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Openreach response to Ensuring tenants' access to gigabit-capable connections consultation

Openreach welcomes the opportunity to respond to this consultation.

We currently face real challenges when it comes to providing full fibre connectivity to multi-dwelling units (MDUs). As our full fibre build ramps up, these will increasingly hinder our ability to build a widespread nationwide full fibre network.

The process of negotiating wayleaves already imposes significant costs on Openreach. Our wayleaves team has c.50 consultants working full-time on wayleaves across all categories – and in 2017/2018, we have seen over 10,000 wayleaves raised. We are always looking for ways to improve our engagement with other interested parties such as major land agents and solicitors, and are committed to working more collaboratively to drive best practice.

There is more work to be done however. For example, we currently struggle to access around 80% of premises within our City of London build, which falls to around 30% in the London suburbs. As we ramp up our ambitious deployment plans (which is already running at 13,000 premises a week) we'll need all the support we can get from a policy perspective. Maintaining (and escalating) this run rate will require the proposals within this consultation to be delivered.

The nature of our full fibre build means that we are looking to quickly cover contiguous exchange areas – rather than cherry picking individual properties. It will be less efficient, and more costly, if we have to go back to areas to cover MDU properties after we have otherwise finished our build. Failure to deliver reform will make it more difficult to meet our ambitious target to pass three million premises by the end of 2020 – and to deliver our aspiration to pass 10 million premises by the 2020s.

This isn't simply about meeting the targets however – the pace at which we are able to build and deliver the greater reliability and speed of full fibre services will be impacted. This will mean more consumers are not able to benefit from full fibre for longer, and will reduce the accrued social and economic benefits of our investments. This will be especially important in MDUs, where large numbers of people could quickly benefit if we're able to access the site. We are investigating whether we'd be able to quantify the benefits of our deployment for social housing, and would be happy to discuss this further.

We therefore welcome the proposals within this consultation. However, as we set out below, we do believe the Government could be more ambitious – so we have set out a range of other measures which will help.

The main difficulties that we face are being able to identify landlords in the first place, and secondly, dealing with cases where landlords do not respond to attempts at contact. Delays caused by this are affecting our ability to deliver full fibre.

The proposals within this consultation should help us to deliver full fibre connections to large numbers of premises in cases where we are able to identify a landlord – moving closer to meeting the Government's ambitions to reach 15 million premises with full fibre connectivity by 2025. What it fails to address is the front end of the process where we are unable to identify the landlord or a means of contacting them.

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We do have additional concerns about some aspects of the proposals set out in this consultation. These include:

- **Two month window prior to accessing court system:** The nature of our deployment plans means that a two month delay will likely mean that properties where we haven't been able to contact the landlord and gain entry to the property will be descoped. We believe that one month (28 days) would be an appropriate time instead.
- **Documentation to support applications for a warrant for entry:** In a proactive build, we will need to build rapidly to large number of premises. Demonstrating our need to enter an individual property to accomplish this would pose substantial burdens on us. DCMS also need to set out how an operator could demonstrate that they are unable to identify a landlord.
- **Issue around tenant requests:** Our primary focus is on delivering a large-scale full fibre network – via proactive build across contiguous exchange areas ahead of potential consumer demand. Individual requests for service by tenants will not be addressed as part of this, and should be treated separately from this process.

The difficulty that Openreach, and other operators, have when it comes to identifying who actually owns a property means we feel these proposals could go further in helping us identify appropriate people to gain entry to properties. Our preference is always to negotiate with landlords – so ideally we do not want to resort to the courts system to provide a warrant of entry. At a time when the court system is already under pressure, we would ideally look to avoid using legal processes wherever possible.

We therefore need to make sure that as many levers as possible are used to enable us to a) identify landlords, and b) make contact with them – so that cases where we need to use a warrant of entry are reduced.

Our proposals to help achieve this are:

- **All buildings must clearly display up-to-date details of how to contact the owner on/by the main entrance.** We believe such a simple measure would slash by weeks the time it takes to get permission to build. However, the display of such data is still predicated on someone physically approaching each premises. Therefore it is important it is not the only measure, there is also need for:
- **A centralised online registry of landlord's contact details and all the buildings they own.** This would save us time having to play detective, instead we can get on with the job of building an ultrafast network across the UK. Scotland and Wales have much better systems of land registration – which is reflected in the lower percentage of issues we have with contacting property owners.

These measures would help us identify who owns a property and reduce the instances where we are unable to contact a landlord. In turn they will reduce the number of times that we would need to use the proposed new warrant for entry process, and enable us to enter into stable, long term settlements with landlords from the outset.

We recognise that there are concerns from landowners and from residential landlords about the proposals set out within this consultation. We do not think that these proposals cut across the positive engagement and agreements which we have recently entered into with

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organisations like the NFU and CLA, and we agree that the rights of property owners also need to be respected.

