

CityFibre

Proposed Guidance under the Communications (Access to Infrastructure) Regulation 2016

**Response to consultation submitted by CityFibre
Infrastructure Holdings PLC**

7th October 2016

Contents

1	Introduction	3
1.1	About CityFibre.....	3
2	Executive Summary.....	4
2.2	Definition of high-speed electronic communications networks.....	5
2.3	Which network operators are covered by the ATI?.....	6
2.4	The relevance of precedence and ‘case law’	6
2.5	The application of the ATI in geographic locations where one network provider is already subject to SMP access remedies.....	7
3	Information about and surveys of physical infrastructure	7
3.1	Section 3 of the consultation document	7
3.2	Section 4 of the consultation document	8
4	Access to Physical Infrastructure	8

CityFibre's response to Ofcom's consultation on their proposed guidance under the Communications (Access to Infrastructure) Regulation 2016

1 Introduction

1.1 About CityFibre

- 1.1.1 As one of the largest and most innovative investors in the UK's digital infrastructure, we take a deep interest in Ofcom's regulation of the sector. We welcome this strategic review as we believe the UK is now at a critical juncture, where our aging communications networks must be upgraded or replaced with modern digital communications infrastructure that will serve the needs of business and consumers in the future.
- 1.1.2 CityFibre, the largest independent provider of open access fibre infrastructure to UK mid-sized cities, enables gigabit connectivity through building, owning, and operating fibre-optic infrastructure that is utilised downstream by CPs and MNOs; providing pure fibre connectivity to businesses, homes and the public sector.
- 1.1.3 Today, CityFibre operates over 650 route-kilometres of local access networks serving over 60 towns and cities. As a large investor in fibre-optic infrastructure nationwide, our coverage is growing rapidly through a strategy to deploy end-to-end fibre connectivity to all users and applications citywide.
- 1.1.4 We are rolling out a model of Gigabit Cities; projects are underway in York, Peterborough, Coventry, Aberdeen, Edinburgh, Kirklees and Hull. Our objective is to deliver 100 Gigabit Cities over the coming seven to ten years, and we are implementing plans to accelerate the speed of deployment.
- 1.1.5 Our 100 Gigabit Cities plan aims to bring pure open access wholesale fibre infrastructure to 100 towns and cities nationwide, serving an addressable market of circa:
- 6.0m homes
 - 600,000 businesses
 - 6,000 mobile cell sites
 - 16,000 public sector sites
- 1.1.6 CityFibre's joint venture with Sky and TalkTalk is delivering FTTP networks for residential homes that are independent of BT Openreach. Work is advancing in York with Sky and TalkTalk's Ultra-Fibre-Optic (UFO) services now available to residents offering broadband up to 1Gbit/s. The opportunity exists for UFO FTTP broadband services to be deployed across all of CityFibre's Gigabit City projects.
- 1.1.7 CityFibre has signed national frameworks agreements with EE/Three/MBNL and Vodafone to deliver dark fibre connectivity for mobile backhaul and other core infrastructure. This will support innovations in mobile networks to enable higher speed mobile services. The UK's first citywide dark fibre network for mobile backhaul is being delivered in Hull.
- 1.1.8 CityFibre is a member of the Infrastructure Investors Group (IIG), whose members also include euNetworks, Virgin Media and Zayo.

