From: **Cooper, Tim** <[redacted]>
Date: Fri, 21 Dec 2018 at 15:31
Subject: Response to Telecoms consultation on behalf of Landsec
To: tenantconnectivity@culture.gov.uk <tenantconnectivity@culture.gov.uk>
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Dear Sirs, please see below our response in respect of this consultation.

Regards

Tim Cooper

Legal Director

Landsec

100 Victoria Street London SW1E 5JL

[redacted]

[redacted]

www.landsec.com

Response to Department for Digital, Culture, Media & Sport's Consultation on Ensuring Tenants' Access to gigabit-capable connections on behalf of the Land Securities group of companies ("Landsec")

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

As a reputable landlord sensitive to the needs of all our customers who occupy our buildings we would always expect to deal with any applications promptly, and accordingly do not envisage the proposals should impact on us as a business. We recognise occupiers require connections as critical to their businesses, and while the fear of consequences may encourage more responses we consider the proposals something of a sledgehammer to crack a nut. Leases and occupational agreements control any alterations a tenant can make and there is protection in the consenting process which generally requires a landlord not to unreasonably withhold or delay any consent. It would seem more appropriate to adopt that as a requirement, with established remedies in place.

It should also be noted that property owners will often proactively interact with operators to ensure that their properties have state of the art communications infrastructure to make the properties more attractive to potential tenants.

There may be legitimate reasons why it may be difficult for a landlord to respond promptly to an operator's request. The operator may be unable to contact the landlord. Their contact details may have changed or an occupier may have given inaccurate details, or the landlord may be based overseas and the operator does not know who acts for the landlord in relation to the property. So the landlord will be unable to respond to the request, because they will be unaware of it, so the test of not getting any response needs very careful consideration.

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?**

Generally speaking, landlords (certainly reputable ones such as ourselves) seek to work with operators to install digital infrastructure in their properties, whether for an entire building or to serve particular tenants. The consensual approach involving the landlord and operator negotiating an agreement is the one invariably used, especially in relation to the installation of fixed line infrastructure in properties. It is worth bearing in mind that the Electronic Communications Code (Code) does not even come into play if there is no written agreement between the occupier (property owner) and operator. While operators could use the Code to apply to a court or tribunal to impose a Code agreement on an occupier, this is rarely done in the case of fixed line infrastructure. So in the context of fixed line installations, it is debateable whether the Code facilitates negotiated agreements between landlords and operators. It is more likely that there will be a commercial motivation for both the occupier and operator to sign up to an agreement. Efforts have been made in the industry to streamline the negotiation process through the production of industry standard wayleaves, which are broadly acceptable to property owners and operators and, therefore, require little negotiation, although it is noted there has not been as much adoption as would be expected, despite the concerns of all parties being the same in virtually all instances.

The obligation to respond to an operator's request may complement a negotiated agreement if the owner, without the obligation, desires to enter into such an agreement. However, the owner may be irritated by being compelled to facilitate the deployment of digital infrastructure in its property. A compulsion to respond may actually dissuade an owner from dealing with a particular operator.

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?**

We agree that it is important for properties to benefit from state of the art infrastructure such as full fibre, gigabit-capable connections and having high quality apparatus is installed to make their properties attractive to prospective tenants. However, we are concerned about the means by which the equipment would be installed. We consider that obtaining entry to a landlord's property via a warrant of entry is an interference with the landlord's property rights. The nature and extent of rights granted, including methodology for the works, duration of the agreement and so on would be uncertain and there is no suggestion the application would trigger any further notice to the landlord.

As stated, there may be legitimate reasons why a landlord is either not contactable at all or within the timescale envisaged. To be able to force entry onto the landlord's property via a warrant is an interference with the rights of a landlord who may not have an opportunity to object or even be aware of. No account is taken of for example insurers of the property who may invalidate cover for the property if entry is obtained using the warrant. No account is taken of other tenants or occupiers at the property who may be disrupted by the operator's entry to install. And yet as stated no opportunity is provided for the landlord to object, who may be unaware of the request.