Where Government could go further

Alongside the proposals above – we think there are other areas where DCMS could go further than the proposals set out in this consultation. We believe that Government should look at whether it would be possible to:

- Mandate a standardised permission to install, maintain, keep etc. (i.e. wayleave agreement) pursuant to the Electronic Communications Code (“the Code”), as set out in Paragraph 3, for all Local Authority owned housing, including social housing and also covering Housing Associations and affordable homes. This wayleave agreement will include permission to provide an upgrade to infrastructure within/serving a premise.
- Provide guidance from DCMS that ‘public interest’ should be included in “best consideration” methodology for certain categories of landowners such as the Crown Estate or social housing groups
- Initiate legislation for third parties (e.g. transport infrastructure providers) to provide Openreach or other infrastructure builders with easy access to upgrade and maintain our network when in the interest of the digital economy.
- Strengthen paragraph 30 of the Code which provides for the continuation of our Code Rights. A specific change to prevent rights being terminated in line with individual tenancies will provide clear security for networks. This very specific change will help ensure that there can be a reasonable return on large upfront costs.
- Create standardised planning permission packs, endorsed by central Government and tailored at Local Authority level for all streetworks, wayleaves, risk assessments, Regulation 5 etc. At present the process of planning and therefore the speed and breadth of delivery, is very dependent on the efficiency at local authority level, which can vary markedly.
- Provide clear guidance from DCMS on the definition of ‘adequate compensation for value of right’. This is particularly relevant when trying to install in rural areas. We have worked closely with the CLA and NFU to develop proposals for standardised rates, rather than using land value.

Ultimately, improving digital connectivity is a key priority for us and the Government. The Chancellor has set out ambitious plans for the sector to deliver – which will require us, and other operators, to significantly ramp up our full fibre deployment in coming years. We see this consultation as being important in allowing us to achieve this.

Enabling us to deliver a full fibre network will also deliver real benefits to consumers across the country. The value which consumers place on enhanced digital connectivity is only going to increase in future, and the consumer willingness to pay to live in premises where full fibre is on offer is likely to increase too. As a result, we see the proposals in this consultation as enabling us to deliver a win-win for operators, Government, consumers, as well as the landlord sector.

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

We agree that placing an obligation on landlords to engage with operators in order to negotiate for access could be a useful step to helping us gain access to MDUs.

However, as the consultation notes, this is unlikely to have a significant impact on landlord behaviour. It is therefore important that this obligation is backed up and strengthened by the new process of gaining a right of access via warrant for operators. Beyond this, our preference will always be to negotiate a wayleave agreement with property owners – allowing both sides to enjoy a solid legal basis for an ongoing, cooperative relationship.

Placing an obligation on a landlord to facilitate an agreement will only work in cases where we can identify and contact any given landlord, or where the landlord takes these obligations seriously. It is unclear in this consultation what the enforcement mechanism would be for this obligation, or what the penalties would be for landlords who do not act in a manner consistent with this obligation.

It is also important to differentiate between the proactive rollout of a full fibre network which Openreach is currently delivering, and build triggered by requests from tenants to landlords.

The consultation makes reference to tenants making requests for service alongside operator notification as being a trigger for this proposed new obligation on landlords to be activated.

However, the nature of our escalating full fibre deployment means that we need to be more proactive than this in terms of negotiating with landlords to deliver our deployment. We are building ahead of consumer demand, so will not be waiting for requests for service before we start the process of building a full fibre network in an area. This will require us to proactively contact property owners to gain access to a property.

We would be concerned about raising expectations from tenants that a request for full fibre service would result in us providing a connection. This consultation implies that tenants would be able to request a service and we'd build to them – in reality, the process needs to be flexible to take into account all commercial considerations when deciding where and when to build.

Q2: Would this undermine negotiated settlements between landlords and operators?

We are committed to working with landlords, and have a clear preference towards negotiating a long term settlement with them. This offers benefits for both us, landlords and tenants. We agree with the Government that negotiated settlements are preferable.

We do not think that placing an obligation on landlords to facilitate the development of digital infrastructure would undermine negotiated settlements – it is in the interest of network operators to maintain good relationships with landlords and to gain a longer term agreement for access, for example, the requirement for ongoing access to ensure that we are able to maintain and, where appropriate, repair services..

As our data demonstrates – the bigger challenge we have is where we are not able to identify landlords and property owners in the first instance, so placing this obligation would not serve to damage these non-existent relationships.

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Q3: 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?

We have not used the existing tribunal process to gain access to an MDU and we believe that there is a clear need for reform. As the consultation recognises, the length of time which it would take to gain access to a property through the tribunal process means the existing system is not fit for purpose.

As we ramp up our deployment of full fibre, we need a simple and quick process to gain access to MDU premises in instances where we are unable to contact landlords.

It would be helpful to have clarification about what the likely costs of seeking a warrant of entry via the magistrates' courts would be – and whether operators would be liable for these.

