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Response to Consultation: Ensuring tenants' access to gigabit-capable connections

For the purposes of this consultation, it is important to differentiate between Operators seeking to roll-out full fibre connections and gigabit-capable broadband to tenants of both residential and commercial premises (such as Virgin Media and other internet providers) with Operators seeking to install mobile network equipment which does not directly benefit tenants of the premises upon which the equipment is installed and/or has not been requested by tenants.

We do not consider that a number of the issues raised would be applicable to mobile network operators such as for example Vodafone Limited, Telefonica UK Limited, EE Limited, insofar as mobile network operators do not seek to roll-out broadband connections to the benefit (or request) of tenants in the premises upon which they seek to install their apparatus. It is therefore essential that any additional rights which, subject to the consultation response, may be granted to Operators for the purpose of providing gigabit-capable broadband to tenants **do not** extend to mobile network operators seeking to access for example rooftops or sites for the installation of aerials and/or masts. Such rights being granted to mobile network operators would be of huge detriment to landowners, particularly where tenants do not benefit from enforced access.

For clarity, where we use the term "Operators" going forward, we refer solely to Operators seeking to roll-out gigabit-capable broadband and not mobile network Operators, for the reasons set out above.

1 Would the placing of an obligation on landlords in the manner proposed encourage more landlords to respond to requests sent by operators?

In answering this first question, it is important to understand why landlords have not responded. In our experience, landlords find Operators very difficult when they need apparatus to be moved. We also find that many landowners have been offered a minimal amount of money for access to their land the installation of cabling upon their land, which often does not even cover the landlord's administration costs of dealing with such matters. In these circumstances, it is not difficult to understand why landowners might decide not to engage.

In our view, the Operators' attitude and approach has to change. The Operators have to work with landowners, acting quickly and cooperatively when apparatus genuinely needs to be relocated. Operators also need to genuinely engage with landowners (for example; by providing an undertaking to pay the landowners' reasonable legal and surveyors' costs; by providing draft agreements and/or heads of terms that are up for discussion and not labelled "non-negotiable"; and by offering a reasonable sum that will genuinely compensate a landowner for the disruption and administration costs of dealing with the Operators' request for access and land use (ie more than a mere one-off payment of £50)).

Wayleaves should include a "lift and shift" clause and the Operators should pay the costs of relocating its apparatus and/or cabling in a timely manner when it receives a reasonable request to do so from a landowner. Without a "lift and shift" clause, a landlord's ability to deal with its land as it sees fit will be fettered and landlords will naturally be opposed to any installation of equipment and/or cabling that inhibits its future dealings with its property.

You mention in paragraph 4.11 of the Consultation that:

> Operators have provided examples of such 'absentee' landlords, including instances where properties are owned as investments by foreign individuals, shell companies or pension schemes.

We do not consider that this is a real issue for Operators. Most land is registered and landowners' details can be easily obtained. There is currently a beneficial ownership register for companies registered in the UK and soon to be one for overseas registered companies and entities. It is essential as part of the notice procedure that the landlord is supplied with sufficient details of the proposal, why its property must be connected (including a copy of the tenant's request) and a plan on how the installation will affect their property. In providing such request or notice, the Operator should be required to deal with the landlord's concerns such as those addressed above.

We are not convinced that Operators face significant problems in finding landlords for occupied properties. In many cases managing agents are appointed who will be able to provide details of the landlord, and a landlord is obliged to provide an address for service to residential tenants so a tenant requesting the installation will have this. Further, a commercial tenant is likely to have a VAT invoice for the rent with an address for payment.

In our view, placing this obligation on landowners will make them less willing to engage with Operators. The way to get landowners engaged is to cover their costs to enable them to take advice, for Operators to negotiate terms/agreements (not just impose their own terms), and for Operators to improve their reputation (by acting in a timely manner when apparatus needs relocating or removing and not making derisory offers which simply offend landowners).

The Legislature should also be alive to the argument that any cabling and/or equipment left in situ following the exercise of a break clause may frustrate a tenant's ability to give vacant possession and successfully exercise a right to break under the relevant lease. If the Operator does not agree to remove its cabling and/or apparatus prior to any break date contained in the relevant tenant's lease (which, under the Code, the Operator is not required to do) then the tenant's break rights may be frustrated for failing to give vacant possession. We consider that this risk needs to be removed by the Legislature to minimise the risks for both tenants and landowners, which will make both tenants and landowners more inclined to engage with Operators going forward.

