteknights
Reading
RG6 6UD

+Corresponding author
E-mail: cathy.hughes@reading.ac.uk
Phone: +44(0)118 378 6036

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## Abstract

The terms of a commercial property lease covers aspects such as rent, alterations to premises and the ability to leave; consequently they have a significant impact on cash flow and the ability of a business to develop.

In contrast to the heavily-legislated residential sector, commercial landlords and tenants in the UK are largely free to negotiate the terms of their contract. Yet, since the property crash of 1989/90, successive governments have taken an interest in commercial leasing; in particular there is a desire to see landlords being more flexible.

UK Government policy in this area has been pursued through industry self-regulation rather than legislation; since 1995 there have been three industry codes of practice on leasing. These codes are sanctioned by government and monitored by them. Yet, 15 years after the first code was launched, many in the industry see the whole code concept as ineffective and unlikely to ever achieve changes to certain aspects of landlord behaviour.

This paper is the first step in considering the lease codes in the wider context of industry self-regulation. The aim of the paper is twofold: First a review of literature on industry self-regulation is undertaken to help understand the key dimensions of self-regulation and, in particular, to suggest key criteria which may explain the effectiveness (or ineffectiveness) of self-regulation. Second, the UK commercial lease codes are then considered in the light of this literature and criteria, using the existing research carried out by the authors to monitor the success of these codes. The outcome is a clearer understanding of the possibilities and limitations of using a voluntary solution to achieve policy aims within the property industry.

# Introduction

Commercial leasing operates within a wide variety of regulatory regimes across the globe. In the UK it is not heavily regulated. There are some statutory limits on certain lease provisions, and statute provides and governs the right to renew leases, but, on the whole, the UK law does not directly control the terms that the parties to a commercial lease are able to negotiate. There is not even a statutory or common law requirement for terms to be fair or reasonable.

That does not mean that UK governments have no interest in lease terms. Commercial leases contain provisions defining and affecting key aspects of the occupation of premises (as noted in Crosby *et al* 2006a, 2006b*)*; these can impact on the ability of a business to develop and grow, or even to contract. Consequently commercial leasing has been linked to Government enterprise and productivity agendas, for example in the UK Government Budget Statement of 2005:

> *The Government's strategy for closing the productivity gap in this environment has two broad strands: maintaining macroeconomic stability to help businesses and individuals plan for the future; and implementing microeconomic reforms to remove the barriers that prevent markets from functioning efficiently and flexibly. Effective and well-focused regulation can play a vital role in correcting market failures, promoting fairness and competition, and driving up standards. However, inefficient regulation can impose a significant burden on business."*
>
> HM Treasury (2005) Budget Statement, paragraph 3.2

In the same chapter, the statement discusses commercial lease flexibility. In response to a University of Reading report on the operation of the commercial leasing market (Crosby *et al*, 2004), the Budget statement commented:

> *"While the Government welcomes the recent trend towards greater market flexibility, it believes much more can be done to strengthen the impact of the code of practice on the market. It will continue to work with the industry on strengthening the code, but remains willing to pursue legislation if further movements towards greater market flexibility are not forthcoming."*
>
> HM Treasury (2005) Budget Statement, paragraph 3.119

The enduring importance of the enterprise and productivity agenda means that successive governments have, especially since the property crash of 1989/90, taken an increasing interest in commercial leasing.

This interest started life as a threat to legislate on the specific areas of upward only rent reviews, confidentiality clauses and rent determination processes at rent review and lease renewal (DOE 1993). However this didn't materialise, instead the property industry proposed a system of self-regulation. This route was endorsed by government and led to the first Code of Practice for Commercial Leases (RICS 1995), developed by a committee of stakeholders in the leasing process including organisations representing landlords, tenants and the land and law professions. Some fifteen years later, self-regulation is still the means by which leasing is

held in check; the industry is currently operating the third edition of the Code (Joint Working Group on Commercial Leases, 2007).

It is proving difficult to declare self-regulation on leasing to be a 'success', or even to determine *how* to assess the extent to which it can be seen to be a successful system in terms of achieving policy objectives. This is despite research commissioned by the Government to monitor the operation of the successive Codes and undertaken by the University of Reading which found that: The first code was poorly disseminated (DETR 2000); The dissemination of the second Code was better but not seen to be directly influencing leasing negotiations or practice (Crosby *et al* 2005); There is a low level of awareness of the third version of the code and again little direct use of it in practice (Crosby and Hughes 2009).