For this process to work, we agree that a fast and simple process for granting a warrant would be necessary – in effect this should be an administrative procedure rather than requiring legal expertise. Administrative delays would again increase the chances that we rescope deployment plans.

Again – we would reiterate that without Government action, it will be more challenging for us to deliver on our ambitious goals and contribute to meeting the Government's targets. We appreciate that there are concerns from the landlord community about these changes – but we need to see action from the Government to deliver an ambitious roll out.

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, what how much time would be appropriate?

Our preference would be for a shorter amount of time than two months before a landlord is considered absent and a warrant of entry could be granted.

Fundamentally, if we, or other operators, have to wait for two months before we can start a court process, it is likely that we will have altered our build plans and will have descoped that property. In addition, unless a warrant of entry is granted quickly (basically as an administrative procedure), then the actual time before we can enter a property will be even longer. At the point of being able to gain access to the courts, operators will already have spent time and resource in attempting to identify landlords and contact them.

We therefore think, that in cases where we are able to identify a landlord, that one month (28 days) from first attempted contact would be reasonable, and would mean that MDUs would remain in scope – allowing us to expand our full fibre footprint and to meet Government ambitions.

We view using the courts as a means of accessing properties as a last resort. We believe that Openreach will likely be the largest builder of FTTP connectivity – so will be an industry leader in delivering full fibre to the UK. We take this leadership role seriously - so we would like to explore how we can work better with the property owner community to reduce the need for court action.

Q5. 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?

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We think the concept of being required to prove our 'need' to enter a property as referenced in the consultation needs more detail and clarity.

The Government has set a target for full fibre connectivity to be delivered to every premises in the UK by 2033. Openreach will be at the heart of meeting these ambitions. We are in the process of passing three million premises with full fibre by the end of 2020, and have the ambition to pass 10 million premises by the mid-2020s, with the right conditions in place. Other providers are also rolling out fibre networks.

Ultimately, we (and other operators) have an aggregate need to enter properties in order to meet the Government's ambition – but demonstrating this need for an individual property for each application would represent an unreasonable and disproportionate burden for us.

We would hope that providing an overview of our planned deployment at an aggregate level would therefore be sufficient to support an application.

We would anticipate the process of being granted a warrant of entry as being effectively an administrative process – where we share copies of the correspondence we have sent to the landlord requesting access. We would self-certify that we haven't received a response from the landlord in the cases where we have been able to find contact details, but haven't received a response.

The process for where we are unable to contact a landlord requires more clarity. In effect, in these cases we would be being asked to prove a negative. When we are entering what we believe to be unregistered land, there are processes we follow in terms of notifying the community (via local news and flyers). We believe a similar process for demonstrating that we have made good faith efforts to identify a landlord should then enable a self-certification process.

As above, a centralised register of landlord details, or placing a requirement to include landlord contact details onsite, would mitigate these challenges, and allow us to enter into formal negotiations with landlords to gain access.

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

This issue is less relevant for the purposes of our planned full fibre rollout programme. We will be proactively building a full fibre network ahead of demand, and our deployment will be governed by commercial and operational considerations rather than individual requests for full fibre services.

Our current process is that we would primarily look to work with landlords, or managing agents, to start negotiations for a wayleave. In some cases where we have struggled to identify those people, we have looked to tenants for information or to gain an access route to the landlord. Generally we do not expect tenants to proactively contact us themselves though.

In order to manage expectations for residential tenants, it is important that this is narrowly defined. The nature of our build means we will not be necessarily be able to be responsive to individual requests for service.

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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 landlord?

We agree with this approach. Where needed, temporary access granted by the Court is the correct approach and should remain valid until a negotiated agreement is signed by the operator and landlord.

We would need to make sure that any negotiated agreement covers any equipment which we have installed under the temporary court-ordered access. However, we would see this as part of the process of negotiating between us and a landlord.

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

We would hope that a negotiated settlement would eventually be reached, to form the basis for long term stability and access to properties. Ultimately this would be a question for an individual landlord. In cases where it is not possible to contact the property owner or their nominated representative(s), there is the possibility that they may not notice that temporary access has been granted or that they may simply choose not to engage even at that point.

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

As above, we would be hopeful that we'd be able to enter into a longer term settlement with landlords. It is in our interests that we have this longer term stability – but ultimately, this will again come down to the decisions of individual landlords.

We would flag concerns that landlords would require us to remove equipment at the point at which they make contact and enter into negotiations. This would cause considerable costs for us, potentially impact on live customer services which we would be providing to tenants and would also go against Government objectives to increase the availability of full fibre. If landlords want to remove equipment which was installed during the period of temporary access, they should be required to make a cost contribution to doing so.

Landlords should also be required to not negotiate a settlement and then immediately terminate a negotiated Code agreement without good cause. They should be required to meet the pre-existing conditions for termination in these cases – this would give us longer term stability and help facilitate the deployment of full fibre networks.