DRAFT RESPONSE TO: GOVERNMENT CONSULTATION ON AMENDMENTS TO UK ELECTRONIC COMMUNICATIONS CODE

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

No. In our experience, where a landlord doesn't respond to a request sent by an operator, it is not due to an absentee or non-responsive landlord but is due to the incorrect person being contacted in the first place. In our experience, there is often a lack of communication between the various departments within the operators (e.g. surveying department/wayleave officers) dealing with the request and the customer. Most tenants have contact details for managing agents who they deal with on a regular basis. Operators should be utilising this information rather than submitting requests to incorrect landlords.

This can be particularly important where there is a complex property ownership structure when it may not be clear who the landlord is for the purposes of obtaining consent to the request.

Our suggestion for a solution to this issue is that the operator has to serve a formal request on a landlord at their registered address (if the landlord is a company) to allow the company to take delivery of the request and take steps to bring it to the attention of the right person.

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?

It would undermine the facilitation of negotiated agreements between landlords and operators. If an operator obtains a magistrates' warrant to enter premises there will be no incentive on the operator to enter into a written agreement. In order to ensure balance, we consider that operators should be required under the Code to enter into a formal written agreement with the landlord once the landlord has engaged with the operator in relation to a request.

There should be sanctions for operators who attempt to use Code rights to locate equipment on a landlord's property without entering into a formal written agreement where:

(a) the operator has not served a request on the landlord at its registered address;

(b) the operator has failed to take the reasonable steps described above to identify the person who will deal with a request on the landlord's behalf; or

(c) the landlord has engaged with the operator with a view to entering into a written agreement.

In our opinion, the Code is already weighted heavily in operators' favour. Any additional obligations on landlords could add further ammunition to the operator's armoury of tactics for avoiding a negotiated written agreement.

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.

In principle we are sympathetic but we are concerned about the detail. In particular, the criteria for an access order should be clearly set out in any amendments to the Code e.g. the access order will only be granted after the operator has shown that they have taken reasonable steps to serve the request on the right landlord/address. The landlord should be able to challenge or appeal an application for an access order if the operator has not followed the correct procedure or if the landlord has engaged and the operator has pressed on with an application anyway. The

process should be robust enough not to enable operators to by-pass the current requirement for a negotiated agreement. Additionally, we have the following specific comments:

(a) **When a written agreement cannot be reached between a landlord and an operator but the landlord has engaged with the operator.**

The current process allowing an operator to apply to the Lands Chamber of the Upper Tribunal for an agreement to be imposed should be retained for cases where landlords are engaging with operators but the parties cannot reach an agreement. Whilst this process has not yet been used by operators it is a provision that should continue to be available in these circumstances.

(b) **When a landlord is "absent and not engaging"**

If this is genuinely the case then we consider the use of the courts reasonable subject to all factors being taken into consideration and provided for in an amended Code. Our main concerns are:

(i) there could be complex property ownership structures which mean that the relevant landlord may not be known without an investigation into the title. This could mean that the correct landlord is not "absent and not engaging" but simply has not been notified. Please also see responses to questions 1 and 5 b) and c).

(ii) risers in buildings can become full of redundant cabling which make it impossible for new cabling to be included. Landlords need to be able to control this and ensure old cabling is removed before new cabling is inserted. The ability to do this will be compromised if operators have additional powers of access and installation. Whilst the Code contains provisions for the removal of apparatus it does not specifically cater for wayleave agreements. These can be for a short duration as the apparatus is only installed for the period that the tenant requesting the service is in occupation. The Code should be amended to deal with the termination of wayleave agreements and the removal of infrastructure which has been installed specifically under wayleave agreements.

(iii) if the premises form part of a multi-let building, the landlord may be bound by third party rights over the common parts. These could be compromised if the operator was allowed to access and install equipment. There may be multiple lease ownership structures in place. Will "landlord" capture each and every landlord under a superior lease?

(iv) as detailed in the response to question 2, once the magistrate issues a warrant of entry there will be no incentive on the operator to enter into a written agreement. This could seriously compromise a landlord who would then have no indemnity for damage, no right to enforce the operator to remove the equipment at the end of the lease or when the equipment becomes redundant and no control over the type and location of the equipment.

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 much time could be appropriate.

Yes, if there is a definition of what constitutes a request by a tenant for a communications service. If there is no definition it would be unclear how this would be regulated/monitored or how the operator would be able to evidence that a landlord has had an appropriate amount of time to respond to the request. If an access order is incorrectly issued because the request hasn't been correctly issued to the correct landlord, there needs to be a swift right of appeal by the landlord so as to stop premises being dug up to install equipment.

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?

The evidence required should include:

(a) written evidence from the tenant that a request has been made to the operator for the operator to provide a service to the tenant. This should include an acknowledgment from the operator;

(b) written evidence that the operator has made a request to enter a property to the correct landlord. This would mean that a definition of what constitutes a request to the landlord should be included within the amendments to the Code so that there are no evidentiary issues as to whether or not an operator has contacted the landlord. If the operator makes the request in accordance with the definition this would be satisfactory evidence; and

(c) that the operator has taken reasonable steps to contact the landlord. The Code should also include a protocol for operators to follow in order to determine who the landlord actually is. Where a tenant has information about managing agents or landlords' addresses these should be copied in.

Question 6: Is there a need to define what constitutes a request by a tenant for a communications service?

Yes. This would ensure that the request would be directed to the actual landlord.

Our proposal would be for the request to be in a standard form providing as much detail as possible in order for the Landlord to consider the request. The details to be provided should, at the very least be:

(a) Full details of the apparatus to be installed;

(b) Details of how long any survey will take;

(c) Details of the access arrangements required.

In addition, once the survey has taken place, the operator should also provide risk assessment method statements ("RAMS") and plans showing the route of the proposed apparatus. The Landlord should be given additional time to review the RAMS and the proposed route of the apparatus to ensure that the RAMS and the route of the apparatus are acceptable and appropriate.

Question 7: 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?

Yes, however see the comments above in response to question 2.

Question 8: Would temporary access granted by the court provide an incentive for landlord's to re-engage?

No, not necessarily. If a request has been made by the operator to the correct landlord there will still be certain circumstances in which some landlords will not engage.

Question 9: Do you foresee any issues with operator/landlord negotiations which take place after the installation has taken place?

Yes, as follows:

a) no incentive on the operator to enter into a written agreement;

b) as the installation has taken place the operator will be in a stronger bargaining position and may compel the landlord to enter into unreasonable terms within the wayleave agreement;

c) the landlord will have no indemnity for damage caused to the property by the operator; and

d) the landlord's insurance may not cover the works.