These latest findings prompted a ministerial statement (Austin, 2009) expressing disappointment that small business tenants are not being told about the code and it is not a "primary tool for the negotiation of new leases" except in the hands of a few large tenants. There has been an increasing focus on small business tenants as the code has developed, to such an extent that it now appears that their awareness and 'use of the code' is the primary measure of the response of the market. The minister called on the property industry to respond or face legislation.

However, over the fifteen years spanned by the three codes, changes have taken place that would seem to be in line with government ambitions. There is increased diversity of lease lengths, including short leases without rent reviews, increased incidence of break clauses, changes to the approach to repairing liabilities and to subletting that are more subtle but significant. These are well documented by Crosby *et al* (2005) and accepted by all stakeholders in the process, including Government. However, the Code monitoring also identified that these changes are essentially market driven, although the various incarnations of the code and the associated threats of legislation certainly played their part in encouraging change (Crosby *et al* 2005).

Research into the Codes so far has not actually attempted to address the wider issues of the advantages and limitations of using a voluntary solution to achieve policy aims within the property industry. This paper aims to move in this direction. It provides a first step in considering the lease codes in the wider context of industry self-regulation. The aim of the paper is twofold: First a review of literature on industry self-regulation is undertaken to help understand the key dimensions of self-regulation and, in particular, to suggest key criteria which may explain the effectiveness (or ineffectiveness) of self-regulation. Second, the UK commercial lease codes are then considered in the light of this literature and criteria, using the existing research carried out by the authors to monitor the success of these codes. We hope to then have the beginnings of a clearer understanding of the role self-regulation can play in commercial leasing, make some preliminary conclusions on the success of these codes and suggest the further research needed to strengthen any findings.

# Literature on self-regulation

## Definition and scope

A commonly cited definition of industry self-regulation is "a regulatory process whereby an industry-level, as opposed to a governmental- or firm-level, organization (such as a trade association or professional society) sets and enforces rules and standards relating to the conduct of firms in the industry" (Gupta and Lad, 1983: 417) This definition doesn't preclude the involvement of government in the process, but places the *primary* responsibility for setting up and operating the regulatory regime with the industry body. For Hemphill (1992), key characteristics are that the development of self-regulation is voluntary and that it covers behaviour that is discretionary.

The scope of self-regulation is wide. Gunningham and Rees (1997) make a distinction between economic and social self-regulation, the former being about controlling the market and the latter about the unacceptable consequences of business activities for the environment, workforce, customers or clients. It is the latter that concerns us in the current study.

Durkheim (1933) saw mediating institutions, such as industry organisations, being in a good position to promote shared ethical practices within an industry. He saw them as 'moralising' industrial and commercial life by creating a normative framework. Adding to this moral leadership, proponents of self-regulation argue that codes can deal with moral issues that governments find difficult to tackle or define, such as taste and decency and (in the case of the advertising industry at least) can even be tougher than legislation (Boddewyn, 1985). Boddewyn further argues, through his study of the advertising industry, that because an industry has a sense of ownership of the rules on behaviour, they are accepted and enforced from within the industry without the hostile response that often accompanies legal solutions. Braithwaite (1993) argues that this sense of commitment can achieve better results than government regulation.

However, self-regulation is not without its critics. Braithwaite exemplifies much of the criticisms in saying that self-regulation is "frequently an attempt to deceive the public into believing in the responsibility of a[n] irresponsible industry. Sometimes it is a strategy to give the government an excuse for not doing its job." (1993: 91). Gunningham and Rees (1997) put it another way, saying that an accusation levelled at self-regulation is that it serves the industry rather than the public interest. They similarly note that it can be seen as a mechanism to ward off state intervention. The European Consumer Law Group makes plain its view that voluntary codes are a last resort for consumer protection and that "the mere existence of a code can seriously undermine the case for future legislative reform" (ECLG 1983: 211). Clearly, self-regulation has the potential to be self-serving but as Gunningham and Rees note, the important questions are about the *circumstances* in which industry self-regulation is self-serving and, alternatively, under what circumstances it may become a "force for moral constraint and aspiration in industrial and commercial life" (1997: 373).

The centrality of an industry organisation, such as a trade association, to self-regulation would seem apparent. Gunningham and Rees (1997:373) describe the importance of the industry as an 'organizational field', a force with the potential to bridge the gap between individual firms and society and so to instigate change. They cite examples of the chemical manufacturing industry's global Responsible Care Program and the American Institute of Nuclear Power Operations (INPO) and their success in achieving a shift in industrial morality in response to particular events and social change. However, the notion of organizational field is more complex than simply trade organisations, and as such may be a more relevant concept in real estate where there is no single trade association to act as an umbrella organisation. DiMaggio and Powell (1983: 148) define an organizational field as "those organizations that, in the aggregate, constitute a recognized area of institutional life". This casts the net wider than a single industry body and includes suppliers, competing firms, consumers, regulatory agencies and so on. Notably the Lease Code was drawn up by a working group representing these various players rather than a trade association; the relevance of this remains to be seen.

