The Product Security and Telecommunications Infrastructure (PSTI) Bill: Openreach submission to the Public Bill Committee

1) While Openreach welcomes the intent of the PSTI Bill, we are concerned that it does not go as far as it could to support accelerated full fibre deployment. Part 2 of the Bill amends the Electronic Communications Code to attempt to support accelerated full fibre deployment while protecting landowner rights.

2) We recognise that there is a balance to be struck between the public interest in improved connectivity and the rights of property owners. However, the measures set out in the Bill could be strengthened to accelerate deployment in urban and rural areas with minimal adverse impact to property owners.

3) We set out two areas where we believe the Bill needs to be strengthened. The first relates to Clause 59 and Clause 60 of the Bill, which restricts where we can upgrade apparatus using existing wayleave agreements. Clause 66 concerns procedures to gain Code rights with unresponsive landlords.

4) Making these amendments would boost full fibre deployment, support the levelling up agenda and help to deliver the Government's manifesto commitment. We set out these amendments in more detail later in our submission.

Background

5) The Government has set a manifesto commitment to improve the UK's broadband connectivity – relying on the private sector to pass 85% of homes with gigabit capable networks by 2025, largely via private investment. The recent Levelling Up White Paper recognised the critical role full fibre will play in supporting this agenda – with one of the twelve new missions set by the Government building on the 2025 target to commit to nationwide gigabit coverage by 2030.

6) Openreach will be critical to help deliver both targets through our ambition to pass **25 million premises with full fibre by December 2026**, including at least **6.2 million properties in the hardest to reach areas of the UK.** Depending on our ability to attract further funding, we want to continue our deployment beyond this point – bringing the benefits of full fibre to even greater numbers of consumers.

7) We're already getting close to reaching 7 million homes and businesses with full fibre, including over 2 million in harder to reach areas, but we know there is much more to do.

8) One challenge we face to deliver our plans is securing legal agreements (wayleaves) to access land and property to install and maintain our apparatus. This process is regulated by the Electronic Communications Code (ECC).

9) Within our commercial plan, we currently aim to pass millions of properties in blocks of flats - which we will need to secure new wayleaves in order to upgrade. To deliver our rural ambitions, we will also need to negotiate large numbers of wayleaves to cross private land.

10) The difficulties we face in securing these agreements means we estimate that:

    a. **We won't be able to access up to 1.5 million flats even in cases where residents want full fibre;**
    b. **Our plans to deliver full fibre to 6.2 million premises in more rural areas will be even more challenging to deliver, and;**
    c. **The success of Project Gigabit – the Government's £5 billion public subsidy programme – will also be at risk.**

11) Based on the content of the Bill, we've already taken the difficult decision to start delaying the phasing for some of our build programme aimed at flats. There are already c.300,000 flats we had originally planned to build before 2025 – which would have contributed towards meeting the manifesto commitment – which we now plan to build after that date. Failure to amend the Bill could mean we further backload our build programme, which would have direct impacts on the ability of the Government to meet their manifesto commitment.

The Product Security and Telecommunications Infrastructure Bill

12) The PSTI Bill aims to mitigate these risks. We welcome the intent of the Bill, but are concerned that it does not go far enough. We believe further amendments are required, which would enable operators to accelerate the pace of their build while continuing to maintain a fair balance between landowner interests and the clear public benefits that enhanced connectivity would deliver.

Clause 59: Upgrade rights

13) As the UK's digital network operator, we already have a vast existing network – connecting flats and crossing rural land across the country. The most impactful change which could be made would be to enable us to upgrade this existing infrastructure without needing to negotiate new wayleaves.

14) The PSTI Bill does amend the ECC to retrospectively add upgrade rights to existing wayleave agreements, but crucially limits these only to apparatus which is installed underground (i.e. in underground ducts), and where there is no burden on the landowner or visual impact. These conditions are more restrictive than the existing provisions for upgrade rights within the ECC which would apply to new wayleaves we agree.

15) These changes will do nothing to help operators deliver full fibre to blocks of flats. They will also not help deployment in rural areas as most of our network is built overhead (using poles).

a. **Access to flats:** Applying upgrade rights in flats would mean we could quickly and safely upgrade our existing network. As in all cases, we would have existing apparatus on site, we could deliver these upgrades with minimal burden to landowners and with minimal visual impact. **We estimate that being able to use upgrade rights would give us an easier path to deploying full fibre in close to one million flats across the UK.**
b. **Access to land and overhead network:** We have **one billion metres of overhead cabling in rural areas**, so being able to upgrade this to full fibre would provide a significant boost to connectivity. There are also over **250,000 poles which we use to provide service to end-customers on private land (distribution poles), and over one million poles which we use to extend out the fibre network (serving poles)**. Under the current proposals set out at Second Reading, we will need to secure new wayleaves in order to upgrade this infrastructure to full fibre.

