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Sent by email only to: tenantconnectivity@culture.gov.uk

**Non-Confidential
21 December 2018**

Three (Hutchison 3G UK Limited, “Three”) response to DCMS’ Consultation titled “Ensuring tenants’ access to gigabit-capable connections”

This is Three’s response to the Department for Digital, Culture, Media and Sport’s consultation on ensuring tenants’ access to gigabit-capable connections.

Three welcomes this consultation on proposals to improve code operators’ ability to access land in a timely manner. If the right measures are adopted, we believe this consultation process provides an opportunity to address some of the key structural flaws in the Electronic Communications Code (the “**New Code**”).

As the UK’s challenger mobile network, Three is committed to making connectivity better for all our customers. This has included offering our customers 4G at no-extra cost, allowing them to use their allowances in 71 destinations worldwide and introducing mobile broadband to the UK market. Given the importance of the New Code to facilitating Three’s network development, we welcome the opportunity to respond to this consultation.

Three launched in 2003. It’s 10.1 million customers can now receive voice, text and data coverage in over 92% of the UK’s geography, serving 99% of the country’s population. This is a consequence of continuous investment in our network, including purchasing and deploying new spectrum, and increasing the number of sites we have to over 17,000 sites today.

In the next year, Three plans further 4G enhancements, and the launch of 5G services enabling the take up of extreme mobile and FWA (Fixed Wireless Access), which Three believes has the potential to rival and ultimately surpass fixed line broadband.¹

¹ 5G Wireless Home Broadband: A Credible Alternative to Fixed Broadband, Ovum, November 2018

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However, for the full benefit of this to be realised, it is essential Government gives mobile services and fixed line broadband equivalent attention and equivalent legal rights, and that it does not discriminate against one of the technologies through its regulatory framework.

Mobile Network Operators (“**MNOs**”) have faced real barriers when it comes to deploying necessary equipment and accessing their equipment in a timely manner. This impedes their ability to ensure that consumers and businesses have the ubiquitous and continuous network services they now expect and require. The New Code was intended to bring down those barriers. However, since the New Code came into force, landowners and their agents have continued to delay approval for development and prevent access to land even where this runs contrary to the principles of the New Code.

Three welcomes the proposals set out in Government’s consultation to better ensure tenants’ access to gigabit-capable connections and believes that if they are optimised and extended to mobile in line with Three’s proposals below, they should help to address some of the deficiencies in the New Code, making it easier for MNOs to gain access to sites in order to ensure they can maintain a high level of mobile coverage for their customers who rely upon such services.

Please see Three’s answers to specific questions set out below at **Annex A**.

We would of course be happy to answer any further questions you may have.

With best wishes

Simon Miller
Head of Government Affairs

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Answers to specific questions

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

Yes. We agree that placing an obligation on landlords in the manner proposed would be a positive step forward to ensure parties engage in discussions to look to agree the granting of code rights.

Its important to note that issues surrounding access are not confined to fixed operators, with MNOs facing their own unique challenges when it comes to exercising New Code rights.

Three believes that placing an obligation on landlords to engage with and respond to requests sent by Code Operators would be very beneficial in helping us extend, improve and maintain coverage for our customers.

The New Code should provide a clear timeframe by which a landlord should respond to a Code Operator. Specifically, we believe that with respect to an access request to install new equipment a 21-day notice period would be a sufficient period ("**Absentee Landlord Scenario**").

In recognition of consumer expectation for coverage, we suggest a shorter 48-hour notice period should be imposed in the case of an access request by a Code Operator whom is seeking to resolve a network repair issue ("**Urgent Access to Restore Network Service Scenario**").

We consider that the landowner and all people with a superior or inferior interest in the land (including new purchasers) should be bound, irrespective of who grants the code rights. Holders of superior interests in land can regulate their relationships with holders of inferior interests (i.e. a landowner or occupier can control what the tenant may undertake or permit to be undertaken on property).

Unfortunately, the current lack of clarity causes issues for Code Operators on the change of ownership of property with some purchasers refusing to acknowledge the continuation of code rights granted by the seller. A clear statement of the principle that purchasers, new occupiers and owners of any other interest created in respect of land affected will remain bound by existing code rights is recommended.

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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?

Three believes that placing an obligation to respond on landlords would complement the facilitation of negotiate agreements.

As responsible Code Operators, Three understands the importance of working collaboratively with landowners and other interested parties and this is reinforced by our adherence to the Ofcom Code of Practice which runs in parallel with the new Code.

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?

Three agrees that using the courts for granting access to operators is reasonable and this should apply in circumstances where either the landlord has not responded (ie absentee landlord) to an access request or the landlord is improperly refusing access to a Code Operator.