The legislation must provide greater safeguards for the landlord before such a warrant can be granted by the court. They are dealt with in the following questions but in addition the operator should be responsible for any damage and disruption caused by its entry.

It may also be the case that a landlord may not want to deal with a particular operator and, therefore, refuses to respond to that operator. Why should a landlord be compelled to accept the equipment of a particular operator with whom it does not want to deal but where it would be quite happy to deal with another operator? Of course if a Code agreement is in place, there are statutory rights to share the apparatus. It is a longstanding principle of contract law that silence is not acceptance.

Linked to that is if there is ongoing discussion with an operator over a proposed agreement or if a landlord cannot come to an agreement with an operator during the course of negotiations, then landlords may well consider that a magistrates' court warrant should not be available. Operators can utilise Part 4 of the Code, and we note that many operators have adopted an unhelpfully aggressive stance from the outset in many instances.

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 would be appropriate?**

Depending on the ability to demonstrate appropriate methods of attempted contact on the face of it two months appears a reasonable period.

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?**

There should be stringent and precise requirements as to what evidence needs to be provided by the operator in view of the interference with the landlord's property rights. Evidence needs to be provided of the number and modes of attempts to contact the landlord. Did the operator seek to liaise with the tenant making the request as to the contact details that the tenant has for the landlord? Have they used the registered address on Companies House, or that given at the Land Registry? Or used the details of Evidence needs to be provided

of why the request for entry is so urgent that a magistrates' court warrant is required. If there is existing contact with the landlord but agreement cannot be reached (for example, because of dispute over the terms of the agreement, or because the landlord does not want to allow the particular operator into its property), then the court should not grant a warrant in those circumstances. In the warrant, the court should be able to set down the basis for the access arrangements. Perhaps reference could be made to the standard OFCOM access arrangements. See the references to access arrangements in OFCOM's Electronic Communications Code's Code of Practice (for example, in paragraphs 1.33-1.41 and Schedules A and B) https://www.ofcom.org.uk/__data/assets/pdf_file/0025/108790/ECC-Code-of-Practice.pdf

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

This needs to be carefully prescribed to avoid any misunderstandings. First, to whom is the request made? To the operator? Or the landlord? There should be a requirement for the request to be in writing and receipt acknowledged by the recipient. Should the request be limited to an installation or other works involving a full fibre gigabit-capable connection, since this is the reason behind the Consultation?

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 landlord?**

The Consultation provides that the warrant of entry is not intended to be an alternative to a formal access agreement and efforts should continue to engage with landlords to achieve a formal agreement. The Consultation's view is that the Code's underpinning of the formal agreement should provide an incentive for landlords to engage. However, negotiations over such an agreement are likely to be impacted by the fact that the apparatus is already in situ. It is not a level playing field for a negotiation because the operator has already got what it wants.

It is not entirely clear whether the installation of infrastructure or upgrading pursuant to the warrant attracts the protection of the Code. It appears that it does not. Therefore, what ability does the landlord have to remove the apparatus (assuming the Code does not apply) if the formal agreement is not completed within a prescribed period such as a year? We consider that the warrant should be time limited to incentivise both parties to try and seek agreement on a more long-term solution. However, the ability to have an "agreed" settlement once an operator has already installed equipment is likely to be problematic and some fall back terms might be appropriate, for example based on the City of London wayleave.

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

See our answer to question 7. It is worth noting that while the Code grants rights to the landlord, it does not grant automatic rights to remove, just to request removal and then the relevant parts of the Code play out. Entering into a Code agreement in fact could prove quite burdensome on the landlord with for example the lengthy and restrictive termination process, and hence the default terms of a document such as the City of London Law Society wayleave may be appropriate.

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

See our answer to question 7. The Consultation states that negotiations which take place following the re-engagement of the landlord will be conducted in the context of provisions within the Code, including the ability to seek resolution via the Tribunal. If the Code does not apply to the warrant and no Code agreement has been entered into, how can the Code have an influence on the negotiations unless Part 4 is applied? Default terms and reliance on the code of practice noted above are therefore of great importance.