2 Executive Summary

- 2.1.1 This document presents CityFibre's comments on Ofcom's proposals for how this would discharge their duties as the dispute resolution body under the Access To Infrastructure Regulations (The ATI), implemented in July of this year.
- 2.1.2 We have kept our comments to a minimum and focused on issues of principle. We believe that the very vague nature of the proposed guidelines leaves considerable uncertainty in the market and could result in a high volume of disputes being referred to Ofcom, simply to create a body of 'case law' that can provide some level of guidance as to how the rights and obligations under the ATI should be interpreted.
- 2.1.3 The ATI Regulations (the ATI) are being introduced at a time when the UK is at a turning point regarding investment of fit-for-purpose all-fibre networks to meet current and future communications needs of private users, business and the public sector.
- 2.1.4 The ATI provide a framework for requesting information about, surveys of and access to duct infrastructure operated by infrastructure operators, including those operating electronic communications networks. They do not, however, provide a set of standardised and predictable terms and conditions for this access, nor do they include even basic non-discrimination provisions for such terms and conditions, making it extremely hard to create predictability even after several disputes have been handled by Ofcom.
- 2.1.5 CityFibre has concerns that the mere existence of the ATI may in some way weaken the application of the existing regulatory framework, and that they could trigger a significant volume of vexatious cases which take up a disproportionate share of operators' and the regulator's time and effort, and that they come to be used tactically to blunt the incentives on firms to build new competitive infrastructure.
- 2.1.6 The ATI clearly state that where existing SMP remedies exist under the Communications Act, the ATI does not apply other than if the scope of the SMP remedies imposed is narrower than that of the ATI, in which case the ATI could supplement the SMP remedies. This does not, however mean that the ATI should be seen as a substitute for SMP regulations and it should therefore not afford Ofcom the opportunity of evading their duty to properly regulate electronic communications markets in which one or more Communications providers have been found to have SMP.
- 2.1.7 CityFibre understands that the Directive was never intended to mirror the transparency and certainty that one would expect from ex-ante regulations applied through a significant market power (SMP) provision under the 2003 Communications Act. Nevertheless, Ofcom have in their BCMR Statement of April 2017 referred to the ATI as effectively replacing the need for SMP-based duct access provisions in the business connectivity market. It is therefore interesting to review the extent to which Ofcom have attempted to create the maximum possible transparency and predictability through their draft dispute resolution methodology, and to assess the risk of the dispute resolution process as set out to create perverse incentives on Communications Providers and potentially economically harmful practices.
- 2.1.8 As written however, the extremely vague nature of Ofcom's proposed dispute resolution guidelines further reinforces CityFibre's view that the ATI should not be considered a credible alternative to ex-ante SMP-based access remedies. Companies investing in and building electronic communications networks need a high level of certainty regarding the costs and timeframes involved in gaining access to existing infrastructure. Financing network investments based on a process as vague as set out in Ofcom's proposed guidelines is unlikely

to be possible and would certainly substantially raise the perceived investment risk and thus result in a higher cost of capital.

2.1.9 The need for transparency, predictability and consistency are clearly accepted as the underlying principles for the imposition of ex-ante regulatory measures in network industries such as telecommunications. The ATI in no way meet those criteria and are clearly not fit for purpose as a substitution for ex-ante remedies. The ATI may deliver benefits in the form of access to a wider range of infrastructure, but as a means of access to the infrastructure of a network provider with significant market power in a specific market, CityFibre considers it to be entirely unsuitable.

2.2 Definition of high-speed electronic communications networks

2.2.1 A critical criterion that will determine the level of impact the ATI could have in the UK, is whether access through the ATI is limited in any way in terms of the downstream use of the network constructed using the ATI. The Government's consultation response dated 4th July 2017 states: *"The Directive does not place any limitation on downstream use of physical infrastructure accessed under the Directive other than requiring access to be with a view to deploying elements of high-speed electronic communications networks. We do not intend to go further than the requirements of the Directive by creating such limitations."*

2.2.2 Ofcom's proposals also do not appear to impose any downstream use restrictions, indeed the information required from an access seeker under the ATI includes no mention at all of what the intended use of the network is – this arguably does not even provide a means of ascertaining whether the access seeker intends to deploy a high-speed electronic communications network.

2.2.3 CityFibre agrees that no additional restrictions should be applied to ATI access, but has concerns as to the different interpretations that could be put on the qualifying criterion of deployment of high-speed electronic communications network. These concerns relate to the definition of high-speed electronic communications networks in the ATI, namely: *"an electronic communication network which is capable of delivering broadband access services at speeds of at least 30 Mbps"*. The inclusion in the definition of the term "broadband" could be interpreted as meaning a mass-market high-speed connection to the internet, if that were the interpretation made then there is a risk that the use of ATI for point-to-point business connectivity products may not be considered to fall within the definition of high-speed electronic communications networks and access might therefore be challenged by infrastructure providers.

2.2.4 In order to generate the financial return necessary to attract investment, builders of fibre networks need to address either the business connectivity market only, or both the business connectivity market and the fixed access (NGA) market. Addressing the NGA market only is unlikely to be a viable business proposition, even with access to existing physical infrastructure. It would therefore be perverse if the ATI was to apply only to the NGA mass-market and exclude the business connectivity point-to-point market. Limiting the ATI to mass-market NGA network provision only is unlikely to deliver the incremental network roll-out and associated economic benefits sought.

2.2.5 Further, the Broadband Cost Reduction Directive (the Directive) states clearly and explicitly that the purpose of the Directive is to further the Digital Agenda, which (in itself) clearly covers private users, businesses and the public sector with equal importance. CityFibre therefore believe that Ofcom's dispute resolution guidelines should seek to pre-empt this kind of dispute

in order that the benefits from access through the ATI can be achieved without unnecessary delays by avoidable disputes.

- 2.2.6 CityFibre urges Ofcom to shed as much light as possible on issues such as this in order that time and effort is not consumed in lengthy and costly dispute procedures when clarity on issues of principle could have been provided in advance.