## The regulation and self-regulation continuum

Gupta and Lad (1983) recognise that self-regulation often coexists with government oversight and also with the threat of direct regulation. Gunningham and Rees argue that where there is a large gap between the interests of the individual firm and that of the public, self-regulation may simply not be able to bridge the gap by itself. Boddewyn (1985) concludes that the interaction of the two is needed to control advertising behaviour, although he sees this manifesting in different solutions in different countries and different industries. Even if self-regulation can provide the mechanisms for control, Hemphill (2004) argues that the public must be kept informed; truthful performance metrics are all important to convince the public that there is no need for government regulation.

Gunningham and Rees (1997) develop the idea of a continuum upon which government and self-regulation interact and co-exist. The issue for them is to determine 'principles of institutional diagnosis' to design the structures of co-existence. They argue that regulation policy must respond to industry structure; this notion of responsive regulation is one associated with Nonet & Selznick (1978) which has been developed and argued by others such as Ayres and Braithwaite (1995). Put simply, the idea is that some industries have the capacity for effective self-regulation while others do not and regulation should respond to this. An example cited by Gunningham and Rees to show how government might respond to an industry with the ability to self regulate, is that of health care in the USA. Industry self-regulation under the auspices of the Joint Commission on Accreditation of Healthcare Organizations was eventually given responsibility and a major role in determining which hospitals could get Medicare funds from the state (1997:397).

## A normative framework

Gunningham and Rees referencing Durkheim's idea of moralising industrial life, argue that "an industry association must establish a normative framework for its members and, equally important, develop ways to ensure its efficacy." (1997: 372). The development of an industry

morality and the associated normative framework is, according to Gunningham and Rees (1997: 376) an important first step in industry self-regulation. They distil a set of principles and practices which, they argue, must be institutionalised through the development of industry –wide policies and procedures to ensure the commitment of firms. The seven features which are central to this framework are:

1. It provides a shared basis for challenging, questioning and guiding industry practices. Looking at these things from different standpoints to standard market view.
2. It is a product of reflection and conscious deliberation.
3. It recognises multiple values and commitments. Economic self-interest is recognised but organisations are asked to become less single-minded.
4. It takes a critical standpoint – assuming practices can be changed in light of reflection.
5. It creates a framework that defines and upholds a special organisational competence such as practicing sustainable forestry or operating nuclear reactors safely and reliably.
6. There is an expectation of willing obedience but not grudging acquiescence.
7. It provides a legitimate account of the industry's activities to the public.

This clearly sets out underpinning principles as well as associated practical manifestations. Key aspects of this are open and inclusive development, continual reflection and review, willing compliance and accountability to the public.

## Free riders

The issue of willing compliance, or rather the converse, is one that exercises the minds of many researchers; Gunningham and Rees argue that it is important that a system of self-regulation prevents free riders. If a code is brought into operation without the full involvement of the industry players then this free riding may undermine the operation of the code (and they argue that legislative backing may be needed). Alternatively if there is full agreement but some then feign compliance self-regulation can address this through peer pressure and formal sanctions.

Lennox (2004), in his study of environmental self regulatory schemes, considered how to avoid the problems that he saw when free-riders caused firms to leave the scheme, potentially leading to its collapse. He postulated that if participants get a benefit from taking part then they will do it even if some of the benefits spill over to non-participants. He identified four types of benefit that could ensure participants did not leave despite some non-compliance:

1. Operational benefits: He found that participants in the chemical industry's Responsible Care Program (RCP) actually got efficiency savings.
2. Affiliation benefits: He notes that a condition of membership of the American Chemistry Council (ACC) was participation in the RCP. Therefore he argues that if the benefits of being in ACC outweigh costs of joining and being in the RCP then firms will not leave.
3. Signalling benefits: Taking part distinguishes good firms from bad.
4. Legitimacy benefits: By being part of the scheme, a firm may become more attractive as a trading partner or in some other way get preferable treatment from suppliers etc. (For

this point he refers to work of institutional scholars such as DiMaggio and Powell (1991) and North (1990)).

