Response to Consultation on ensuring tenants' access to gigabit-capable connections

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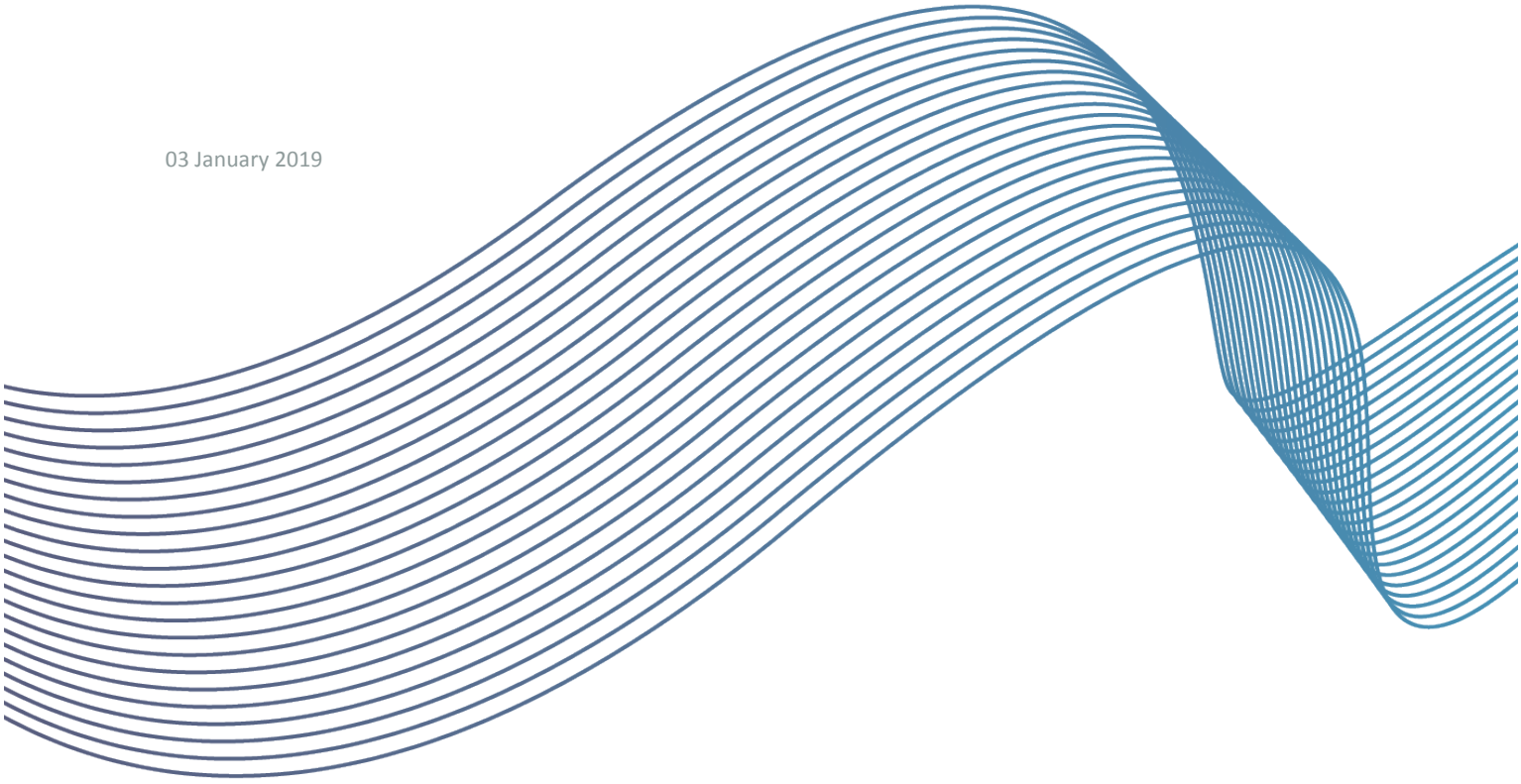

Hyperoptic Introduction

Hyperoptic is a Code Power operator founded in 2011 by Dana Tobak and Boris Ivanovic. Hyperoptic is the largest provider of 1 Gb residential broadband in the UK and currently use a Fibre to the Building infrastructure operating across 28 cities with ambition to service significantly more. We have installed or are in the process of installing to over 400k residential homes and over 10k business units.

Hyperoptic was founded to bring the UK's broadband infrastructure to the next level creating a new full fibre infrastructure, offering 1 Gb services and raising the level of expectations on the role of connectivity in British households and businesses. Customers get the wired speeds they expect, and we have over 95 percent customer satisfaction rating consistently on our quarterly surveys.

To date, we have been expanding our network 100 percent year on year, and having recently secured 100m in debt funding. Our plans are to reach 2m homes passed by 2022 and 5m homes passed by 2025.

