TalkTalk response to DCMS Consultation on Ensuring tenants' access to gigabit-capable connections
December 2018

Overview
TalkTalk welcomes the opportunity to respond to this consultation. We recognise that the consultation specifically addresses issues which arise when landlords do not respond to requests from operators to access their properties to install gigabit-capable networks. We agree with the Department for Digital, Culture, Media and Sport's conclusion that it "often proves exceptionally difficult to identify an individual with sufficient authority to grant the necessary permissions" in instances where landlords are domiciled overseas or have no active engagement with their property, and we welcome the Government's commitment to address this issue.

We support these new proposals to create a new legal process to grant warranted access to properties via the Magistrates' Court in cases where the operator has been able to demonstrate that the landlord is uncontactable. In our answers below we make several points regarding how we think the new proposals could be implemented, as well as areas where we think there needs to be further discussion and consultation with industry.

Third party land
We are disappointed that these proposals are limited to case where there has been a tenant request for a service, and therefore will not facilitate access to third party land which is necessary to enter/ cross to connect premises. Gaining access to this land is often essential to deliver a service, as it is needed to connect sites to the backhaul. If operators continue to be unable to access this land, they will still not be able to connect a tenant, despite the warranted access and the tenant request for a service.

Our view is that Government should consider whether it is possible to extend these proposals to cover third party land where the landowner is not responsive. We recognise the challenges that accessing third party land without contact with the landlord poses to operators. Without a tenant on site – or any communication with a landowner or its representative – an operator could struggle to find the necessary information regarding installation e.g. location of existing infrastructure or best infrastructure design. Government is right to consider this as a potential barrier to widening the applicability of this new legal route. However, our view is that the Government should engage with industry to establish whether these issues could be overcome, for example by establishing cross-industry standards or requiring additional information about proposed access through the Courts process. Extending the proposals would significantly increase the impact of the new process, and therefore it is worth considering ways to make it possible.

Wider wayleave problems
While we welcome the Government's recognition that the issue of unresponsive landlords is a problem which limits operators roll-out plans and ambition to deliver improvements, we are

disappointed that these proposals will not offer any solution to the wider problems regarding wayleaves that we encounter in network deployment.

In our FTTP deployment in York, we have encountered landlords, or agents acting on behalf of landlords, who seek excessive compensation for wayleaves. To give one example, when a potential customer first approached us about a new connection and we began conversations with the landlord, the landlord's agent required a fee of £2,880 up front to even consider application to install a new connection. It would have also required further charges for the actual wayleave itself. In this case, the combined cost was above what we could consider in our business plan and made the site economically unviable.

In our view, these types of disputes are limiting network roll-out and are creating unnecessary gaps in coverage. Government intervention to help operators agree reasonable terms with landlords would support full fibre roll-out plans and set a level playing field between different operators and landlords, creating a fairer and more consistent regime.

Operators have the option of taking a case to the Land Tribunal if landlords are being unreasonable. However, this process is both time-consuming and expensive: as the consultation document identifies, a case can take between seven and twelve months, and incur high costs from legal advice. Considering that build plans involve connecting tens of thousands of homes per year, operators should not be expected to have to litigate thousands of cases at considerable cost. In addition, operators are constrained by time restrictions. Deploying full-fibre networks requires an intensive period of civil engineering work; operators need to plan and manage the construction process carefully, risking considerable additional cost and operational strain should the build be disrupted. This requirement means the lengthy engagement required via the Land Tribunal will often pose too cumbersome a way to resolve disputes.

These shortcomings suggest that the Land Tribunal route is not an appropriate mechanism to resolve disputes. Since the reforms to the Electronic Communications Code were introduced in 2017, we are not aware of any cases in which operators have brought cases to the Land Tribunal. This response demonstrates that the new processes do not have the confidence of industry and the need for further intervention to simplify the process. We understand that these specific proposals regarding warranted access granted through the Magistrates' Court may not be appropriate for disputes – however, we hope the Government will consider what further reforms could help achieve a better outcome for operators and, ultimately, consumers.

Wider applicability

The proposals in this consultation will be beneficial for operators seeking to connect medium/large multiple dwelling units (MDUS) as it will help reduce cost and complexity to extend the network. However, wayleave costs are only one cost factor in connecting a site and, while significant, may not change an operator's assessment of economic viability. Operators need to build a business case for roll-out plans and can only extend their networks to where costs of deployment are within a reasonable threshold, and there is the potential to connect customers. For example, operators may

still face significant civil engineering costs associated with connecting the site to the backhaul, which ongoing revenue from connections are unlikely to offset.

Our assessment is that this new process is less likely to be used for smaller/ more isolated properties, as the operator may still consider a site to be economically unviable site due to time and financial resource pressures. However, we are optimistic about its impact in cases where wayleaves are the primary blockage, for example in large MDUs or business parks where there may be multiple unresponsive landlords.

Q1. Would the placing of an obligation on landlords in the manner proposed encourage more landlords to respond to requests sent by operators?