2 To what extent would placing an obligation on landlords complement or undermine the facilitation within the Electronic Communications Code of negotiated agreements between landlords and operators?

The Consultation identifies several reasons why inaction by a landlord prevents gigabit-capable connections, but we similarly consider that obligating landlords to respond to requests will further reduce the facilitation of negotiated agreements as envisaged by the Code. We do not consider, in any circumstances, that the threat of compulsion complements a facilitated agreement: parties that are railroaded are far less likely to be satisfied with the outcome and will be more extreme in their positions going forward.

Conversely, if Operators are placed under a duty to contact landowners with sufficient rigour and with terms that address landowner issues as set out above, then we consider facilitated agreements to be more likely. No party wishes to receive a requirement to attend court and the Operators must attend to the service of an earlier notice with appropriate and negotiable terms with the same level of diligence.

3 Do you consider that the use of the courts for the purpose of granting entry to operators where they have been unable to contact a landlord is reasonable? If not, why not?

We do not consider that the proposal is reasonable.

The Consultation proceeds with an inherent bias: that a voluntary agreement will be negotiated. The Consultation does not address that fact that a landlord can and may successfully argue that there should not be one, notwithstanding that the Code itself contains a test to be applied by the court before an agreement is imposed on a landowner. Enabling an Operator to apply to the magistrates' court for access undermines the Code process and the test contained at paragraph 21 therein.

It is important that both the government and Operators consider why there may be delay in receiving a reply from the landlord. Assuming the request is safely received, the landlord will need to consider its plans for the property. The government wishes to speed up the planning process and is allowing far more flexibility to landlords/property owners regarding changes of use that do not require planning consent.

If a landlord wishes to redevelop its site, the 18 month notice period required to be given to an Operator which has the benefit of a Code agreement (in accordance with Part 5 of the Code), is three times as long as the minimum notice required under the Landlord and Tenant Act 1954 to be given to a business tenant, and nine times as long as the minimum notice required to seek possession from a residential tenant under an assured shorthold tenancy. Thus, just as the planning process speeds up, the removal of electronic communications apparatus slows down and there is no guarantee that a property owner can secure vacant possession. This means that a landlord has to have a long, hard look at its proposals for the property, with its advisers, before it can respond. We imagine that the Operators seek responses much quicker than the landlord is able to properly consider this.

The Consultation also fails to deal with the situation where an agreement has been imposed by the magistrates' court and how that will be notified to an absent landlord. The landlord may act in contravention of the temporary agreement (and the likely permanent agreement) because it has no knowledge of it. We reiterate that we do not think that tracing absent landlords should be as difficult as indicated by this proposal. We think that this proposal is akin to "a sledgehammer to crack a nut".

4 **Do you agree that two months is an appropriate amount of time to pass before a landlord is considered absent and an operator can seek entry via the courts? If not, what how much time would be appropriate?**

As mentioned above, we do not consider it appropriate that Operators should be able to seek entry via the magistrates' court.

If such rights are made available to Operators, we do not consider that two months is reasonable. We consider that there should be a minimum of three months and that Operators should be required to send at least three notices/letters to all addresses it has for the landowner (ie property address and address at HMLR) before any action can be taken. The onus should be on the Operator to prove service.

Most tenants will have an obligation to pass notices received to its landlord within 21 days but the notice may have to go further up the chain if there are a number of intermediary leases. As noted above, we do not think that notifying "absentee landlords" is as difficult as intimated in the Consultation.

5 **What evidence should an operator be reasonably expected to provide to the courts of their need to enter a property and their inability to contact a landlord?**

Evidence of service of the relevant notice (ie signature through Royal Mail special delivery service or witness statement by agent serving by hand) should be produced to the court together with a copy of the notices which, as indicated above, should indicate why the landlord's property must be connected (including a copy of the tenant's request). Evidence should also be provided of the steps that have been taken to contact a landowner.

As a matter of course, the Operators should be prepared (and able) to demonstrate the importance of the property's connection to its "roll-out plans", and able to satisfy the tests as set out in paragraph 21 of the Code. Enabling access via the magistrates' court is akin to imposing an agreement and the relevant tests for the same should not be disregarded, other the magistrates' court will be used by Operators to get a Code agreement "through the backdoor".

6 **Is there a need to define what constitutes a request by a tenant for a communications service?**

Yes. We consider this should be a written request not verbal. We also think it is important that a tenant explains why it needs electronic communications apparatus installed. This is particularly important in a multi-occupied property where a request has not been made by all tenants. In some instances, a tenant has a much shorter and far less valuable interest in the property yet its request (if put into effect) will have a long-term effect on the landlord's interest long after the tenant's lease has ended.