Currently, 50 percent of our footprint would, without Hyperoptic, be fibre-free with its residents only able to use ADSL often below 10Mbps – we are a key deliverer to whitespace areas and often target these areas having been neglected by other operators and network builders.

Response summary

Hyperoptic welcomes the opportunity to respond to the DCMS consultation on ensuring tenants' access to gigabit-capable connections.

The ambition of Government, as set out in the FTIR, to roll out full fibre to 15m premises by 2025 and nationwide by 2033, will require considerable, and accelerated infrastructure build. Hyperoptic is keen to encourage this ambitious attitude, and any attempts from Government to facilitate this process.

Hyperoptic has built up a significant body of experience in providing services into mutli-dwelling units ("MDUs"). Based on this experience we support the government policy to resolve issues with gaining access to premises where this is necessary. However, we have a number of concerns both about the premise that the proposed changes are based on (i.e. the scope of the problem), as well as some of the details of the proposal.

We also believe that there is a fundamental issue that the consultation does not consider at all, but is essential to the furtherment of the government's stated strategy of infrastructure competition. What could be less consistent with promotion of infra competition than giving a competitor a legal freeride into a building that a commercial and competing operator has already negotiated via its own entrepreneurial zeal? Hyperoptic does not demand exclusivity, but a level playing field.

The remainder of this response sets out our views and addresses the consultation questions in turn.

The scope of the problem

As we understand it, the fundamental principle underpinning this consultation is that gaining access to premises is proving problematic and given that access to telecoms services is akin to utility service, operators should therefore be treated in the same way as other utility providers.

The consultation sets out that the experience of a number of operators is that their requests for entry go without responses in around 25-40% of cases. As examples that underpin this figure it cites that "*one operator provided an example of one city centre deployment where they were able to connect only 30 out of 750 properties in the initial network build plan because of an inability to contact or agree terms with a landlord. Virgin Media estimates 750,000 properties are within 25 metres of their network but unable to be connected due to access issues. Virgin Media further estimate they could bring an additional 2 million premises into their 'Project Lightning' deployment if access problems were addressed.*"

Hyperoptic has a vastly different experience in respect of both being able to contact landlords as well as reaching commercially satisfactory arrangements for all parties. Our data shows that 80-90% of contacts to freeholders are made via property managers and there is active engagement. As one would expect, some of the responses are negative but there is engagement as one might guess given their responsibility as the manager of the property to look out for the owner's interests with respect to the asset. For the remaining sites that we contact, the overwhelming majority of cases, respond

(albeit some eventually). We have less than double figures of sites where no response at all can be elicited from the freeholder.

The figures presented in the consultation are prefaced by "being able to contact or *agree terms"* and "access issues", this brings into question the exact nature of the figures. It would appear that multiple scenarios have been included together in order to arrive at the figure of 25-40% of cases, when in reality the number of cases that would be addressed by the proposal would be significantly smaller. Before any proposals are finalised, it would be in the interests of good policy to ensure that the data which under pins them is accurate and that the problem warrants the proposed solution. Otherwise the risk is that parliamentary time is taken up with passing something that has little actual benefit to fibre roll out programmes.

Telecoms as a utility

A comparison is drawn between telecoms and other utilities, with the proposal to bring telecoms in line with other utility providers and allow operators to seek a warrant of entry via a magistrates' court. The government itself set out what it believed was the requirement in this area. In a debate on Broadband Universal Service Obligation in December 2016, The Minister for Digital and Culture (Matt Hancock) stated that "*We are committed to building a country that works for everyone; that means ensuring that nobody is digitally excluded, and "everyone" means everyone. That is one of the motivations underpinning our drive to have a USO. This requires us to ensure that the UK's digital infrastructure meets not only today's broadband connectivity needs, but those of tomorrow; that is crucial. Let us be clear: the delivery of fast broadband, particularly in rural areas, is an economic imperative, not simply a "nice to have"*." This was set by the government via the broadband USO so that "*wherever someone lives in the UK they will have a legal right to high-speed broadband by 2020"*

We therefore assert that a distinction needs to be drawn between telecoms as being a utility (i.e. as underpinned by the USO) and the provision of gigabit capable networks (which goes above and beyond the legal rights to provision of service).

It is also important to note that there are differences between telecoms and other utilities, which mean that a direct comparison is not possible. For other utilities, forced entry is permitted on the grounds of ensuring that there is no threat to life or safety, there is no immediate comparison for telecoms. That point aside, another clear distinction between telecoms and traditional utilities is that where there is competition e.g. in the energy market, the competition is at the retail layer not the infrastructure layer. Given that government telecoms policy is aiming to encourage competition at the infrastructure later where commercially possible, it creates complexities that need to be explored but that are not present for other utilities.

