BT GROUP RESPONSE TO ENSURING TENANTS' ACCESS TO GIGABIT-CAPABLE CONNECTIONS

BT Group welcomes the opportunity to respond to this consultation.

As the major investor in Openreach fibre deployment, BT Group has a strong vested interest in ensuring the cost and complexity of fibre deployment is kept to a minimum, and that the process of accessing properties and installing new infrastructure is as straightforward as possible.

In the case of full fibre deployments, the actual installation work is undertaken by Openreach utilising BT capital and then made available on a wholesale basis to the wider industry.

We have therefore not responded as BT Group to the detailed questions in this consultation as Openreach will be responding in their own right. We have, however, provided some additional views/perspectives from the perspective of BT, of which EE is a part, as a mobile network operator, given similar access issues and our experience of the new Electronic Communications Code. (the "**New Code**").

Improving digital connectivity is a key priority for BT and the Government. Realising shared ambitions for full fibre and 5G will require major investment from the industry. We recognise that this consultation is intended as an important start to this. But it needs to consider: the wider issues associated with delays caused by wayleaves and contacting of landlords, not just in MDUs, but across rural and other areas of the UK; and the rights granted under the New Code. The consultation needs to ensure that the process in the New Code works effectively or is augmented if necessary. The process should work both in response to tenant requests and as part of a pro-active deployment as well.

Mobile Position

We consider that the New Code already provides an effective framework to help facilitate the deployment, upgrading and sharing of communications infrastructure. We are committed to following the principles set out in the New Code and Ofcom's Code of Practice. Specifically, we consider that the New Code already caters for the grant of rights on an expedited basis (subject to tribunals being adequately resourced), including in situations where a landowner is unresponsive, or cannot be located.

However, if additional powers and obligations, along the lines of those proposed by DDCMS, whether in connection with tenant-request, or other scenarios, would assist in ensuring these rights are effectively implemented, it should be made clear that these apply to all operators, and be technology neutral. It is important that any rights granted to operators pursuant to the new proposed process should be New Code rights. This will ensure the equipment and networks are protected in the interim period pending a new agreement being entered into or being imposed by the Tribunal.

We feel strongly that the New Code strikes a fair balance between the operators' need to deploy and maintain digital infrastructure and the landowners' need to protect their assets. We are already beginning to see decisions from the Lands Chamber of the Upper Tribunal in England and Wales (the "**Tribunal**") which provide welcome clarity on how the New Code operates[1].

[1] Cornerstone Telecommunications Infrastructure Limited and the University of London. Re. Lillian Penson Hall (3, 9 October 2018); & EE Limited and Hutchison 3G UK Limited and the Mayor and Burgesses of the London Borough of Islington Re: Threadgold House (19 October 2018)

These decisions make clear that the New Code can deliver rights for the timely deployment of infrastructure e.g. paragraph 26 of the New Code permits an Operator to make an application to the Tribunal for interim Code Rights (including a right to access and install Electronic Communications Apparatus ("**ECA**")) pending a full hearing. Crucially, an application can be made under this section before 28 days has elapsed, or the site provider has said that it will not grant the rights.

Under paragraph 26(3) of the New Code, the Operator has to demonstrate that it has a "*good arguable case*" that the interim rights should be granted. The Tribunal has demonstrated that it will deal with applications for interim rights quickly, usually as a part of the initial case management conference. In the Threadgold case, interim rights were granted by the Tribunal within 2 months of the initial application. Where the Tribunal is hearing applications for the grant of long-term Code rights, it is obligated to hear cases within six months from the date of the initial application[2]. To date, all the signs are that the Tribunal will comply with that obligation, although resourcing may become an issue if the volumes of applications increase, e.g. as part of a large scale Fibre deployment.

Absent/Unresponsive Landlords

In the case of absent, or unresponsive landlords, interim rights can be sought by serving a paragraph 26 notice on that landlord, and an application being made to the Tribunal. The New Code provides that the necessary notices can be left at the relevant land/building if it has not been possible to ascertain who the owner of the relevant property interest is (paragraph 91(6) of the New Code). It seems clear that this applies in the scenario where the landlord was not occupying the building, yet its consent was required to the grant of rights. Additional clarity from DCMS on this point may help if there is any doubt.