2.3 Which network operators are covered by the ATI?

- 2.3.1 A further definitional point which affects the scope of the ATI is the definition of “network operator” under the Directive and the ATI. CityFibre is aware of a level of uncertainty in relation to this definition and can therefore see the scope of ATI requests being referred for dispute right at the beginning of an access-seeking process, by the infrastructure provider challenging the status of the access seeker or, indeed by the party in receipt of a request for information about or access to infrastructure claiming that it is not a network operator and therefore is not covered by the ATI.

- 2.3.2 CityFibre considers it would be expedient and appropriate for Ofcom to address this point of uncertainty as early as possible to avoid unnecessary disputes and provide transparency and clarity for all the parties subject to the ATI.

2.4 The relevance of precedence and ‘case law’

- 2.4.1 In paragraph 1.4 of the consultation document, Ofcom state that “each referral will be assessed on its facts, case by case”. Whilst CityFibre understands that Ofcom do need to consider each referral on its facts, it would be extremely helpful if there was clarity regarding the extent to which Ofcom’s decisions should be considered as establishing ‘case law’ that can be considered by other parties to assist in resolution of disputes without formal reference to Ofcom.

- 2.4.2 Several sections within the ATI include non-discrimination provisions, namely sections 4, 5, 7, 8 and 9. Would Ofcom expect that their resolution of disputes relevant to these sections of the ATI would constitute relevant ‘case law’ which could be used to reduce the number of disputes referred to Ofcom?

- 2.4.3 We note that Ofcom have a duty to publish non-confidential versions of decisions as well as the actual appeals and consider that it would be helpful if Ofcom were to indicate the extent to which other parties should review these cases on the presumption that Ofcom would use the same or very similar approaches in future disputes.

- 2.4.4 In assessing each referral on its facts, it is unfortunate that the methodology has to deviate from the tried and tested methodology by which the existing Communications Framework determines whether rights of access should be granted, namely an assessment of market power. This is an important departure as Significant Market Power is well-understood as both a legal and economic concept. By relating the question of whether access has to be granted to a finding of SMP, the existing framework creates a transparent process for regulators to follow and ensures that the private rights of infrastructure owners are interfered with only where there would otherwise be substantial economic harm. Notwithstanding the abandonment of this principle in the Directive, we would expect Ofcom to look at the relevant costs of granting or refusing access, both direct and indirect. Being blunt, demands for access and the related disputes cannot become a mechanism whereby vexatious or purely tactical demands are used to harm the economic prospects of new infrastructure being built.

2.5 *The application of the ATI in geographic locations where one network provider is already subject to SMP access remedies*

2.5.1 CityFibre is concerned to understand whether a network provider could reasonably request access to another non-SMP operator's infrastructure in a location where another network operator is subject to SMP-based access remedies to similar infrastructure. CityFibre considers Ofcom should clarify up-front in their dispute resolution guidelines that in situations like that, Ofcom will reject requests for dispute resolution as the request for access is unreasonable due to a viable alternative access option being available.

3 Information about and surveys of physical infrastructure

In this section we provide comments on sections 3 and 4 of the consultation document.

Section 3 of the consultation document

3.1.1 Paragraph 3.3 lists the information an access seeker would need to provide for an access request to be valid. CityFibre notes that this list does not include any information about the use to which access would be put, should the information request result in an access request. CityFibre proposes that any information request must include a statement that the purpose of the request is to subsequently request access to infrastructure for the purpose providing high-speed electronic communications network in accordance with the clear definition as provided by Ofcom. The inclusion of this information would ensure that costs are not incurred by both parties in requesting and providing information which could not subsequently be used due to the intended use not being for the deployment of high-speed electronic communications networks.

3.1.2 Paragraph 3.4 states that a response to a request for information must be provided no later than two months following the date of receipt of the request for information. It is not clear how this obligation would be affected by the need to negotiate separate confidentiality undertakings. It is CityFibre's view that the two-months starts upon the agreement of appropriate confidentiality undertakings. If this were not the case, then it is likely that infrastructure providers would spend costs and resources on preparing the requested information even if confidentiality terms cannot be agreed. This would make it impossible for the infrastructure provider to recover any costs incurred. CityFibre would be grateful for Ofcom's confirmation that this interpretation is correct.

3.1.3 CityFibre agrees with Ofcom's paragraph 3.10, that there is no obligation on infrastructure operator to provide more information than they hold within their business at the time of receipt of the enquiry.

3.1.4 In paragraph 3.15, CityFibre considers that Ofcom may have made an error where the term 'network provider' is used in the third line, wondering whether this should instead be 'infrastructure provider'. If so, then the same correction should be made to the equivalent paragraphs in the other sections of the document.