The situations that need addressing are those that are created by infrastructure competition and the possibility for more than one operator to want to obtain a warrant to enforce entry, or for an operator to seek to enforce entry when another operator is already offering gigabit capable services into the premise. In order to answer these questions, we would consider what best serves the interest of the FTIR targets of rolling out full fibre to 15m premises by 2025 and nationwide by 2033?

To address the contradiction between the proposal and the government's stated objective of infrastructure competition, we believe that where there is already a fibre connection into the building, no warrant should be able to be obtain. This would of course not preclude commercial agreement between the landlord and an operator, but there is no policy objective to be met for situations where fibre is already available in a building. Further infrastructure build and previously published plans/numbers are based on current incentives and returns on current investment, yet the consultation fails to consider how implementation of the policy will it affect these incentives and plans where our market advantage will be legislated away. Hyperoptic would examine all available options in seeking to have the correct balance on this point.

Where a warrant is obtained to permit access where there is no fibre, we believe the policy objective would be best served by creating a condition that the access should be 'open access'. This would strike a reasonable balance between meeting the policy objective but also being the least obtrusive method in respect of landlord's property rights.

Drawing further on the analogy with utilities, we believe that the correct balance between meeting the policy objective and respecting property law rights is for a warrant to be granted in respect of an MDU only where there is a firm request for service from a tenant. We believe that to be granted a warrant on a speculative basis would be a step to far. The comparison should be drawn with a fibre roll out down a street, there is no right to put lead-ins into every house in the street in case they subsequently want to take service. Accessing a building on a route that is being rolled out, is the equivalent of a lead-in and should be treated in the same way. We believe that this is an appropriate balance because it is within the gift of operators to ensure that they commence access requests at an appropriate point in a build programme.

Safety and standards

There are concerns about how a court-granted warrant would impact health and safety arrangements for the build itself. In some situations, there may be a management company in place who are able to provide these details, and surveys can go some way towards mitigating concerns. However, there will also be instances where operators are unable to gain this information due to the unresponsive landlord as well as no help from the site itself. Operators require access to further information normally obtained from landlords in a commercial setting to perform a proper risk assessment in order to be able to deliver a high-quality installation that would not leave operators open to claims from landlords, tenants and staff.

As an industry there is a need to ensure that installations under a warrant are done in the correct way, failure to do so, will not only create negative impact on the individual company but will also cause reputational harm to the industry as a whole. At a point where industry is ramping up to meet challenging targets set by government, the last thing we would want to do is create a situation where landlords have a perverse incentive to engage with the an access request by responding negatively – only to ensure that the conditions for obtaining a warrant are not met and therefore the only recourse for an operator is via the tribunal or to bypass that particular building, precisely what this policy seeks to avoid.

Given the difficulty in obtaining the required information in situations where there is no engagement from landlords, we believe it is essential that further clarity on how the warrant process will cover this off and a full assessment of the impact that this could have is essential to ensure that these risks are addressed. Our suggestion is that a warrant should include mandatory compliance with an agreed Code of Practice that sets out the steps that an operator must comply with in order to use a warrant to access an MDU.

Some of the issues that would we believe would need to be considered in such a Code include (in no specific order):

- Asbestos – risk of contamination if no asbestos register is provided by landlord.
- Fire stopping/ fire safety – engineers working at risk if building not safe/ fire status unknown. Potential to put residents in danger if full details not known, this is particularly relevant in the post Grenfell environment.
- Slips, trips, falls of residents due to use of materials and work – without knowledge of residents (including any vulnerability requirements) or building no informed safety adjustments can be made to keep engineers and residents safe during works
- Traffic accidents – without knowledge of parking/ traffic issues at a property could cause obstruction or accident with vehicles.
- CDM – Without proper agreement of CDM roles (which requires the landlords' agreement) operators will be working at risk and outside of HSE guidelines.
- Control & competence of contractors – Without CDM guidelines and agreement with landlord, contractor monitoring and behaviours as per HSE guidelines cannot be controlled.
- Security – Both potential breaches of security to residents (especially vulnerable/ social housing) and security of engineers whilst working could be caused by no knowledge/ agreement of security rules on site.
- Access to operator work equipment particularly when working at height – without agreement of processes and working practices operators could be working at risk.
- Confined space work – without full knowledge of the building, engineers could be working at risk.
- Require access to electrical equipment & security of such.
- Roof work and access to – all buildings have a clear process for this which must be adhered to in order to stay safe as roofs have multiple hazards, these must be known and assessed before engineers access them.
- Abseiling requirements and impact on residents – Must be carried out with full understanding of building and residents.
- Violence/abusive behaviour (potentially both form operator staff and from the residents) – without understanding of residents or special conditions, difficult situations could arise putting engineers at risk of attack or abuse.
- Communication – without strong communication to the residents from landlord or building owner operators may be hindered or obstructed from working on site. We have seen examples of this already with local authority housing where comms have not been strong enough and residents object to our presence.