16) DCMS have applied a more restrictive set of conditions for these rights than exist under the current Code. This applies a condition of having no adverse (visual) impact and no burden on the landowner, whereas the current Code uses a threshold of having a no more than a minimal adverse (visual) impact on the landowner.

17) DCMS have applied these more restrictive conditions on the basis that they are being applied retrospectively. Our view (which we shared with DCMS) is there is no principle that would require retrospective rights to be more limited than those under the existing framework in the Code. If, for instance, it could be said that the existing framework itself is well within the boundaries of compatibility with the European Convention on Human Rights (ECHR) - its retrospective extension might more readily be said to fall within those boundaries.

18) The impact of applying the existing framework retrospectively should be considered on its own merits. Our view is that any limited negative consequences flowing from retrospective application of the current framework, as proposed above, would be outweighed by the significant positive impact on the general public interest and that, therefore, the proposed changes would maintain a fair balance.

Proposed amendment

19) This amendment would have the effect of applying the same conditions in the existing Code to wayleaves agreed prior to the passage of the Digital Economy Act 2017. This would mean operators could more easily upgrade any apparatus in flats or across land.

Amendment One: Amend Clause 59 (4) to read:

> After paragraph 5 insert—
> "Upgrading and sharing provisions

5A Paragraph 17 of the new code (power for operator to upgrade or share apparatus) applies in relation to an operator who is a party to a subsisting agreement, but as if for sub-paragraphs (1) to (6) there were substituted—

"(1) This paragraph applies where –

(a) an operator ("the main operator") keeps electronic communications apparatus installed on, under or over land, and

(b) the main operator is a party to a subsisting agreement in relation to the electronic communications apparatus

…

(3) The first condition is that any changes as a result of the upgrading or sharing to the electronic communications apparatus to which the agreement relates have no adverse impact, or no more than a minimal adverse impact, on its appearance.

(4) The second condition is that the upgrading or sharing imposes no additional burden on the other party to the agreement.

…

(9) Any agreement under Part 2 of this code is void to the extent that— (a) it prevents or limits the upgrading or sharing, in a case where the conditions mentioned in sub-paragraphs (3), (4) and (6) are met, of any electronic communications apparatus to which the agreement relates that is installed on, over or under land, or
(b) it makes upgrading or sharing of such electronic communications apparatus subject to conditions to be met by the operator (including a condition requiring the payment of money).

…

(10) Nothing in this paragraph is to be read as conferring a right on the main operator to enter the land which the main operator would not otherwise have, when upgrading or sharing the use of the electronic communications apparatus.

…

(12) In this paragraph— "the relevant land" means—
(a) in a case where the main operator has a right to enter the land, that land;
(b) in any other case, the land on which works will be carried out to enable the upgrading or sharing to take place or, where there is more than one set of works, the land on which each set of works will be carried out;

20) The next amendment would mirror the above amendment to apply to apparatus installed before 29 December 2003, and would have the effect of applying the same conditions in the existing Code to the previously agreed wayleaves.

Amendment Two: Amend 60 (3) to read

After paragraph 17 insert—

"17A (1) This paragraph applies where—

(a) an operator ("the main operator") keeps electronic communications apparatus installed on, under or over land,

(b) the main operator is not a party to an agreement under Part 2 of this code in relation to the electronic communications apparatus, and
(c) the electronic communications apparatus was installed before 29 December 2003.

…

(3) The first condition is that any changes as a result of the upgrading or sharing to the electronic communications apparatus to which the agreement relates have no adverse impact, or no more than a minimal adverse impact, on its appearance.

(4) The second condition is that the upgrading or sharing imposes no additional burden on the other party to the agreement.

…

(9) Nothing in this paragraph is to be read as conferring a right on the main operator to enter the land which the main operator would not otherwise have, when upgrading or sharing the use of the electronic communications apparatus.

…

(11) In this paragraph "the relevant land" means—
(a) in a case where the main operator has a right to enter the land, that land;
(b) in any other case, the land on which works will be carried out to enable the upgrading or sharing to take place or, where there is more than one set of works, the land on which each set of works will be carried out."

21) Potential substitute amendments which could support the objectives of improving coverage while protecting property rights would be to give the Secretary of State the power to designate what upgrade activities could be carried out using pre-existing wayleave agreements. We understand DCMS had considered this approach to clarify what activities they considered permittable for wayleaves agreed after December 2017, but didn't want to unduly limit the application of these rights. Taking this approach with regards to wayleaves agreed prior to December 2017 could give DCMS the ability to apply a greater level of oversight over our activities.

22) Further amendments could be made to limit the application of these provisions to exclusively apply in cases where a tenant had requested a full fibre service. Using a tenant request for service would demonstrate an even clearer public interest than a more general application of these provisions, and could therefore be seen to justify a wider application.

