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Tenant Connectivity Consultation
Digital Infrastructure Directorate
Department for Digital, Culture, Media and Sport
100 Parliament Street
London
SW1A 2BQ

By email to: tenantconnectivity@culture.gov.uk

Dear Sir/Madam

Ensuring tenants' access to gigabit-capable connections
Response to consultation on ensuring tenants' access to gigabit-capable connections

Question 1: Would the placing of an obligation on landlords in the manner proposed encourage more landlords to respond to requests sent by operators?

Ashurst LLP primarily acts for landowners on their instructions to complete a wayleave agreement in response to a request from operator to landowner. In our experience we are not aware that there is a delay in landowners responding to requests for access. Whilst we note that the consultation paper mentions that operators have informed DCMS that a high number of landlords, especially in relation to multi-dwelling units – are not responding to access requests, the introduction of measures such as those proposed in this consultation paper should only be introduced as a response to a proven and significant issue. If the issue is that landlords of multi-dwelling units are not responding to requests for access, that may be because requests are being made to the landlord entity (which may be a company owned by the leaseholders, or may be an investment/development company) but are not being passed on to the managing agents/management company which runs the property on a day-to-day basis. It may help speed up the process of operators ask their intended customer to provide them with the details of the managing agents/management company and to make their request for access to that entity (in addition to a formal request to the landlord entity). The intended customer will almost always have that information, and this will be the most effective method of engaging the landlord in a discussion with the operator. We believe that operators can resolve this issue without the need for further legislation.

Question 2: 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?

Part 4 of the Electronic Communications Code (the "Code") sets out the provisions whereby the tribunal can impose an agreement on a person and that includes the right of operators to seek temporary and interim code rights. Recent decisions of the tribunal have demonstrated that the operators have been able to secure interim rights under the Code within a matter of months. In particular in the case of CTIL v University of London [2018] UKUT 0356, an application was issued

by CTIL on 16 July 2018 and judgment was handed down on 30 October 2018. The Upper Tribunal is dealing with these applications swiftly and in our view there is no need for further legislation which would place matters which are essentially civil in nature, within the remit of the criminal courts.

Question 3: 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?

As explained above, we consider that it is not necessary to grant further powers to operators who already have the mechanisms set out in the Code to obtain orders allowing access. If DCMS considers that further powers are appropriate, we consider the most appropriate amendment would be to the existing Code and the relevant forum would be the Upper Tribunal (Lands Chamber) as the same tribunal would then deal with any application for an agreement to be imposed on the landlord. In our view would not be an efficient use of judicial resources for two different courts, one civil and one criminal, to be dealing with the question of whether an operator should be able to install electronic communications apparatus without the consent of the landlord/landowner.

We are concerned to ensure that any application by an operator comes before the magistrates with a fair and balanced representation of the facts. The magistrates' court (or the Sheriff Court in Scotland) would decide the application for the warrant based on the operator's evidence alone and the landlord may have no opportunity to present evidence as to why it would be inappropriate for a warrant to be granted.

Further, it is a matter for the landlord and tenant to agree the terms on which electronic communications apparatus may be installed within common parts of a building and/or the tenant's demise. Indeed tenants can only install and/or connect to telecommunications services where they have the appropriate right granted to them in their lease.

Question 4: 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 [sic] much time would be appropriate?

From what we have said elsewhere in this response, we consider that it is disproportionate for operators to seek magistrates warrants to enter premises. That said, if the government considers it appropriate to introduce this measure, we consider two months should be sufficient notice. It is essential that the operator should prove where and how it has served notice and whether it has sought to contact the managing agent/management company (if any), before making an application for a warrant. We also consider that this procedure should only be available in the case of registered land. Where land is unregistered there is no central register of land interests and we consider it will be almost impossible for operators to prove that they have contacted the appropriate landowner in that case.

In the event that a landlord has acknowledged the notice but then not engaged with the operator in agreeing the terms of the wayleave, we consider that the appropriate remedy is for the operator to apply for an agreement to be imposed pursuant to the Code. It should not be open to an operator to choose between their rights under the Code and the ability to apply for a warrant.

Question 5: 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 consider it essential that the operator proves that they have used their best endeavours to contact the correct landlord, at the correct address and that it is necessary for them to access the landlord's property (other than the area let to the tenant, which the tenant can consent to). Examples of the evidence that might be appropriate include the following:

If you have any queries about this response, please do not hesitate to contact us.

Yours faithfully