Lennox's work found that participants in the RCP were better off by being in it, but then so were the non-participants. Therefore despite the operational benefits, the issue remains as Hemphill (1992) notes, where the problems of free riders may put those that abide by a code at an economic disadvantage as they are bearing the cost of the 'public goods' that are effectively provided for all in the industry regardless of their contribution. Lennox found that a group of large visible firms continued to support the RCP and so ensured its continuance. "For policymakers, this raises interesting questions about how to respond to self-regulatory efforts that are in part successful and yet still suffer from free riding and opportunism." (Lennox, 2006: 687)

## A possible framework

In order to evaluate the property industry and the Lease Code as a system of self-regulation, a framework is needed that allows us to interrogate the system of self-regulation, which will then enable us to assess issues such as the extent to which there is an institutional morality, a robust normative framework, and a mechanism to ensure compliance. Issues such as the role of government and public perceptions also need a framework for evaluation. We can then comment on the extent to which the industry has the capacity for self-regulation, both generally and in the case of leasing in particular.

There is potentially a useful practical tool produced by the Canadian Office of Consumer Affairs, an organisation which has, over many years, undertaken research and actively promoted debate in the use of voluntary codes. This has led them to produce a guide to the development of voluntary codes (Office of Consumer Affairs, 1998) and subsequently a framework for evaluating voluntary codes (Industry Canada, 2002). Figure 1 sets out the main headings of their framework with the associated issues. For each of the issues, the framework includes a set of performance indicators which can be used to answer the various questions. The main headings are Due Process, Relevance, Success and Alternative Approaches.

The concerns over *due process* resonate with the establishment of a normative framework discussed by Gunningham and Rees. The performance indicators suggested to evaluate due process revolve around the meaningful involvement of all industry players and other stakeholders, including government, in the development of the code, so according with the notion of a shared basis and a process of conscious deliberation. Similarly, such involvement should mean that there is 'willing obedience'. Overall, the notion of due process is about inclusivity in development but also about ensuring that the burden of development and implementation is fairly spread. It also includes notions of clarity in communication, fair and independent, monitoring procedures through to complaints procedures and proportional consequences of non-compliance.

Ensuring *relevance* is an important aspect of the Canadian framework, which reinforces the idea that an industry must be constantly reflecting and reviewing the operation of a code to refine, develop or simply scrap it if it is no longer required.

To measure the *success* of a code, the framework questions the measurable achievements, the behaviour of individual firms and their internal processes with respect to the code as well as the institutionalisation of the code within the industry.

Finally *alternative approaches* questions whether the voluntary code could be reinforced or whether alternatives such as legislation would do a better job.  The public perception of relevance and success is also considered here.

In the light of the literature review, this framework appears compelling as a format to use to in respect of the Lease Code.  Therefore, in the next section we first briefly set out the content and mechanics of the Lease Code and attempt to answer each of the questions in Fig. 1 for this specific voluntary code.

## Framework for evaluating voluntary codes

| Evaluation factor | Issues |
|---|---|
| *Due Process* | Has code development been open, transparent, fair and meaningful? |
| | Is the implementation of the code fair? |
| | Are the requirements of the code clear? |
| | Are there fair procedures for monitoring and enforcement? |
| | Are there fair procedures for dispute settlement, complaints and sanctions? |
| | Is there a range of appropriate negative consequences and incentives for compliance? |
| | Are the negative and positive incentives used? |
| *Relevance* | Does the voluntary code address a fundamental problem or actual need? |
| | Are there competing codes or legislative instruments? |
| *Success* | Have the objectives of the code been achieved? |
| | Are the firms capable of compliance? |
| | Are there incentives for compliance? |
| | Is there an industry organization or another group to develop and administer the code? |
| | Are there mechanisms to hold the industry or firm accountable for compliance with the code? |
| | Are there sanctions or negative consequences for non-compliance? |
| | Are sanctions or negative consequences used? |
| | Are there unintended or negative effects of the code? |
| | Are there champions of the code? |
| | Has an industry code achieved wide coverage? |
| *Alternative approaches* | Has the coverage been as wide as anticipated? |
| | Are the sanctions in the voluntary code adequate? |
| | Does the code cover interjurisdictional situations? |
| | Is there a need for uniformity of rules? |
| | Does the voluntary code require additional credibility? |
| | Is independent monitoring, enforcement or adjudication required? |
| | Are sufficient resources being devoted to the code (for rule making, communication, monitoring, enforcement, adjudication, sanctions and revision)? |

Fig 1: Framework for evaluating voluntary codes. Source: Industry Canada 2002

# Evaluating the Lease Code

## Outline of current code

Having already set out the background to the lease code concept and its development, the initial focus of this section is on the requirements of the current code and processes surrounding its operation.

