

DCMS Consultation on EU Broadband Cost Reduction Directive

25th January 2016

The Home Builders Federation

The Home Builders Federation (HBF) welcomes the opportunity to respond to this important consultation. Moreover, throughout 2015 the HBF has been actively involved in discussions with DCMS, DCLG and Openreach in terms of transposing this latest Directive into the UK's legislative framework. Our response builds upon the outcome of these earlier discussions, in addition to crystallising a number of responses from HBF Members.

As the national trade association representing the body of UK House Builders responsible for providing around 80% of all new housing in the UK we trust that appropriate quantitative and qualitative weight will be given to our response. Importantly, as a result of our extended involvement in this matter we are more than happy to meet with DCMS and/or other Government Departments in order to effectively deal with any post-consultation queries or questions that you may subsequently have.

Our response opens with a number of general comments and subsequently proceeds to deal with each question in turn.

1. General Comments

The title of this consultation is a little misleading as on first reading the proposals appear to have the propensity to add to the cost of utility service provision and ultimately, the cost of new housing. However, it is difficult to appreciate what this impact might be in the absence of any assessment/commentary specific to new housing. Moreover, it is surprising that established guidance dealing with utility service provision in general has not been referred to or for that matter relied upon, i.e. NJUG publications and the more recent DCLG guidance, 'Better Connected'. These documents provide useful information on how to achieve cost effective synergy when it comes to the provision of utility service infrastructure in general. It is for this and other reasons that will become evident in our response that the current proposals could well create confusion whilst introducing an adverse effect on the delivery of much needed new homes both in terms of timescale and volume.

In many respects there are three important but inter-dependent and inter-related components in the delivery of superfast broadband to the customer/consumer:

- Infrastructure within the building (micro level)
- Infrastructure that links the building to the primary network
- The primary network itself (macro level)

In the context of new housing and the need to meet the aspirations of our customers, infrastructure within the building is already being effectively delivered by house builders. This consultation however seeks to introduce improved efficiency and therefore reduced cost when delivering publicly funded, primary infrastructure. That said, it is the work involved in providing the all-important intermediate infrastructure link that is both significant and essential to the successful implementation of the Broadband Directive. It is here where HBF members have had the greatest concerns regarding broadband delivery by respective providers. Moreover, it is guidance on the practical synergy between the consumer and the primary infrastructure that is missing from this this consultation. For example, is the network downstream of the primary infrastructure expected to follow the same 'in-pipe' concept. If so privately funded utility and sewerage infrastructure costs are likely to increase. In the case of sewers over 225mm in diameter this will definitely be the case given the reduction in the hydraulic capacity of the sewer itself. It would appear that cooperation and cost effective downstream continuity have not been considered and/or addressed.

An example of this is that it appears that DCMS have not fully recognised that in relying on modern methods of construction, for example timber frame, it is possible to complete the construction of a new home and one ready for occupation within 3 weeks. Allowing an initial 6 week lead-in period for the prior construction of roads, sewers and other key infrastructure means that a new home could be completed before the 'minimum information disclosure' and 'survey' period, as defined in the consultation, has elapsed. With the pressure to increase housing output, the timescale of 3 months to complete appears to short.

It is suggested that Wholesale Infrastructure providers will be exempt. However, the current Market Reform/New Charging Rules that are under consideration by Defra/Ofwat will create a new 'wholesale' entity within the Water & Sewerage Sector – in this context, does it mean that WaSCs will now be excluded from April 2017, i.e. when the market reforms are expected to come into force. Clarity is needed on this issue.

2. Consultation Question Responses

Q1: Is there any type of physical infrastructure not mentioned in the Directive definition that may be suitable for sharing?

There appears to be no consideration given to 'dark fibre'

Q2. Are there any organisations not listed above that may be subject to provisions of the Directive?

Organisations such as Virgin Media et al are excluded. Is there a specific reason for this or are they included by virtue of a 'catch all' provision

Q3. Do you consider further clarification is needed in relation to any of the definitions in the Directive?

Yes – see earlier comments relating to the proposals currently under consideration for 'market reform' in the Water and Sewerage Sector.

Q4. Are there cases where wholesale infrastructure providers provide a public communications network, and where they would therefore fall within the definition of a 'network operator'?

Not to our knowledge.

Q5: Should physical infrastructure operated by wholesale infrastructure providers be treated in the same way as physical infrastructure operated by other 'network operators' What would be the impacts of doing so?

For consistency we would say yes but it is at this juncture that the whole process, as currently intended starts to become somewhat confusing. It would be far more beneficial for the consultation to define respective roles and responsibilities and within a framework of more responsive performance KPI's.