We welcome the placing of an obligation on landlords. Creating an obligation recognises the importance of connectivity for tenants, as well as the need for landlords to facilitate access where possible.

We are unsure whether this obligation would encourage more landlords to respond to requests sent by operators. TalkTalk's experience is in line with the consultation document's assessment that no response is received to around 25-40% of wayleave requests. We believe there are already considerable incentives for landlords to engage with operators, including better connectivity to their properties and appropriate financial redress through agreed wayleave rates, and therefore we are not sure whether the existence of an obligation would act as an additional incentive.

We would welcome further research by DCMS into the reasons why landlords do not respond to wayleave applications to understand how a new obligation will increase engagement rates beyond current levels. In our experience, the optimal outcome for both landowners and operators is to reach a voluntary agreement, with landowners recognising the importance of better digital connectivity for tenants and both sides working collaboratively together. Landowners representative bodies could play an important role in promoting information about the full fibre roll-out and the wayleaves process to help encourage engagement.

However, in cases where the landowner is not identifiable/ contactable, we welcome the placing of an obligation and the creation of a new legal process to facilitate access. The Government is correct to identify this as a priority and our view is that the placing of an obligation and the creation of a new legal route through the Magistrates' Courts will help the enable network roll-out and support the Government's public policy ambition to improve digital connectivity.

Q2. 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?

We believe that the placing of an obligation will complement the Electronic Communications Code process. As discussed in our answer to Question 1, we remain unsure how this new obligation will encourage engagement with the Code process, due to their uncontactable status. However, we do not see how it could undermine reaching agreement in the future, if it clearly sets out the rights of both landlords and operators under the ECC.

Q3. Do you consider that the use of the courts of the purpose of granting entry to operators where they have been unable to contact a landlord is reasonable? If not, why not?

Yes, we consider the use of the courts to grant entry to operators is a reasonable response.

The current system is unsatisfactory, as it leaves some tenants unable to access new services and frustrates operators' roll-out plans, even in cases where landlords have not actively raised objections. In the absence of any objections, and with evidence of a tenant request for a service, it is appropriate to reconsider how access could be granted to fulfil this request. The proposed court mandated access is a sensible proposal which can facilitate access but also scrutinise and set standards regarding operator behaviour. The Magistrates' Court will have the power to challenge operators to demonstrate that they have made all reasonable efforts to contact the landlord, and in our view, this will act as an appropriate legal test to balance the landlord's right with the tenant's right to a service.

The proposals also suggest that any warranted access would not prevent the landowner from utilising the Code process, including receipt of financial compensation, if they choose to re-engage. Therefore, creating a new system of warranted access would not see landlords lose any current rights.

The proposals raise questions about how operators will physically access land or buildings to install apparatus. Operators will need to gain information about the interior of a building and, therefore, will likely need to rely on a tenant's knowledge. One option could be for the Courts to require information about the proposed route and method of the construction and authorise this in the warrant for access. As discussed in our previous answers, we also hope Government explore how this system could be used to grant access to third party land.

The warrant granted by the Court should also be recognised as legal access and therefore an operator's insurance policy should cover any liability for damages incurred in a build facilitated through the new Court process.

Q4. 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, how much time would be appropriate?

TalkTalk's view is that two months may be unnecessarily long. Rather than defining a set period of time in the new primary legislation, we believe the process should be less prescriptive. Instead, it should require operators to make all reasonable requests to contact a landlord before seeking entry via the courts, giving the Magistrates' Court the discretion to define what constitutes 'reasonable'.

Our assessment, based on our experience across different types of sites, is that in some cases the suggested steps required could be completed in under two months. Therefore, we do not believe the legislation should fix a set period. This approach would recognise the variation between different operators and landlords.

For example, an operator may encounter a landlord that it has recently tried to contact regarding another property, and therefore it seems unnecessary to have to wait for a two-month period where contact has already been tried and failed. In another case, a landlord may be registered in the UK, and therefore the Courts may require the operator to send communication via recorded delivery, while it would not require this when the landowner is based overseas. Therefore, the legislation should be not overly prescriptive, and instead give the Courts appropriate discretion to adjudicate whether the operator has made all reasonable effort to communicate.

Q5. What evidence should an operator be reasonably expected to provide to the courts?

Operators must be required to show that they have:

- Completed a Land Registry check for ownership and contact details;
- Communication with landlord to show:
    - An initial request for a wayleave which has included details of the proposed route to install apparatus [with proof of delivery];
    - One further notification with request for contact [with proof of delivery];
    - A notice of intention to bring to the Magistrate's Court [with proof of delivery];
- Proof of that a tenant wants the service [if applicable];
- General method statements as to the works required;
- Details of contractors who will carry out work.

Q6. Is there a need to define what constitutes a request by a tenant for a communications service?

As discussed in our previous answers, we do not believe the new Magistrate's Court process should be restricted only to cases where there is a tenant request but should also be available to operators to use to access third party land for backhaul purposes. This amendment will be essential if the policy is to help operators to build to areas such as business parks and new build developments.