Other issues that require further thought and clarification include who would be responsible for any damage caused by the entry and installation, and how would this be assessed?

An area that the consultation does not address but one where we believe a warrant would be extremely beneficial and would not come up against many of the problems outlined above is the application to the rural environment to tackle national roll-out issues. Examples of this would include situations where a route would either need to go under a field or take a longer route over a bridge or under a river etc, the impact of which could be not permitting the roll out of the scheme to be as wide as would otherwise be possible. A warrant to permit entry to go under a field would facilitate this and would therefore have great synergy with other government schemes to facilitate national roll out.

Timescale and burden

Given the small number of instances where we believe a warrant process could actually be used, (i.e. far less than the 25%-40%), we believe that it is essential for there to be clear criteria for when an operator can apply to court. This must include the process which must be followed to evidence that bona fide attempts have been made to reach the landlord, thus ensuring the policy aim that the landlord has sufficient opportunity to respond before an application can be made. This should include a specific number of attempts over the course of the two months a landlord is permitted to respond and could include letters sent to the correct address via recorded delivery, calls made to the correct contact (call logs or recordings of messages could be provided) etc.

Further consideration should be undertaken about situations where there has had engagement from a landlord, but the response was that they had rejected access to other operators previously. Where a subsequent operator doesn't receive any engagement to their request, should there be a burden of proof that the landlord has not only failed to engage with the specific access seeker, but with all access seekers? In a similar vein, account also needs to be taken of scenarios where the landlord is in engaged in positive discussion with another operator, (see point earlier about conflict with competitive infrastructure build). There is no policy purpose to permit the use of a warrant where gigabit capable networks are already present or in the process of being installed.
As this will impact on the balance between the landowner's property rights and the rights of a tenant to have access to gigabit capable broadband, the onus must be on the access seeker to prove that the circumstance under which a warrant can be applied for have been met.

Uncertainty

It is our understanding that the interplay between the warrant and standard Code process can result in uncertainty for an access seeker. Thus, if a connection is installed under the warrant scheme and subsequently the landowner rejects the right of the operator, the operator would face a choice to negotiate (at a disadvantage because they could be serving live customers at this point) or seek to enforce their rights via the Tribunal. For reasons set out in the consultation, the Tribunal route is not likely to be an attractive one. The effect of this is to reduce the certainty around the validity of connections built using a warrant process and hence reduce the incentive to use it at all, reducing the benefit of a warranted approach. We would welcome further guidance on this point.

Conclusion

As set out in this response, we believe that the scope of the problem has been overstated and that the instances where a warrant could be used are far lower than the consultation sets out, in which case the government will fail to meet the political objective behind the policy. If the volumes are significant there is a concern that the political objective will not be met because the policy rides roughshod over a meaningful number of landlords' rights and will therefore be subject to high legislative scrutiny and possible legal challenge. This will inevitably result in the policy taking up a disproportionate amount of parliamentary time to potential gains. It is for these reasons that we believe that the consultation on delivering gigabit capable connections to new builds will ultimately have a more positive impact in helping to reach the targets set out by the government. Especially when taking into account the government's equally ambitious plans for new homes built.

In respect of Implementation of this policy, should the government decide to proceed, it must also take into account the contradictory consequences the proposal will have on the government's policy of infrastructure competition and the negative consequences on incentives to invest. We also believe that further detail needs to be considered carefully in order to ensure that where a warrant is used, it is done so in a manner that makes certain that issues (including health and safety, risk etc) that all stakeholders face are adequately addressed without risking existing relationships.

Consultation questions

Turning to the specific questions that the consultation poses.

1. We do not see that adding this obligation on landlords would have a significant impact on this area, but there is certainly some benefit in doing so as it at least places the onus on a landlord to respond.
2. We do not believe that adding the obligation to respond will alter the dynamic between landlords and operators. Where a landlord engages, the process will follow the ECC process, including where the response is negative. Where they do not engage, a warrant can be applied for. The obligation to facilitate per se, does not vary this.
3. As outlined above, as long as the correct balance is struck and a warrant can be sought within limited, controlled criteria, the courts are appropriate. We are also keen to avoid the types of issues that have plagued other utilities where abuse of warrants has taken place.
4. See substantive response above.
5. See substantive response above.
6. See substantive response above.

7-9 As set out above we believe that this creates some negative incentives which could result in the unintended result that a warrant is deemed an unattractive option by an operator because of the uncertainty it brings.