Q6. Will it be sufficiently clear what civil work is financed by public means, and what is not?

To a degree yes but would the provision of affordable housing for an RSL fall to the definition of being publicly financed. If yes, then the civil work associated with utility service infrastructure provision would be affected. This has the potential to create confusion, delay and additional cost. It would be far more practical/sensible for utility service infrastructure

associated with RSL affordable housing to be defined as privately funded infrastructure, in particular when delivered through a S106 Planning Agreement.

Q7: Where there are existing systems for storing and sharing infrastructure information, will you be able to use them either as they are or with minor adjustments to comply with the requirements of the Directive. If you won't be able to, why not?

Access to existing, reasonably accurate utility service records is essential. However, the concern we have is the escalating costs associated with the disclosure of such information. The proposals contained in this consultation will likely result in a further increase in costs. In our view and given that most of this information is held electronically, it should be made available at a nominal cost if not free of charge. That said what minor compliance adjustments are being contemplated. These have not been defined. Access to records and information should be encouraged at all times and therefore any costs in this regard should be minimal/nominal.

Q8. How do you propose to verify the credentials of a requester, i.e. that a request is from a genuine (or prospective) public communications network operator and for the stated purpose?

No comment.

Q9. Do you agree that cost recovery is the best approach to charging for providing access to information?

No – see response to question 7.

Q10. Would you seek to charge for access to the minimum information. How might you calculate and collect this charge?

Where there is a statutory obligation to maintain and provide utility service information it should be provided at nil cost. In all other instances cost should be nominal. Moreover, there are health and safety and asset protection benefits in making such information freely available and/or at the lowest possible cost.

Q11. What will be the likely costs of carrying out surveys in most cases. How should costs be shared fairly?

We are not in a position to provide any evidence as to the likely cost of any surveys that may be required but our concern is that such costs will have little management control and will likely be passed on to house builders/developers inclusive of additional management and/or processing charges. Moreover, the process/timescale outlined in the process flow chart are far too long.

Q12. Do you agree with the process that we have set out for requesting access to the 'minimum information' on physical infrastructure and civil works.

No.

Q13. What do you think might be examples of strong cases for an extension of the time period allowed to respond to a request?

In many respects this is where the proposals fail to recognise what actually happens when it comes to the utility service sector, together with the developer's need for accurate qualitative and quantitative information to make informed commercial decisions. In our opinion, there should be no need to consider and/or agree to extensions of time.

Q14. What type of and how much information is required in order for the 'minimum information' to be useful (i.e. to inform a decision to request a survey or access to infrastructure, or to co-ordinate civil works)?

We cannot provide a meaningful response to this question but would flag up the absence of any reference to the need to also comply with the Traffic Management Act 2004. The latter can have serious repercussions in terms of the timing of any intended civils works. This in turn could affect the timing of broadband delivery to a new site. Again it would be useful to reflect upon the practical synergy and continuity of delivery that is of fundamental importance.

Q15. Do you agree that the use of the wording in the Directive is appropriate and should be copied into the regulations. Do you think the regulations should explicitly allow network operators to limit "information which may harm competition"?

The first part of this question we are unsure of. As for the second part, unless the disclosure would compromise a matter of national importance, there should be no 'limitations'.

Q16. Do you think additional measures should be used to ensure respect for confidentiality and operating and business secrets. If so what measures do you think would be appropriate. Will it be sufficient to leave these arrangements to be agreed between requesters and the relevant network operator?

Not in a position to make an informed comment, other than to re-affirm that the timely availability of information is crucial.

Q17. Do you agree that the factors we have identified are likely to be relevant to the pricing of access?

In general yes but the concern of the HBF and the development community in general is that any agreed costs are likely to be passed on to the developer. Moreover, if such 'pass through costs' are deemed legitimate then these should be made known at the land purchase viability stage. This is not evident within this consultation.

Q18. Do you agree that minimising the cost of access for installing communications infrastructure achieves the aims of the directive?

Attempts to minimise cost are welcomed but we are not convinced that the proposals contained in this consultation will achieve the objective for the reasons stated at the outset.

Q19. How should fair and reasonable be interpreted when there is a potential alternative use for a given physical infrastructure and this use can be associated with an option value.

Defining what is reasonable is difficult at the best of times and different utility providers will have differing views of what is reasonable in terms of asset values. We can offer no definitive response that effectively deals with this question.

Q20. Do you agree that using a standard prescribed will simplify the administrative aspects of making requests?