As discussed in our answer to question 3, we recognise that extending this new process to facilitate access to third party land raises operational questions regarding how operators could access this land without direct engagement with a representative. However, we hope the Government will

engage with industry to consider how it may respond to this challenge and whether it would be sufficient to justify extending the regime.

However, should the proposal be limited to properties with tenants and be dependent on a tenant request, there should be flexibility in what constitutes a tenant request for a service:

- For in-home connections, this could be a request at the point of sale, which establishes a contractual relationship between tenant and operator and would be easily understood by the Courts.
- However, wayleaves to access land/ buildings are required by operators at the build stage, which is often several months ahead of sales processes going live. Therefore, a request could constitute an expression of interest in potentially receiving a service, without requiring a formal order. Such expression could come from an individual tenant (e.g. one flat in an MDU) or from a representative body such as a Tenant Management Organisation or a Residents' Association. These would not incur an obligation to take a service once it becomes available but indicate a willingness to consider it at that point. This approach would be an appropriate balance between recognising operators' operational demands and requiring it to engage and co-operate with residents.

Q7. 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 a landlord?

No. Our view is that any access granted should be legally considered permanent. Once a tenant has been connected, that tenant should have the right to continue with the service, regardless of any future discussions between the operator and the landowner. As we discuss below, we do not think this means that the landlord has no entitlement to charge for a wayleave, but our view is that the apparatus should not be threatened with withdrawal.

However, if DCMS decides to keep the temporary nature of the proposals, there are several features which are required to build operator confidence in the process:

- Operators need confidence that their apparatus will remain in place – with no alteration or tampering – throughout any future discussion or negotiation with the landlord. Therefore, a landlord should be required to go to the Courts for an injunction to remove the apparatus, if they want to remove it before the conclusion of any negotiation process. This should apply to works in track/ any ongoing maintenance, with landlords requiring a court order to stop any of this work.
- Re-engagement must be based on the rates set out in part 4 of the new Electronic Communications Code, with no further negotiation/ discussion required. We accept that landlords have the right to compensation under the terms of the Code, and we do not object to paying reasonable levels of redress.

- Should a landlord not want to engage on these terms but wish to seek further redress by referring the case to the Land Tribunal, landlords should be required to cover the costs of the operator. Operators will be compelled to go to the Tribunal due to the lack of contact from the operator, and after the Courts have found the operator to have made all reasonable efforts to contact the landlord. Therefore, it is unreasonable to expect operators to pay high fees for a Land Tribunal process if a landlord makes unreasonable financial demands.

  If this is not a requirement of a new system, our view is that operators may be unwilling to use the new Magistrates' Court process, due to concerns about leaving themselves liable for expensive legal proceedings at an unknown future point.

Q8. Would temporary access granted by the court provide an incentive for landlords to re-engage?

It is not clear whether this would incentivise landlords to re-engage. As referred to in our answers to Questions 1 and 2, if landlords have not responded to operator communications in the first instance, then we are unclear why they would later seek to re-engage.

In addition, as we have stated in our previous answers, we caution against basing this policy around incentivising landlord engagement, as this would risk confusion as to what success looks like. The policy ambition is to allow operators to access land, to ensure tenants can get the services they request, and to support the Government's ambition of delivering national FTTP coverage by 2033. The success of this policy should be measured by the number of additional premises which can access gigabit capable connections on the way to the 2033 target, rather than by how many landlords choose to re-engage after access is granted.

If landlords do not respond to the initial communication, there should be an acceptance that they have missed their opportunity to enter extensive discussions with the operator. While they will not be prevented from re-engaging if they desire or seeking appropriate level of compensation, there should be no expectation that re-engagement is the desired outcome. In particular, there should be no obligation placed on the operator to seek engagement from the landowner post-installation on an ongoing basis. The legislation should clearly define what is expected of operators and this should be minimal – for example, making contact when seeking access for maintenance of apparatus.

Q9. Do you foresee any issues with operator/landlord negotiations which take place after the installation has taken place?

Yes – we are concerned that landowners may seek unreasonable terms from an operator to keep their apparatus installed.

Should a landlord re-engage post installation and seek to enter negotiations, by this stage operators will have invested considerable amounts of resource to connecting a premise. This will create an imbalanced and unfair negotiation:

- Operators will have invested in apparatus and manpower to connect the premises, both on site and to connect it to the backhaul network. This will have required considerable upfront investment, with the expectation of payback over several years. If a landlord engages before this payback, the operator stands to lose money should a negotiated settlement not be reached.
- The operator may also have customers on the network which retail the product to their own customers. Retail providers will likely have signed significant contracts with the network operator, potentially leaving the operator exposed to legal challenge should it have to remove apparatus.
- As discussed in previous answers, operators move on from the construction to new sites and projects, and therefore will have limited resources to re-engage with sites which may have been connected months or years earlier.

These considerations give operators considerable incentive to protect their initial investment, which leaves them at a disadvantage compared to a landowner. These issues further support the principle of re-engagement on Code terms, with the landlord required to cover legal costs entailed by further negotiation, as this would appropriately balance the risk which operators could face.