The 3rd edition has two main objectives. It promotes specific lease clauses and behaviours and has a more general stated objective to *"promote fairness in commercial leases".* There is also an information dissemination role and a further objective is stated to be "*to ensure that parties to a lease have easy access to information explaining the commitments they are making in clear English."* It consists of three parts:

1. A guide for landlords with 10 specific requirements in order for their lease to be Code-compliant;
2. A guide for occupiers, explaining terms and providing helpful tips; and
3. A model Heads of Terms (which can be completed on line and downloaded).

(JWGCL, 2007)

It was developed over many months by working group representing various stakeholders including landlords, tenant bodies, property and legal advisers and government. The group was clear that it wanted to produce a code that could be of practical use for the parties to lease transactions. This is the opening text:

*This revised lease code is the result of pan-industry discussion between representatives of landlords, tenants and government. The objective is to create a document which is clear, concise and authoritative.*

*However, our aims are wider. We want the lease code to be used as a checklist for negotiations before the grant of a lease and lease renewals. Landlords should be transparent about any departures from the code in a particular case and the reasons for them.*

(JWGCL, 2007)

The code was launched by a government minister in February 2007 and she welcomed "plans for wide dissemination of the Code" (Cooper 2007). However, the research done by Crosby and Hughes (2009) found that the dissemination of the code and attempts to ensure its adoption differed between the various members of the code working group. For example, the BPF implemented initiatives such as the Commercial Landlord Accreditation Scheme (CLAS) and the 'Pledges of support from law firms and agents', to encourage good practice in general and adoption of the Lease Code in particular. On the other hand the RICS and the Law Society publicised the Code through various journals, newsletters, e-bulletins etc. as well as seminars and other events. The RICS introduced an initiative to encourage banks to promote the Code to small businesses. The Law Society produced a business lease, for short term lettings of simple premises, which explicitly conforms to the Code.

While this shows a range of initiatives to encourage its use, there is no overall and continuing system of accreditation, monitoring or audit of compliance with the code.

## The current code; answering Industry Canada's questions

The detailed answers to each of the questions is set out in Appendix 1

## Due process

The development process appears to have been open, transparent, fair and meaningful with wide consultation. The resulting suite of documents contains clear requirements for landlords during lease negotiations and during the life of a lease. However, due process fails in two key respects. First, there is no single 'industry' to take on responsibilities under the code; there are several groups who need to act to make the code work by implementing its requirements. For example some lease clauses will be agreed by the landlord's property agent (such as lease term) and others (such as assignment arrangements) are likely to be the responsibility of the lawyers. The responsibility for ongoing management is likely to be given to a (different) firm of managing agents. This means that implementation is fragmented. There are no processes for monitoring and enforcement (beyond the periodic and high level monitoring commissioned by government). Similarly there are no real incentives to comply, or negative consequences for those that do not.

## Relevance

Given the composition of the code working group, including representatives of several occupier groups, it perhaps can be assumed that the code is addressing relevant issues. It has been revised three times to respond to changing circumstances and the findings of research into its effectiveness (DETR, 2000, Crosby *et al* 2005). Other research into landlord and tenant relations suggests that the issues are still very much alive (see for example the Occupier Satisfaction Index report (Property Industry Alliance and Corenet global (2009)).

## Success

This is really not clear, largely because of the lack of mechanisms to implement and monitor the operation of the code at a detailed level. There are certainly organisations representing various stakeholders as well as firms and individuals that are championing the code; there are also firms with the expertise and capacity to implement compliance regimes. However, as discussed above, without the overall industry body to administer the scheme, the implementation is fragmented. Dissemination is the only issue concerning the latest code to be addressed so far and it was found that the code was reaching even fewer tenants than its predecessor and a minority of small landlords. It is difficult to see how a code can be considered a success if it is not even reaching those to which it is aimed, even before any assessment of its impact on the behaviour of those it does reach (Crosby and Hughes 2009).

## Alternative approaches

Given the lack of measurable success and the lack of mechanisms to implement and monitor the operation of the code, alternative approaches may seem to be necessary. This may be legislation, some system of mandatory use by professionals and/or the introduction of a monitoring body and associated systems. However, the financing of such systems may be

controversial. There are examples of where legislation has been used to regulate the process of leasing to new tenants; for example, the case of retail leases/tenants in Australia (see, for example, Australian Government Productivity Commission (2008); Crosby (2007))

# Conclusions

The Lease Code has been developed and revised over 15 years; those involved have responded to changing circumstances and the findings of research on its effectiveness. The third edition of the Code reflects a concerted effort by a wide range of stakeholders to produce a code that can be implemented and can achieve the objectives of promoting fairness and ensuring access to information. However, despite these efforts the code cannot be seen as *measurably* successful. There is no normative framework necessary to ensure that self-regulation works and it is not clear that there any sense of an 'industry morality'. The structures are not there to ensure implementation, monitor compliance and record views of affected stakeholders. While many firms advertise that they endorse and implement the code, it is not possible to ascertain whether they do or whether they are free-riders.