No – if anything, the administrative proposals that are being advanced may well result in an extended delay in the delivery of utility service infrastructure in general. Moreover, the HBF are very much of the view that control over the provision of key elements of utility service infrastructure could be taken away from the development community whilst third parties continue to haggle over terms and conditions. The dispute resolution process that is being proposed does not help.

Q21. Do you agree that, in practice, PCNs already enjoy a right to offer access?

In general, yes but such rights can be accompanied with significant monetary considerations. How is this to be dealt with on a fair, equitable and proportionate basis.

Q22. Do you agree that there should be no reciprocal right for non-communications networks to request access to share communications infrastructure. (E.g. an energy network operator should not have a right to request access to communications infrastructure in order to roll out its electricity network)

Yes – on the grounds of practicality.

Q23. Do you agree that there should be no restriction on the downstream use of shared infrastructure?

Yes - providing it is practical and sensible to do so. Downstream connectivity needs to be compatible if additional costs and/or delays are to be avoided.

Q24. Do you agree with our definition of works fully or partially funded by public means?

Yes - however, the need to also comply with the provisions of the Traffic Management Act 2004 is not mentioned in this section. Compliance with this important strand of existing legislation can have significant timing implications when co-ordinating utility service works in the public highway.

As such, it should be a material reference for any proposals relating to the provision of broadband infrastructure. Moreover, control/co-ordination and timing of any civils work remains with the Highway Authority and not necessarily the utility provider. In addition, the

introduction of the term 'partially funded by public means' introduces an element of confusion. Precisely what does this terminology mean. Can it be explained in more detail?

Q25. Do you agree with our interpretation of the possible grounds for refusing coordination of publically funded works?

For the reasons articulated in our response to question 24 – no.

Q26. Do you agree that we should not provide rules in apportioning costs?

No – it is essential for rules to be provided and these should clearly state what is excluded whilst also stating what costs can be included on a fair, equitable and proportionate basis.

Q27. Are you aware of any other permits that are normally required in order to carry out civil works to roll out high-speed electronic communications networks?

Only those notices/submissions that are required by the Health & Safety Executive and possible Party Wall Act notices where the front of existing buildings are adjoining with the adopted, public highway.

Q28. Do you agree that there should be no additional administrative appeal route for compensation in case of non-compliance with deadlines for deciding permit applications?

Yes – any appeal process will cause delay.

Q29. Do you agree with our analysis and conclusion that no further action is required in order for the UK to comply with Article 7(3) of the Directive?

Yes.

Q30. Do you agree that information relating to works “envisaged” within the next 6 months should only be available from the network operator, and that it would be unreasonable to expect any third party to handle such information?

Yes.

Q31. Do you agree that works carried out solely under GPD rights are generally minor works and consequently unsuitable for coordination?

Yes.

Q32. Do you agree that network operators should publish responses to requests for the minimum information relating to planned civil works?

Yes.

Q33. What measures do you propose to ensure that responses to requests for the minimum information relating to planned civil works are widely available to all PCN operators?

Not able to provide a meaningful response.

Q34. Do you agree that the decision making authorities (all authorities with a responsibility for planning and street work licenses) are the correct designated bodies to perform the functions of the SIP?

Yes.

Q35. Do you agree that the decision making authorities (all authorities with a responsibility for planning and street works licenses) already perform the necessary functions to comply with the minimum requirements of the Directive?

Unable to provide a meaningful comment other than they appear to be the only competent bodies to do so.

Q36. Do you agree that in-building physical infrastructure should not count as physical infrastructure belonging to the PCN operator?

Yes.

Q37. Do you agree with our proposal not to provide exemptions where an existing wholesale network is provided?

Yes.

Q38. Do you agree with our proposal not to provide rules for compensating damage, on the grounds that the existing recourse to the courts is sufficient?

In many respects, no. Recourse to the Courts may appear to effectively resolve any dispute but the time involved to reach a decision may be such that there are serious delays in providing the necessary infrastructure. Moreover, industry is being encouraged to consider alternative and more expedient dispute resolution procedures and perhaps this should be an approach advocated as part of the current DCMS proposals. That said would dispute resolution be more viable/speedy as matters were referred to Ofgem or Ofwat as appropriate, given the thrust of existing legislation in the energy and water sectors respectively.

Q39. Are the exemptions proposed under Article 4(7) appropriate. Should there be any further exemptions under this article?

In our opinion all sewerage infrastructure, both foul and surface water should be exempt. The potential inclusion of broadband infrastructure within sewers is to be discouraged on several practical and safety grounds. In addition, WaSCs could use the failure of a PCN to

co-operate as a legitimate reason for not completing a section 98 requisition in the statutory timescale it is obliged to do so. (Note: S98 sewer requisitions can often include capacity for future development and therefore may fall to the definition of being partially public funded. It would be useful to have clarity on this issue).

