

Virgin Media: consultation response

Ensuring tenants' access to gigabit-capable connections

Summary

We appreciate the opportunity to respond to this consultation and the work done by the DCMS to help tenants gain access to gigabit-capable connections.

We agree with the department's assessment of the problem: data from the year to date provided by our dedicated wayleaves department demonstrate that we routinely encounter landlords of Multi-Dwelling Units ('MDUs')¹ whose intransigent behaviour acts as a block to their tenants receiving high quality, gigabit-capable connectivity (further below).

In order to realise the Government's gigabit-capable ambitions for the UK, we would like the DCMS to go further than it proposes in the consultation. Virgin Media regularly encounters landowners (or their agents) that frustrate tenants' access to gigabit-capable connections. However, using magistrates' court – a system already subject to a heavy workload – risks delaying the provision of service unnecessarily, unless the process can be bound to tight timescales. We therefore propose a 'deemed consent' to access should be permitted, on the condition that providers follow a due process which gives landlords sufficient time to object. The process should not include the need to demonstrate interest from a tenant. To do so risks putting the cart before the horse: we do not sell to properties unless we can give an installation date, and, in any case, we would not seek to provide connectivity to a premises without anticipating that we would have willing customers. In essence, the deemed consent approach would put access to gigabit-capable broadband on the same footing as water another service that is regarded as essential.

We also propose that the consent should apply to all properties that would be caught under a bulk² wayleave. The consent could be overturned by the landlord through a magistrates' court process, or by responding to our (and others) entreaties.

The nature of the problem

As at 5 December 2018, Virgin Media had 142 outstanding contacts with landlords regarding MDU wayleaves where we have received no response. Typically, the first contact was made 24 weeks ago. Of those 142, we calculate that 61 of the bulk MDU wayleaves³ being sought relate to 691,405 premises (based on publically available data). The lack of engagement with operators is a consequence of there being no compulsion on landlords to consider an operator's wayleave request and that there are no consequences to the landlord as a result of inaction. We describe these landlords as 'absent', although we understand that the property industry may have a different interpretation of the term 'absent landlord' or 'absentee landlord'.

Virgin Media encounters inaction at two stages in our contact with absentee landlords of MDUs. The first – the focus of the consultation – is where the landlord fails to respond to, or indeed acknowledge, an operator's request for a wayleave. The second – which is not included in the

¹ Virgin Media defines 'MDU' as relating to six or more premises. Less than six premises, but more than two, is categorised as a 'Single Dwelling Unit' or SDU.

² A 'bulk' wayleave refers to where a wayleave applies to multiple properties, owned by a landlord.

³ In the majority of instances, we seek bulk wayleaves agreements, to gain permission to a property owner's entire portfolio.

consultation but which also requires Government's attention – relates to instances where a (bulk) wayleave has been granted, but where the landlord then fails respond to any follow up, to enter into a negotiation to agree access – in effect the landlord becomes 'absent'. Given the focus of the consultation, our response deals primarily with the former issue, but given the importance of the latter, we also make repeated reference to the challenges associated with absentee landlords after a wayleave has been accepted.

We draw on this significant experience, because we are concerned that as a potential unintended consequence of the tightly defined proposed changes, landlords may accept a wayleave but then refuse to negotiate on terms to mitigate the operator accessing the property through a temporary access order (or deemed consent). This scenario is not currently covered by the ECC and accompanying guidance. If it is Government's ambition to remove significant barriers to gigabit-capable broadband rollout across the UK, the absentee landlord must be dealt with in the round, not just at the stage where an operator seeks wayleave permission. In addition, we also ask Government to consider the risk of landlords rejecting wayleaves, having not considered request fully. We believe the Government should consider under what circumstances a wayleave may be rejected.

When it comes to the wayleave request, Virgin Media of course accepts that there will be instances where a landlord has a legitimate reason to decide against granting a wayleave – for example where a landlord is planning imminent works to a property. However it is reasonable to assume that such instances will be exceptional. By extension, it is therefore likely that in the majority of cases where an absentee landlord has not engaged, it will simply be because they have not considered a request at all. This is evidenced by their lack of response to Virgin Media receives to MDU wayleaves requests, despite repeated attempts – at least once a month – over an average six month period to engage the absentee landlord.