The code would therefore seem to be failing as an effective system of self-regulation. In the light of the literature, several reasons for this may be suggested. The leasing process involves individuals and organisations from different professions and lines of business making the organisational field highly complex. This means that there is no single governing body and responsibility for ensuring code compliance rests with individual organisations. This may distinguish this 'industry' from others that have successful schemes of self-regulation which typically have a central industry body overseeing its operation. In addition, the interaction between government and self-regulation may be too much in favour of the latter. The threat of legislation is not perceived as strong, which may be reducing the effect of the main incentive for compliance.

The question then arises as to whether the voluntary Lease Code (or similar self-regulation) could ever work. In order to address this, research is needed into the experience of other countries in regulating the property industry by voluntary means. There is a wealth of research into self-regulation in other industries, some of which has been mentioned in this paper; research is now needed to look more closely at the structures of these systems and if there are similar industries that have been able to overcome the institutional difficulties to make a success of self-regulation.

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<table>
<tr><th colspan="3"><h2>Appendix 1: Completed framework for evaluating voluntary codes</h2></th></tr>
<tr><th>Evaluation factor</th><th>Issues</th><th>Performance indicators</th></tr>
<tr><td>Due Process</td><td>Has code development been open, transparent, fair and meaningful?</td><td>Meaningful involvement of all industry players (including SMEs) in development?<br>In the context of commercial leasing this is a diverse group. Industry players include landlords and their representative bodies as well as their advisers (lawyers and property agents). The answer is yes as these bodies were all involved in development of the 3rd edition as part of the working group: The Association Of British Insurers, British Council for Offices, British Property Federation, Investment Property Forum, The Law Society of England and Wales, The Royal Institution of Chartered Surveyors, The Forum of Private Business.<br>Involvement of affected public (incl workers, consumers, public interest groups) in development?<br>The key groups are those representing occupiers , large and small. These were represented in the working group in the shape of the British Retail Consortium, Confederation of British Industry, CoreNet Global, Federation of Small Businesses,<br>Funding or support for SMEs or affected public?<br>Not that we are aware of.<br>Government involvement?<br>Yes, Communities and Local Government and the Welsh Assembly Government were in the working group.<br>Is the code publicly available?<br>Yes it is readily available on the web.<br>Did a standards development body develop the code?<br>Yes in the form of a working group.<br>What was the decision making process (eg consensus, majority voting etc)?<br>We have no information.</td></tr>
<tr><td></td><td>Is the implementation of the code fair?</td><td>Is there an imbalance of power in the industry?<br>First there is not really a single industry. The leasing process and consequent relationship involves solicitors and surveyors among others. There are strong individual firms of landlords that also have a strong lobbying organisation, as well as strong professional groups representing advisers. To set against this there are an unknown number of smaller landlords who are not part of any organised group.<br>Does the code impose different burdens on different industry members?<br>We have no information on the costs of implementation but would assume that there are economies of scale for larger organisations who can spread compliance input over a larger</td></tr>
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| | | number of individual property leases<br>**Are the rules clearly communicated to the industry and the affected public?**<br>The monitoring research suggests not. For all three editions of the Code it was found that there are problems with dissemination. For the latest edition there was a surprising lack of awareness among landlords, occupiers and their advisers with the exception of the largest landlords and occupiers. |
| | Are the requirements of the code clear? | **Does it use plain language?**<br>Yes, certainly the 3rd edition makes a concerted attempt to use plain language, largely as it is aimed at small businesses be they landlords or occupiers.<br>**Are there clear obligations on the industry?**<br>The third edition was drafted with the intention of achieving this as the second edition had been criticised for being very vague and having little in terms of specific obligations on landlords. Typical of this earlier edition is the following example:<br>*Both landlords and tenants should negotiate the terms of a lease openly, constructively and considering each other's views.* (2nd Code).<br>Yet, even for the 3rd edition, at first sight the answer is no as the home page of the website gives conflicting messages. It first gives a signal to landlords that they do not have to follow it although with a general 'government is watching' threat:<br>*"The Code is voluntary so occupiers should be aware that not all Landlords will choose to offer Code-compliant leases. The Government, however, takes a keen interest in ensuring the property industry complies with this voluntary Code."* (www.leasingbusinesspremises.co.uk 2007)<br>However there is a specific Landlord's Code which contain clear expectations for lease negotiations, clauses and property management such as:<br>*"Landlords must make offers in writing which clearly state: the rent; the length of the term and any break rights; whether or not tenants will have security of tenure; the rent review arrangements; rights to assign, sublet and share the premises; repairing obligations; and the VAT status of the premises."*<br>Some require landlords to simply respond to requests from prospective occupiers and a few are somewhat vague:<br>*"Tenants' repairing obligations should be appropriate to the length of term and the condition of the premises."* |
| | Are there fair procedures for monitoring and enforcement? | **Is there a compliance policy to govern monitoring and enforcement?**<br>**Are there independent and knowledgeable third party audits?**<br>**Is there approval of the internal audit process by independent third parties?**<br>No to all three questions – the only real monitoring is that |