Q40. Are the exemptions proposed under Article 5(5) appropriate. Should there be any further exemptions under this article?

Yes – but in many respects we have reservations as to whether the proposals advanced by this consultation are actually workable from a practical perspective – see opening comments.

Q41. What might be suitable values for each of the placeholders indicated by ‘XX’ in the above text. Are there any other metrics that may be suitable for specifying civil works that should be exempted from information sharing requirements?

See response to question 40. Consequently, we feel unable to offer any suggestions as to what values and/or parameters would be appropriate.

Q42. Are the exemptions proposed under Article 6(5) appropriate. Should there be any further exemptions under this Article?

No comment.

Q43. Would an exemption under Article 9(4) be appropriate. If so, how might this best be specified?

Not in a position to provide a meaningful response.

Q44. Do you agree with our approach to the creation, removal, and modification of Exemptions.

Yes – this would seem appropriate.

Q45. Do you agree that Ofcom is the appropriate national dispute body throughout the UK across all of the dispute contexts described above.

Yes it should be the regulator.

Q46. What other bodies should be involved in resolving disputes when Ofcom lacks Expertise.

This depends upon the nature of the dispute but it would be appropriate for established construction based arbitration/adjudication procedures to be included, for example the arbitration process available through established professional institutions, aka the Institution of Civil Engineers.

Q47. Do you agree that the Competition Appeal Tribunal is the correct appeal body for decisions from the NDSB.

Yes.

Q48. Do you agree that appeals of decisions by the NDSB should be heard on a 'judicial review' standard and that this would encourage swift and effective dispute resolution?

In theory yes but whatever is decided, speedy dispute resolution and/or determination is essential.

Q49. Do you agree that financial penalties levied by Ofcom are appropriate.

Yes.

Q50. Do you agree that Ofcom, as the NDSB, is the correct body to enforce the collection of penalties.

This seems to be appropriate.

Q51. Do you agree with our decision not to implement the above optional provisions?

No – in our view, unless there are fundamental underlying reasons not to do so then the Directive requirements should be applied in full.

Q52. Are there any other technical issues that are of significant importance (i.e. that will regularly be relevant in negotiations for infrastructure sharing)

Unsure at this stage and therefore unable to offer any meaningful and specific response to this question – but see later comments in our response to question 54.

Q53. Do you agree with the assessment of firms within scope or do you believe that more / less firms will be impacted by the Directive. If you disagree, can you provide an estimate of the number of firms within scope.

Unable to provide a meaningful response.

Q54. Do you agree that the Directive will not lead to a notable increase in infrastructure sharing. If you disagree, can you provide an estimate of the volume and type of additional sharing that you think will take place.

For the reasons voiced in this section of the consultation we do not believe that there will be any increase in infrastructure sharing. All utility service providers are rightly precious about their assets and in particular their long-term integrity and performance. The degree of infrastructure share that is being suggested is heroically aspirational. Moreover, developers as the ultimate customer of utility service infrastructure, including sewers may

well be exposed to increased costs, delays and access limitations that are wholly outside of their control. At a time when new housing provision is a major objective of Government, these proposals do not appear as though they will assist in any way.

Q55. Do you agree that the Directive will not lead to a large volume of disputes. If you disagree, can you provide an estimate of the volume and type of disputes that you think will take place.

It creates a climate that has rich potential for possible and quite lengthy disputes.

Q56. Do you agree the Directive will not directly lead to a notable increase in information Requests. If you disagree, can you provide an estimate of the volume and type of additional information requests that you think will take place?

At this stage it is not possible to either disagree or agree but on the balance of probabilities an increase in information requests can be expected. As to the level and nature of these requests we are unable to offer any suggestions.

Q57. Do you agree with this assessment of familiarisation costs or do you think costs will be higher/lower. If you disagree, can you provide an estimate of familiarisation costs.

Given the likely work content and associated learning curve the costs identified appear to be quite low and unrepresentative. Whilst we cannot be so specific it would not be unreasonable for the costs identified to be a mere half of what is likely to be incurred.

In summary, the objectives set out in this consultation are laudable but there is a need to consider the wider, practical implications if transposition is to be both smooth and achieved without any unintended consequences. The potential impact that these proposals could have on the provision of new housing is quite difficult to assess but as drafted, and for the reasons articulated in our response, we continue to have reservations.

We would therefore suggest that armed with our response to this consultation there is a compelling need for further dialogue between DCMS, DCLG and HBF and to this effect we would confirm our willingness to do this as soon as practical after the consultation closes.