Case study 1: Private landlord – no response to a wayleaves request

Virgin Media's wayleaves team has attempted to engage with a major Private landlord in the since 2017. The private landlord, has a 28k property portfolio with the vast majority located close to our network. While the landlord has not rejected or declined our request, they have provided a statement "*[we are] currently taking advice on the terms of the new Act as we have been approached by a number of operators of telecoms with various requests*". We submit that the DCMS should regard this type of response as equivalent to no response.

Virgin Media finds that this lack of engagement is particularly prevalent amongst local authorities and other public landlords. This is despite the often publically stated ambitions of these bodies in relation to digital connectivity. On anecdotal evidence, we believe that the absent public landlord is symptomatic of either a disconnect between departments, or because there is a lack of resource.

Case study 2: Housing Association (linked to Local Authority) – no response to wayleave request

VM wayleaves team has attempted to engage with a Housing Association, which controls the housing stock of a Local Council, since January 2018. Following persistent contact through different teams at the Council, VM managed to get a meeting with the Housing Association in early November and shared a copy of the bulk wayleave agreement. This would cover approximately 3k premises. VM has heard nothing back.

The Local Authority has clear digital connectivity ambitions which are not being matched by the actions of the Housing Association. The Council website states that: *“Many areas... have access to superfast broadband internet and a wide variety of digital services. However, some areas still suffer from slow speeds that limit residents to only the most basic of internet tasks... Superfast internet access will help improve the lives of [area] residents and boost our local economy.”*

Case study 3: Local Authority – granted wayleave, but no response to request for route access

A major public authority signed a VM bulk wayleave agreement in May 2018 after conversations that started in August 2016. This wayleave would grant VM access to 18k housing stock that is close to network, as well as the ability to cross their land and site cabinets on their land.

While the authority agreed to respond to route plans⁴ within four weeks, VM is chasing the authority to agree a process for each route into an MDU/a service level agreement an additional six weeks later. Further, VM wrote to the association in July to notify them that we will be siting our cabs under the ECC (Schedule 3a) as we have sent them plans but they have not responded (and both are vital to Lightning build).

The authority's publically stated ambition is to *“improve broadband connectivity by extending Next Generation Access (NGA) broadband infrastructure so that the remaining 12% of premises can access services of at least 30 Mbps....The project will seek to be complementary to recent announcements made under Future Telecoms Infrastructure Review. The overarching aspiration... is to deliver future-proofed broadband access to as many premises.”*

In addition, they have stated they intend to: *“Pilot a digital inclusion project for tenants to help them in accessing services and providing facilities in our offices for tenants to get help to apply for Universal Credit on-line”*

Through Project Lightning Virgin Media is undertaking a significant and complex programme of broadband delivery across the UK, which requires months of planning in advance to deliver. While our wayleaves team builds in leeway to the process of obtaining a wayleave and subsequent route access, if we have not received communication from a landlord after multiple attempts, it may affect build plans – particularly in the case of Project Lightning. In addition, if Virgin Media is unable to secure significant wayleaves access to bulk MDUs, build plans will also have to alter, meaning that potential ‘in fill’ sites are missed.

⁴ Route plans describe, in detail, how Virgin Media will provide connectivity to an individual MDU.

On the basis of this evidence, we are supportive in principle of the department's proposal to amend the Electronic Communications Code ('the ECC'). However, we make a number of tweaks to the proposed process and also ask Government to be bolder and to go further to address the significant issue of the absentee landlord.

Responses to consultation questions

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

We support an obligation in law requiring landlords to respond to requests sent by operators. The obligation will add credence to any magistrates' court process (despite our misgivings about using the magistrates' courts detailed below). We are hopeful that such an obligation, coupled with the prospect of entry into the property if the landlord continues to avoid engagement, may change behaviour on the part of some landlords.

However, in the case of MDUs, Virgin Media typically seeks a 'bulk wayleave agreement' that covers multiple properties owned by the same landlord. Importantly, the obligation should cover all properties owned by the landlord and, by extension, the court order (granted by the magistrates' court) or, under our proposal, the 'deemed consent' to allow entry should apply to all properties that would otherwise be covered under the bulk wayleave agreement.