One area where an absent/unresponsive landlord might impact the level of service being provided by an operator to its customers, is in the area of providing access for fault fixes. This is not a widespread problem, but one fault might impact hundreds or thousands of customers. So a single instance has a material impact. One of the purposes of the consultation is to align the rights/powers operators have with those enjoyed by providers in the gas, power and water industries. Those providers have broad powers to access land/buildings in certain circumstances, including operational emergencies, and we consider that similar powers could be extended to operators in connection with ensuring communications infrastructure continues to provide the service its customers demand.

Process Improvements

Although we consider that the New Code contains the necessary processes to facilitate prompt deployment of communications infrastructure (which is the Governments objective for the New Code), we would make an additional recommendation which might alleviate some of the pressure on the process, if volumes increase.

We propose the creation of an adjudication process, or sub-forum, working under the auspices and with the authority of the Tribunal, which could hear interim rights applications, temporary rights application requests for access (whether prior to a grant of Code rights or during the life of a Code agreement) and similar matters. We are aware of industry-specific adjudication schemes (such as the Pub Code) and mindful of the ways that employment tribunals are set up to hear cases quickly.

[2] Regulation 3(2) of the Electronic Communications and Wireless Telegraphy Regulations 2011, referred to in paragraph 97 of the New Code

These forums/processes are designed to keep costs as low as possible for applicants and ensure cases are heard quickly by experts who are aware of the challenges in the industry.

The adjudicators should be able to readily assess the impact on coverage that any grant of Code rights might have through evidence presented in a standard, pre-agreed format. The adjudicator should also be cognisant of the practical impact that the grant of rights may have on the landlords' building. Cases about access should be heard very quickly and often in conference calls, or video conferences.

It may only be appropriate to initially use this procedure where the impact of the grant of the rights is relatively immaterial (i.e. where a fibre connection is sought into a building or some small cells are being placed within a building). As the Tribunal makes more determinations, the adjudicators will have more guidance on which to base their decisions.

Secondly, we consider that, where a tenant serves a notice requesting a service on an operator (perhaps using Ofcom or DDCMS templates), that should create a (rebuttable) presumption that the public benefit test that the operator needs to satisfy in paragraph 20 of the New Code has been met. That is not to say that evidence from tenants/customers should be required as a matter of course in order to satisfy the public benefit test, just that where it is provided, it creates the presumption that it is satisfied.

Overcoming restrictions in tenants' leases

It is clear that operators may use the New Code to acquire rights from the landlord where the landlord occupies the relevant land (such as common parts of the building outside of the tenant's demise). However, rights may also be required over the tenant's premises and various lease restrictions may prevent the tenant from granting them voluntarily e.g. alienation and alterations restrictions.

Section 134 of the Communications Act 2003 may assist in this situation. The effect of that section appears to be that any restriction in a tenant's lease which fetters the tenant's ability to grant Code rights to an operator (e.g. consent requirements), is deemed by statute to be subject to a provision that the landlord cannot unreasonably withhold its consent.

The grounds on which the landlord could withhold consent should be very limited since *"the question whether the consent is unreasonably withheld has to be determined having regard to all the circumstances and to the principle that no person should unreasonably be denied access to an electronic communications network or to electronic communications services"*[3].

But as the Falcon Chambers book on the New Code ("The Electronic Communications Code and Property Law; Practice and Procedure") makes clear, section 134 has seldom been used. And Falcon Chambers say "*the Law Commission were unable to arrive at any certain conclusion to its continuing effect if any*" [4]

We consider that through some specific clarification and guidance, many of the problems tenants encounter in securing high quality electronic communications services of their choice could be solved.

[3] Section 134 (5) Communications Act 2003

[4] See Para 7.2.49, page 95 ("The Electronic Communications Code and Property Law; Practice and Procedure" Falcon Chambers (2018))

In order to provide the necessary certainty around tenant rights we recommend:

(1) DDCMS clarifies that Section 134 of the Communications Act 2003 can be used by tenants when they are confronted with clauses in their leases (whether to with alterations/operations or alienation) which fetter the tenant's choice around electronic communications services; **and**
(2) DDCMS and OFCOM providing clear guidance to tenants about how they make use of this power cheaply and effectively.