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| | | funded by and for the Government. For the 2nd edition of the code some of the interested parties attempted to collect data via questionnaires but this was not impartial monitoring. There is no ongoing audit at firm level. There is no obvious 'industry body' to do it. |
| | Are there fair procedures for dispute settlement, complaints and sanctions? | **Performance indicators suggested here are about the process: presence of ombudsman, process for industry and public complaints, reports of complaints, transparency of complaints process etc.**<br>There is no process either for the industry or for occupiers to complain about the operation of, or adherence to, the code. No 'body' has any role in this regard. |
| | Is there a range of appropriate negative consequences and incentives for compliance? | **Performance indicators are about proportionality, deterrent nature of consequences and incentives for compliance**<br>There are no negative consequences at an individual firm level and similarly no firm level incentives for compliance. There is a general threat of legislation which is associated with the periodic research done for the government ; however the most recent research suggested that this threat is no longer perceived as strong. |
| | Are the negative and positive incentives used? | As above – no incentives so cannot be used. |
| *Relevance* | Does the voluntary code address a fundamental problem or actual need? | **Are the objectives of the code still relevant?**<br>There are two main objectives of the code. It promotes specific clauses and behaviours and has an objective to *"promote fairness in commercial leases".* There is also an information dissemination role and a further objective is stated to be "*to ensure that parties to a lease have easy access to information explaining the commitments they are making in clear English."*<br>Some within the industry would say that the first objective has largely been met through market mechanisms, although of course others would disagree. Ireland has within the last year abolished the use of upwards only rent review clauses in their commercial leases, the original catalyst issue for UK occupier pressure for lease reform in the early 1990s. Given the similarity of Irish and UK lease terms, this suggests that lease reform is still a highly relevant issue in commercial property markets<br>**Can the behaviour that needs to be changed be identified?**<br>To a large extent the answer is yes in terms of the specific requirements of the Code. There would not be consensus about which aspects of behaviour need changing but the flexibility agenda of Government is quite well understood even if it is not well defined. The code monitoring has identified a number of issues and the Government has used these reports to identify issues such as assignment and subletting, upwards |

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| | | only rent reviews and the awareness of small business of the implications of signing leases where they would like behaviour to change.<br>**Does the problem the code addressed still exist?**<br>See above. Also work such as the Occupier Satisfaction Index (OSI) (reference) suggests there are still many problem areas.<br>**Has the code been updated to reflect changing conditions?**<br>Yes, the new version is quite different to its predecessors and reflects changes in leasing practices. Significantly. It is clearly targeted at smaller landlords and occupiers. It also tries to reflect the main concerns of occupiers.<br>**Is there a process in place for evaluation and revision of the code?**<br>The Code working group still exists but there appears to be no process for reviewing the code on an ongoing basis. |
| | Are there competing codes or legislative instruments? | No. The only confusion that might occur is between the various versions of the code: The monitoring research of the dissemination of the latest code suggested that professionals are aware of the 2nd version and believe that to be the current edition rather than the 3rd. |
| *Success* | Have the objectives of the code been achieved? | **Performance indicators are about increase or decrease in customer/stakeholder complaints, number of violations, achievement of measurable objectives and the reputation of industry**<br>The answers to the questions on relevance of the code show how difficult it is to answer this question. The lack of continual monitoring or procedures for complaint adds to these difficulties. Certainly there have been changes to lease clauses which might be seen to promote fairness; however the OSI suggests there are still problems to address. In terms of dissemination – the monitoring research shows that this objective has not been achieved. |
| | Are the firms capable of compliance? | **Performance indicators are first about the firms – their sophistication, expertise, provision of training, compliance regimes, resources given to compliance, familiarity with code requirements. Second, the industry body – its training activities, resources for monitoring etc.**<br>The point has already been made that, although the code is largely aimed at regulating the behaviour of 'landlords', the firms involved in creating and operating a lease span several types of business. Within each group there are certainly some very large and sophisticated firms who are used to complying with regulations, for example the property advisers typically belong to the RICS and the lawyers are required to be members of the Law Society. There is some evidence of 'training' within these firms and their professional bodies have been active in dissemination to the members. The BPF, representing landlords, has similarly been active in dissemination. However |