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 obligation will complement the facilitation within the Electronic Communications Code (ECC). The ECC assists with a situation where an operator and a landlord are unable to agree terms of an access agreement (wayleave), i.e. the parties are negotiating, but cannot reach an agreement. The new obligation is directed at a different situation where a landlord fails to engage properly with an operator (or at all) to negotiate an access agreement. We believe that it should also include situations where the (bulk) wayleave has been agreed by the landlord fails to sign off the individual route plans (i.e., does not respond to communication, rather than wishes to make changes) within a specified length of time.

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 think that the use of the courts should be kept to a minimum:

- Magistrates' courts have a high workload and the time taken to deal with access applications is unlikely to be substantially less than the time taken by the Upper Tribunal to resolve access agreement issues, which limits the usefulness of a magistrates' process. Based on the latest quarterly statistics (April – June 2018) published on www.gov.uk (click [HERE](#)), the average time taken for the magistrates' courts to conclude a case (other than a criminal or motoring offence) in Q1 2018 was 148 days and in Q2 2018 was 144 days, i.e. in excess of 4.5 months. Since 2016 the average timescale has been at the mid 130 days mark. Although this is better than the 7-12 months timescales for the Tribunal to reach an "actionable decision", the requirement to go to the magistrates' court can result in a lengthy delay.

- There is no recourse available to operators if a magistrates' court fails to enter judgment on an access application in a timely manner and such delays / uncertainty may again push the cost per premises too high to invest in telecommunications apparatus in the property or to connect the property to the network.

We suggest that, following a due process (described below), if the landlord does not respond or refuses to discharge meaningfully the obligation put into the ECC, then there is a 'deemed consent' to install infrastructure.

1. Deemed consent for an operator to access a property to install telecommunications apparatus necessary to supply TV, broadband and/or phone services ("Communications Services") to the property shall be granted if condition 1(1) plus either 1(2) or 1(3) below are met.
 - (1) The operator has made three (3) or more attempts to contact the landlord to gain access to the property.
 - (2) No later than twenty (20) working days from the date of the operator's first attempt to contact the landlord to gain access, the landlord:
 - (a) did not respond to the operator;
 - (b) in response did not indicate whether it would grant access; or
 - (c) in response indicated that it did not intend to negotiate a voluntary access agreement with the operator and the landlord did not provide adequate explanations as to:
 - (i) why any prejudice caused by access to the property and/or installation of telecommunications apparatus at the property would not be adequately compensated for by money; and
 - (ii) how the landlord's rights in respect of the property outweigh the benefit to persons who would obtain access to Communications Services.
 - (3) Following agreement between the operator and the landlord of a voluntary access agreement, the operator had contacted the landlord for details regarding access and the landlord either did not respond or provided limited response so that it was unclear to the operator the details regarding access.
2. On deemed consent being granted, the operator shall notify the landlord that the operator intends to access the property no later than ten (10) working days from deemed consent being granted.
3. Deemed consent referred to in 1 above shall be withdrawn if the landlord issues an application to the magistrates' courts no later than 10 working days from receiving the operator's notice referred to in 2 above, and receives an order to confirm that:
 - (1) the required conditions referred to in 1 have not been met; or
 - (2) in all the circumstances of the case, the landlord's rights in respect of the property outweigh the benefit to persons who would obtain access to Communications Services.
4. The date on which the order referred to in 3 above was entered shall be the date on which deemed consent was withdrawn.

5. If, following deemed consent being granted, the landlord seeks to agree terms of a voluntary access agreement with the operator, deemed consent shall continue to apply unless and until such a voluntary agreement has been entered into or an agreement has been imposed by the Upper Tribunal.
6. The references to property in 1 – 3 above shall mean a dwelling, business or commercial premises.

In the alternative, we describe below how the magistrates' court process should work.

For i) and ii) the process above is followed. For iii) the magistrates' court process (outlined below) is required.