Unfortunately, operators continue to experience difficulties in gaining initial access to buildings or land and gaining access to inspect, repair, upgrade or maintain our communications apparatus. This also applies in the case of access to neighbouring or third party land due to obstruction or refusals from owners of third party land which then can result in delays, dead cells (communications apparatus is not operational and no operational coverage is available), leading to increased costs due to access attempts being aborted.

Access issues arise not only due to the landowner being unable to be identified or failing to respond; they also arise as a result of landowners' deliberate obstruction of operators seeking to exercise code right. Operators must be able to access sites to maintain equipment in the case of outages and to restore service to customers as quickly as possible without unnecessary cost. Three has experienced numerous instances of landowners blocking access to sites or only allowing access subject to a payment, even where access without payment is allowed for in the site agreement (lease) it has with that landowner.

In effect, some landlords continue to hold operators to ransom, further delaying the restoration of services to customers. Such a situation requires urgent action, as they are 'service impacting faults' i.e. faults which impact a single site but might impact thousands of customers.

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Due to the impact and time constraints associated with such a fault, Three is concerned the courts may not be best equipped or resourced to reach a determination in proposed timescale. This is why we believe a quicker resolution might be available if some form of deterrent were introduced. Three notes that criminal sanctions have been used in this regard previously, where landlords who intentionally obstructed an operator or its employees during the course of its business, faced a criminal penalty.

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?

Three believes two months is too long a period, and it should be shorter and take account of the context of the request for access.

As stated, when seeking to address a service impacting fault, we believe the period should be 48 hours. Alternatively, where it is in the context of exercising a Code Right to install new apparatus, we believe 21 days from the initial application would be more appropriate.

Where there is a network service impacting fault it can result in mobile coverage to a local area being no longer available and as a result customers in that area whom rely upon such services being severely impacted. Customers consist of individuals and businesses whom rely upon a reliable and continuous mobile network coverage.

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?

In the context of the Absentee Landlord Scenario, the Magistrates Courts is the appropriate forum to provide access to land and in such instance, the Operators should be required to provide the original request for access and all subsequent correspondence to the landlord.

Operators should be required to provide a declaration confirming that no substantive response has been received from the landlord. [relevant documents to evidence contact and declaration/undertaking that no response has been received]. The magistrates court are the appropriate forum to such situations as they can award rights of access fairly swiftly offering an expeditious resolution.

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In the context of an Urgent Access to Restore Network Service Scenario where a landlord has raised a dispute in connection with a Code Operators' access request, we believe that Code Operators should be able to go to the Chancery Division of the High Court for a resolution. As mentioned above, there are a number of instances where landowners refuse access to land on ransom terms and in such a situation there should be a forum for such issues to be resolved promptly.

Priority should be given to ensure Operators can *maintain* and provide a good network services to its customers (made up of individuals and businesses in the local community whom rely upon the mobile connectivity in their daily lives). In this regard, we have previously suggested drafting which could be included in the new Code to allow an operator to apply to the Chancery Decision of the High Court for an order allowing it to exercise any Code Right. A clause to give effect to this might read as follows:

"If a Code Operator

- (i) requires access to land in order to exercise any Code Right or Rights; and*
- (ii) has given to the Site Provider and any other landowner 48 hours prior notice or such lesser period of notice as in all the circumstance's it considers to be reasonable;*

Then it may apply to the Chancery Decision of the High Court for an order allowing it to exercise any Code Right and the Court may grant such relief as it sees fit.

On the making of such an application, the High Court will:

(i) (for the avoidance of doubt) act on the basis that Code Rights are enforceable between any Code Operator and any owner or occupier of land;
And

(ii) Assume that the public interest in access to a choice of high quality electronic communications services outweighs any prejudice which might be caused to an individual owner or occupier of any land by the making of any such order; and; and

(iv) Assume that damages would not be an adequate remedy for the Code Provider;
and

(v) Act on the basis that no proof of special damages shall be necessary for the enforcement of any Code Right

(v) Apply the provisions of the CPR

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

Three believes that a request by a tenant for a communications service would only be of benefit to fixed line providers, and would in-turn end up hampering MNOs ability to access and acquire sites.

If Government wants to encourage ubiquitous mobile coverage, we would urge them to remove the proposal for tenants to request service, as it is unlikely they would do so, particularly when you consider sites on residential or office buildings in busy urban areas, where there is an inherent expectation that mobile coverage would exist.

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?

We agree that any temporary access granted to an operator should remain valid until such a time as a negotiated agreement, underpinned by the New Code, is signed and in place.

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

Three believes that any temporary access granted by the court would be a good enough incentive to encourage landlords to re-engage with the negotiation process.

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

Three would hope that after installation has taken place, an adequate contract between operator and landlord would be reached that would address any potential issues surrounding ongoing access to the site.