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| | | there is little evidence of firms adopting compliance regimes; our research found evidence of only one firm that ensured it had procedures in place to conform to the code before using the code logo. It is also not clear the extent to which landlords (who endorse the code) ensure that their advisers and agents are using it.<br>Beyond the large firms, there are many SMEs in all types of business that are unaware of the code and so unlikely to score highly on these performance indicators. |
| | Are there incentives for compliance? | **Performance indicators include: logo, financial incentives, competitive advantage, regulatory incentives, high exit costs, negative consequences for non-compliance, identification as non-complier.**<br>There is no logo for the 3rd edition; to show endorsement of the code agents typically put a line on the particulars such as this from a property being marketed by Jones Lang LaSalle, property agents:<br>*LEASE CODE*<br>*British Land supports the aims and objectives of the Code of Practice for Commercial Leases in England and Wales. A copy of the Code is obtainable from your advisors or from www.commercialleasecodeew.co.uk or from the Royal Institution of Chartered Surveyors. 12 Great George Street, London, SW1P 3AD.*<br>The advantages of compliance are not clear; there may be some reputational advantage but there is no direct evidence of this. There are certainly no specific and measurable consequences of non-compliance. Whether compliance is valued by customers is unclear without research into this. |
| | Is there an industry organization or another group to develop and administer the code? | To develop yes – but not to administer. This role is dissipated across professional bodies and industry groups who represent various players with different inputs into the leasing process. |
| | Are there mechanisms to hold the industry or firm accountable for compliance with the code? | **Performance indicators include complaints procedures, reports, audits etc**<br>No – only the Government funded periodic research which address specific questions posited by government. |
| | Are there sanctions or negative consequences for | No – only a general threat of legislation |

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| | non-compliance? | |
| | Are sanctions or negative consequences used? | No sanctions so cannot be used. |
| | Are there unintended or negative effects of the code? | **Performance indicators such as limiting completion or uneven burden between players being imposed**<br>None that are apparent; there is certainly no sense that conforming to the code limits competition. Given that conforming with the code is arguably not particularly onerous then it does not overburden them. |
| | Are there champions of the code? | **Do leaders support, promote and apply pressure on peers to implement code?**<br>Industry leaders do publicly support and endorse the code. However, while the BPF is quite vocal in encouraging members to conform, the professional bodies are reluctant to apply pressure on their members. The monitoring research for the third code found that this reluctance is because they believe they cannot instruct members to undertake activities that may be 'against their clients' interests', such as giving potential tenants information on the consequences of agreeing certain lease clauses. |
| | Has an industry code achieved wide coverage? | The monitoring research suggests not |
| *Alternative approaches* | Has the coverage been as wide as anticipated? | No, government and the various code group bodies are disappointed with the monitoring findings on this. |
| | Are the sanctions in the voluntary code adequate? | There are none |
| | Does the code cover interjurisdictional situations? | No |
| | Is there a need for uniformity of rules? | **Would legislation produce uniform rules and, if so, how would such legislative rules likely be developed?**<br>Given that there are specific actions that can be taken within the code to meet objectives, these could be developed into a set of legislative rules. Other countries (such as Australia )have taken this approach although the operation of the legislation in Australia is controversial and has recently been subject to an Australian Productivity Commission report that discussed deregulation using the UK voluntary code model as an example. |
| | Does the voluntary code require additional | **What would add to the credibility of the rules and the rule enforcement regime?**<br>The professional bodies are in a position to work with their |

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| | credibility? | clients to establish a set of verifiable procedures and to make many aspects of the code mandatory on their members. |
| | Is independent monitoring, enforcement or adjudication required? | Some kind of individual transaction level monitoring procedure would add weight, but it is not clear who this would be and who would pay. |
| | Are sufficient resources being devoted to the code (for rule making, communication, monitoring, enforcement, adjudication, sanctions and revision)? | We are not aware of any significant resources being devoted to this apart from government funding of the monitoring research. The Joint Working Group is an ad hoc group from the membership and/or administration of the various organisations and we believe they are unpaid. |