1. An operator may issue an application to the magistrates' courts for an order permitting access to a property to install telecommunications apparatus necessary to supply TV, broadband and/or phone services ("Communications Services") to the property if conditions 1(1) and 1(2) plus either 1(3) or 1(4) below are met.
 - (1) The operator has made three (3) or more attempts to contact the landlord to gain access to the property.
 - (2) the application is made on notice to the landlord.
 - (3) no later than twenty (20) working days from the date of the operator's first attempt to contact the landlord to gain access, the landlord:
 - (a) did not respond to the operator;
 - (b) in response did not indicate whether it would grant access; or
 - (c) in response indicated that it did not intend to negotiate a voluntary access agreement with the operator and the landlord did not provide adequate explanations as to:
 - (i) why any prejudice caused by access to the property and/or installation of telecommunications apparatus at the property would not be adequately compensated for by money; and
 - (ii) how the landlord's rights in respect of the property outweigh the benefit to persons who would obtain access to Communications Services.
 - (4) Following agreement between the operator and the landlord of a voluntary access agreement, the operator had contacted the landlord for details regarding access and the landlord either did not respond or provided limited response so that it was unclear to the operator the details regarding access.
2. The magistrates' courts shall issue an order permitting the operator access to a property to install telecommunications apparatus necessary to supply Communications Services to the property ("Access Order") unless the landlord demonstrates to the magistrates' courts that:
 - (1) the required conditions referred to in 1 have not been met; or
 - (2) in all the circumstances of the case, the landlord's rights in respect of the property outweigh the benefit to persons who would obtain access to Communications Services.
3. Judgment shall be entered by the magistrates' court no later than twenty (20) working days from the date of the operator's application for an Access Order.

4. If, following Judgment being entered by the magistrates' court, the landlord seeks to agree terms of a voluntary access agreement with the operator, the Access Order shall continue to apply unless and until such a voluntary agreement has been entered into or an agreement has been imposed by the Upper Tribunal.
5. The references to property in 1 and 2 above shall mean a dwelling, business or commercial premises.

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?

No. We suggest 20 working days from the date of the operator's first attempt to contact the landlord to gain access. Once time for the magistrates' court process to conclude is included, the elapsed time will be at least 5.5 months (20 working days plus average court timescales Q1 and Q2 2018) to get to an actionable order.

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?

We believe that operators should not be required to provide the evidence of their need to enter a property or number of properties. Virgin Media neither sells or markets its services to tenants of MDUs before has secured a wayleave because, without the wayleave, we cannot commit to a service installation date. That said, we will not attempt to seek a wayleave from a landlord unless we are convinced of the prospect of selling services to the tenants within the MDU. In short, given the cost involved in connecting MDU, the risk of speculative requests for wayleaves (and then access) without assurance of future demand is minimal and certainly insufficient to warrant any additional cost and delay imposed on the operator.

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

Our proposal to drop the requirement for evidence of demand obviates the need to define what is meant by a communications service. If it is ultimately required, we suggest that a tenant or occupier's request/expression of interest would not require any financial commitment to the operator and could be by any means of communication, including but not limited to by email, letter, phone call, text, on line, via a portal, etc.

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?

Yes, the temporary access order (or deemed consent) will give the landlord an incentive to conclude a wayleave agreement. Importantly, the access order should not be frustrated by a simple 'no' from the landlord (and neither should this be deemed an appropriate response from a landlord following a request for a wayleave for the purposes of this legislation). In order to reverse the order before telecommunications equipment is installed the landlord would need to get a stop order from a magistrates' court (meaning that the landlord's rights in respect of the property outweigh the benefit to persons who would obtain access to Communications

Services). If telecommunications equipment has already been installed, the landlord will have recourse to the Lands Tribunal if it wishes to have the equipment removed and service (or prospective service) ceased.

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

Yes, for the reasons stated in our response to Q7, we think that our proposals on deemed consent and an Access Order would properly incentivise landlords to engage with operators regarding access.

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

We consider that our proposals on deemed consent and an Access Order provide appropriate safeguards to a landlord to protect their interest in their own property. All our proposals are seeking to do are to encourage landlords to engage properly with operators so that decisions can be made on investment in telecommunications connectivity. The longer and more protracted the access discussions become, the less likely an operator will invest in the relevant property due to increased costs and delays. Our proposals provide an opportunity for a landlord to engage and agree an access agreement with operators at any point.

We do not think there will be issues with access agreement negotiations even after installation has taken place because the issue of long term consent for installed apparatus remains relevant as our proposals provide operators with a right to access to install until either deemed consent or an Access Order is successfully overturned by the landlord.

**Virgin Media
December 2018**