Clause 66: Unresponsive landlords

23) One of our key issues with the Telecommunications Infrastructure (Leasehold Property) Act 2021 ("TILP 21") was that it creates a risk that we would need to apply to a tribunal on two separate occasions – to first acquire a temporary right, followed by an application to secure permanent Code rights. Simply put - in order to still be legally compliant, keep our apparatus in situ, and obtain access to the apparatus, we would still have to re-apply to the courts once

temporary Code powers had expired. This risk would be highly likely given the unresponsive nature of the landowner we would have been trying to contact.

24) The same issue applies to the new provisions set out in the new proposed Part 4ZA within the PSTI Bill, which would extend a similar framework for addressing unresponsive landlords to land where the landowner is unresponsive.

25) Our concern could be addressed, while still maintaining individual human rights under the ECHR, through an approach that could avoid the most objectionable aspects of the current scheme without breaching human rights principles.

Proposed amendment

26) This proposed amendment would amend paragraph 27G in the current Code and draft paragraph 27ZF in the PSTI Bill so that any agreement imposed under Parts 4A/4ZA could be terminated by the occupier on notice, but not before the end of the minimum term (which could be 18 months, six years or some other period). We consider a notice period of three months would be appropriate.

Amendment Three: Amend 27G in the Communications Act, and amend 27ZF in the PSTI Bill:

> 27G (1) A Part 4A code right ceases to be conferred on the operator by, or otherwise to bind, the required grantor —
>
> > (a) if a replacement agreement comes into effect, in accordance with that agreement,
> > (b) if the court decides to refuse an application by the operator for the imposition of a replacement agreement, in accordance with that decision, or
> > (c) upon termination in accordance with Part 6 of the Code, provided that (i) at least 3 month's prior written notice to terminate has been given by the grantor to the main operator and (ii) such notice shall not expire earlier than the end of the specified period.
>
> (2) In sub-paragraph (1) a "replacement agreement", in relation to a Part 4A code right, means an agreement under Part 2 by which the required grantor confers a code right on the operator, or otherwise agrees to be bound by a code right which is exercisable by the operator, where that right is in respect of the same land as the Part 4A code right.
>
> (3) In sub-paragraph (1)(c) "specified period" means the period, of no more than 18 months, specified in regulations made by the Secretary of State.
>
> (4) The required grantor has the right, subject to and in accordance with Part 6 of this code, to require the operator to remove any electronic communications apparatus placed on the connected land in the exercise of a Part 4A code right which has ceased to have effect, or otherwise to bind, the required grantor.

AND

Expiry of Part 4ZA code rights

> 27ZF (1) A Part 4ZA code right ceases to be conferred on the operator by, or otherwise to bind, the required grantor—

(a) if a replacement agreement comes into effect, in accordance with that agreement
(b) if the court decides to refuse an application by the operator for the imposition of a replacement agreement, in accordance with that decision, or
(c) upon termination in accordance with Part 6 of the Code, provided that (i) at least 3 month's prior written notice to terminate has been given by the grantor to the main operator and (ii) such notice shall not expire earlier than the end of the specified period.

(2) In sub-paragraph (1) a "replacement agreement", in relation to a Part 4ZA code right, means an agreement under Part 2 by which the required grantor confers a code right on the operator, or otherwise agrees to be bound by a code right which is exercisable by the operator, where that right is in respect of the same land as the Part 4ZA code right.

(3) In sub-paragraph (1)(c) "specified period" means the period, of no more than 6 years, specified in regulations made by the Secretary of State.

(4) The required grantor has the right, subject to and in accordance with Part 6 of this code, to require the operator to remove any electronic communications apparatus placed under or over the relevant land in the exercise of a Part 4ZA code right which has ceased to be conferred on the operator by, or otherwise to bind, the required grantor.

27) This approach would have the following advantages:

a. The operator would remain lawfully present at the end of the minimum term and could continue to exercise rights under the agreement (such as access to repair).
b. There would be no requirement that the operator seek a full code agreement unless the occupier served notice.
c. The apparatus could only be removed using the Part 6 procedure (as already provided for by Parts 4A/4ZA) and any such procedure would be stayed pending any paragraph 20 claim brought by the operator (paragraph 40(8)).

28) There is precedent for this approach. It is essentially how paragraph 21 (and paragraph 5) of the old Code operated. It seems likely that most occupiers, having been unresponsive in the past, would not take the trouble to serve notice under Part 6 and most installations would simply remain in place indefinitely.

29) This is also potentially an attractive approach from a human rights perspective. On the one hand it does impose an additional burden on the occupier, in the sense that it would not acquire the right to apply to remove the apparatus automatically as time passes, but would rather have to take the positive step of serving notice. Furthermore, this right would have been acquired by a summary paper procedure.

30) On the other hand, the additional burden imposed on the occupier is modest. In practical terms, its effect is simply to delay the earliest date that removal could be achieved by the period of the notice. Critically, the provisions of Part 5 of the ECC (with continued Code agreements even after contractual termination) would not apply.

31) On this basis, we believe this is a modest change which would make the provisions of the TILP Act and the PSTI Bill more effective without imposing significant burden on landowners.