Ensuring Tenants' Access to Gigabit-Capable Connections Consultation

RICS TELECOMS FORUM

The RICS Forum fully supports Government in its ambitions regarding UK broadband availability. It concurs with the view that whilst the new ECC should ultimately facilitate the achievement of those goals, it is evident that the provision of digital connectivity to customers who are tenants of business and residential premises remains a challenge.

To understand why this might be and why the new Code, as it currently stands, may not have sufficient impact to overcome the issues, it is necessary to understand the underlying context of the problem being addressed.

As a starting point, the crucial factor is that there is a contextual, practical and even legal difference between a scenario where an operator is seeking to deploy network on private land solely to extend/upgrade their network – we will call this a "network agreement" – and one where the operator has a request from a customer to deploy network on private land for the purposes of serving that customer – this we call a "service agreement". The former instance can be characterised by examples such as a mobile mast being sited on a field or on the rooftop of an office building. It also covers fixed line (copper/fibre cable) network deployment where "trunk" routes are being laid across land. In all these instances the landowner is not gaining any benefit from the network. As such, the Code stipulates that their agreement is required, and they are entitled to payment of consideration and/or compensation in accordance with those provisions.

However, the situation with service agreements is different. The operator is seeking to put into effect a customer request for service but because that customer is a tenant of either business or residential accommodation, the operator is nevertheless still likely to have to obtain their landlord's written agreement. This requirement arises either by virtue of the fact that the operator may have to lay network through "common parts" of the premises (from the street access point over private paving/parking/road areas, or internal service corridors/walls etc) for which only the landlord, not the tenant, may give consent, and/or, the tenant's own lease will stipulate restrictions that mean they must obtain their landlord's consent.

This problem is particularly acute with multiple dwelling units (MDU's) which may be either residential or commercial blocks occupied by many tenants. Even so, it also challenges tenants who rent an entire building because whilst there may be no common parts, their lease may contain requirements to secure landlord consent where works to the structure are proposed. Technically speaking therefore, if an operator must drill through external building walls for example, that may constitute structural works. In such cases there may even be lease requirements on the tenants to obtain Licences for Alterations to enable such works to be undertaken. Such requirements are very typical within modern commercial and residential leases although the need for such Licences will depend on the extent of the work proposed.

Nevertheless, an ostensibly simple customer request for service installation can in fact give rise to a plethora of challenges. The evidence points to a substantial proportion of landlords being at best difficult to motivate and, at worst, impossible to contact due to the nature of the organisations. This is clearly articulated in the Consultation background. Whilst many responsible landlord organisations are pro-active in their management of their properties, indeed to the extent that they employ professionally qualified managing agents to ensure property related matters run smoothly and efficiently, unfortunately there remains a significant proportion who, for one reason or another, are

disinclined to be involved in any day to day matter. This clearly makes it extremely difficult for operators and tenants to obtain the requisite Code agreement.

Theoretically landlords should feel inclined to want to act in their tenants' best interests. After all, without tenants there is no rental income. But some leaseholds are held on a virtual freehold basis e.g. 99 years with a nominal ground rent and in these cases, there is little interest in the ground landlord dealing with operator connectivity requests. Even where a landlord is receiving a full market rent and their property is being managed by agents, their perception of operator connectivity requests is one of hassle and nuisance. They do not see any benefit to their overall investment even if it means the difference between a happy or unhappy tenant.

In some cases, the continuing ignorance around the Code means that landlords and their agents are unable to distinguish a service agreement request from a network agreement request. As soon as they see any form of request from a Code operator they are fearful they may be "saddled" with equipment they cannot ultimately remove. Of course, this is not correct in either scenario but the "fear factor" can frighten landlords and their agents into silence in the hope that the operator will go away.

Another key distinguishing factor between network and service agreements is the matter of payment. In the case of service agreements, because the landlord is receiving rent from the tenant with whom they should, in theory, wish to maintain a positive relationship, there should be no expectation of consideration payment by the operator to the landlord. If such a request was made by the landlord, the operator would have to pass the cost onto the tenant.

Sometimes landlords wish to engage professionals to consider operator requests and again, the costs associated with that will be passed onto the tenant. In most cases and providing the complexity of the works warrant this referral and associated professional costs are fair and reasonable, this is an entirely understandable request as the landlord seeks appropriate reassurance. Of course, it is only right that landlords protect their investments and where service installations are likely to involve intrusive and/or structural works, operators can expect to be required to provide sufficient information and landlords are likely to want to engage a surveyor and lawyer.

Ultimately however, the focus should be on collaboration and keeping costs and delay to a minimum in order to ultimately serve the best interests of the tenant occupier. There is increasing evidence that where landlords take this approach and work proactively with operators, it becomes a positive situation for all concerned.

Against this background we therefore respond to the consultation questions as follows:

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

We believe the imposition of such an obligation would help to reinforce to landlords the need to respond to service agreement requests and highlight the importance government is placing on the wider provision of digital connectivity.

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?

Whilst we cannot provide any quantitative evidence, we nevertheless believe the proposed measures would support the improvement of the current situation for the reasons stated above.

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 see any reasonable alternative to this if the government's objectives are to be achieved. At present, the tenant is faced with a binary situation. Lack of contact means no service which cannot be right in the wider policy context. However, we would stress the importance of operators being required, in circumstances where courts do grant entry, to do so with full care and responsibility and to undertake any physical works only in accordance with proposals submitted to and approved by the courts. It would clearly undermine the objectives if operators were to exploit the situation of an "absent landlord" by conducting works in a way which caused nuisance or damage to the landlord's property or other tenant occupiers. In this respect we would point out that operators typically contract out service connection site works and a lack of supervision in such circumstances may give rise to legitimate landlord concerns.

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?

We feel that this is probably about right given the impact on tenants of having inadequate broadband connectivity both in terms of business operations and normal daily life. However, this would be conditional on satisfying the courts in respect of those matters in (5) below.

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?

As a minimum, we believe operators should submit evidence of the customer request and attempts to identify (including Land Registry searches) and contact the landlord. They should also submit details of their planned works for the courts approval and a commitment to undertake such works in a way which does not damage or interfere with the interests of the landlord or other tenants.

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

We believe the form of the request is not important providing that there is unequivocal evidence of such a request being made by a legitimate tenant.

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?*

Whilst there is a risk that a continuing "temporary access" may encourage operators to reduce their efforts to make contact and sign an agreement with the landlord, to do otherwise would put the tenant's service in jeopardy. Since this would defeat the ultimate objective of expanding broadband connectivity, it would not make sense to time limit a court access order. However, there may be a monitoring role for OFCOM and implications for operators' licences in respect of operators who fail to follow up on obtaining retrospective landlord agreements.

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

Whilst there are some landlords who will remain unmoved by any action, we do feel that most will be more inclined to engage.

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

Providing operators have undertaken the service installation properly and responsibly and in accordance with any court access conditions, then they will have a defence against those landlords who simply wish to be obstructive or uncooperative. In such cases, where a retrospective agreement cannot be consensually agreed, the parties should of course proceed in accordance with the Code provisions for dispute resolution.