7 **Do you agree the temporary access granted by the court should be valid until such a time as a negotiated agreement, underpinned by the Code, is signed between an operator and landlord?**

The Consultation states at paragraph 3.15:

Court-enabled access will provide a temporary order permitting operators to install and maintain electronic communications apparatus, which will remain valid until such a time as the landlord re-engages with the operator and a duly-negotiated voluntary agreement is signed between the parties.

As stated above, the Consultation proceeds on the basis that a voluntary agreement will be negotiated, ignoring the fact that a landlord can and may successfully argue that there should not be one, particularly where it is the landlord's intention for example to development the property (paragraph 21(5) of the Code).

As the Code already allows an Operator to obtain code rights where the landlord does not agree to grant them, it is difficult to envisage how a "duly-negotiated voluntary agreement" would follow an application to the magistrates' court, particularly in the case of an absentee landlord. Should the parties engage at this late stage, it is likely that the Operator will seek to extend what the court has already allowed it or, at the very least, insist that something very similar is offered.

The Operator's negotiating position will be strengthened greatly (and the landlord's reduced accordingly) by presenting an agreement that already has a court's approval as the basis for negotiation. Having been permitted to install its equipment, the Operator will have no incentive to negotiate a "voluntary" agreement which changes those routes or the placing of its equipment. This will put considerable pressure on the landlord if it continues until a formal agreement is concluded. A magistrates' court will have little experience of Code agreements or property rights and interests generally. Given the strict limitations on the ability of a landowner to seek the removal of electronic communications apparatus, a landlord would have grounds to consider that its rights over its property have been lost without due process.

If the magistrates' court determines that a temporary agreement should be permitted based only on the Operator's request and a tenant's desire, how will the terms be agreed? Landlords will want to ensure that the process does not prevent them from entering into permanent agreements with Operators allowing them to "lift and shift" equipment either to undertake their obligations for repair (for which landlords are responsible under leases to those same tenants) or to redevelop the property and e.g. to ensure operators will comply with security arrangements when seeking access. Other details may be omitted from the temporary agreement and some of these e.g. security should also be required to be part of a temporary agreement, but there is no indication in the Consultation how this might be achieved in the absence of the landlord.

8 Would temporary access granted by the court provide an incentive for landlords to re-engage?

A process to provide a system by which Operators can contact absent landlords (similar to service required by court) would clearly aid Operators and access for tenants to gigabit-capable connections. The nature of the access, however, is not just access to ascertain whether a property is suitable for connection but to actually install and connect equipment. This is imposing an agreement under Part 4 of the Code "by the back door" and without having to consider the relevant statutory tests.

The Operator will lose money and the value of the equipment if a permanent agreement is not negotiated and given the poor negotiating position of the landlord (as the code permits a tenant to seek an order in another court for a permanent agreement) the Operator is likely to be successful. If the tenant has asked for it and the Operator has installed it, the landlord has no bargaining position at all. Indeed the thrust of the Consultation is that this process will ensure landlords enter into agreements, not enter into negotiations for them.

9 Do you foresee any issues with operator/landlord negotiations which take place after the installation has taken place?

As noted above, we see the following problems:

9.1 a lack of understanding by the magistrates' courts of the process involved and property rights generally may lead to an agreement that is disproportionately in the favour of the Operator in the absence of the landlord but this agreement will be used as a basis for the permanent arrangement and create a substantial advantage in negotiations in the favour of the Operator;

9.2 there is no mention of the terms of reference the magistrates' court should be given – if this is to be a temporary agreement then this ought to be different from those in the Code when the court is asked to determine the terms of a permanent Code agreement under paragraph 24, interim Code rights under paragraph 26, and temporary Code rights under paragraph 27. Clearly, all of these rights/agreements will need to be distinguished form one another;

9.3 in the absence of a full understanding of the landlord's and others interests in the building the landlord will be on the back foot seeking to negotiate appropriate terms relevant to the building in question;

9.4 because the equipment will already have been installed, there will be a reluctance on the Operator to change the route of cables or the site of the equipment even if this were to make successful negotiation of a permanent agreement more likely, or to even enter into an agreement which requires for example the payment of money to the landowner "post" installation of such cabling; and

9.5 the Consultation envisages the creation of a permanent agreement which rules out the opportunity for the landlord to argue that there should be no agreement.

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