3.1.5 CityFibre welcomes Ofcom's acknowledgement in paragraph 3.19 that separate confidentiality undertakings may be necessary, in addition to those already provided in ATI regulation 11. CityFibre further notes that as Ofcom acknowledges that the terms of confidentiality could be the cause of a dispute, it is important that such terms are agreed before the two-months period for the provision of information starts.

3.1.6 Paragraphs 3.20 – 3.22 address the charges an infrastructure provider can levy on network operators requesting information. Whilst CityFibre agrees that only efficiently incurred cost

should be recoverable, it is important that when considering costs incurred such costs should include the opportunity costs of not deploying the relevant resources for their standard duties. This could result in delays in obtaining wayleaves, completing network designs, and other such critical activities. This is particularly important for smaller network operators like CityFibre, where ATI requests will be handled by staff members who have full-time positions doing other things and those activities will be halted while ATI requests are processed.

3.1.7 Further, for infrastructure providers with relatively small network footprints, it may be necessary to recover costs such as changes to systems from a single network provider as there is no certainty that more requests will be received.

3.2 Section 4 of the consultation document

3.2.1 In paragraph 4.6, Ofcom may have erroneously used the term 'network operators' in the second line when it perhaps should have been 'infrastructure operators'?

4 Access to Physical Infrastructure

4.1.1 Paragraph 5.2 reiterates the wording from the ATI that the right to request network access should be 'with a view to developing elements of high-speed electronic communications networks with that infrastructure'. And again provides the definition of 'high-speed electronic communications' as a network 'capable of delivering access to broadband services at speeds of at least 30 Mbit/s'.

4.1.2 CityFibre is aware of some uncertainty in the market regarding the interpretation of this definition. The uncertainty relates specifically to the term 'broadband' or 'broadband services'¹, which some CPs consider as meaning only mass-market NGA networks or including an internet connection, excluding point-to-point connectivity.

4.1.3 In the Government's consultation response, dated July 4th 2016, it stated specifically in respect to Question 23 in the consultation document that '*we do not intend to go further than the requirements of the Directive by creation such limitations*'. It does however refer to the need for access to be with a view to deploying elements of high-speed electronic communications networks. Further in the Section Summary box for relating to access to existing physical

¹ CityFibre has attempted to find a definitive definition of the term 'broadband, but as demonstrated here, there are many definitions some of which vary considerably from each other.

FCC: "The term broadband commonly refers to high-speed Internet access that is always on and faster than the traditional dial-up access. Broadband includes several high-speed transmission technologies such as: Digital Subscriber Line (DSL) Cable Modem. Fiber."

Wikipedia: "In telecommunications, broadband is a wide bandwidth data transmission with an ability to simultaneously transport multiple signals and traffic types. The medium can be coaxial cable, optical fiber, radio or twisted pair"

PC Magazine encyclopaedia: "High-speed transmission. The term commonly refers to Internet access via a variety of high-speed networks, including cable, DSL, FiOS, Wi-Fi, WiMAX, 3G, 4G and satellite, all of which are faster than analog dial-up by a huge magnitude"

Oxford dictionary: "A high-capacity transmission technique using a wide range of frequencies, which enables a large number of messages to be communicated simultaneously."

Cambridge dictionary: "a system that makes it possible for many messages or large amounts of information to be sent at the same time and very quickly between computers or other electronic devices"

infrastructure, the Government states in point (6) *'We do not propose to limit the types of products that should be delivered using shared physical infrastructure or to restrict it to any geographical area or market segment'*

- 4.1.4 Whilst the Government's statements do not provide an interpretation of the term 'broadband', the Government does make it clear that it is the intention that the access to infrastructure should not be restricted to the provision of specific types of services or to serve specific market segments. CityFibre interprets the Government's statements to infer that network operators should be allowed to provide all types of high-speed services via the network created through the infrastructure access.
- 4.1.5 Further the Directive refers explicitly in several instances to the Digital Agenda² and that the purpose of the Directive is to further the Digital Agenda. When inspecting the scope of the Digital Agenda, it clearly applies to all market segments, not only to mass-market NGA services. CityFibre therefore considers that this is a further strong indication that the Directive and the resulting ATI in the UK should apply to all types of high-speed electronic communications networks, and that therefore the definition of 'broadband services' should be one including all types of services in excess of 30Mbit/s. Ofcom's consultation refers to Recital 19 of the Directive (in footnote 20 to the consultation) in which there is a direct reference to the Digital Agenda.
- 4.1.6 Given the considerable uncertainty in this area, and the critical importance of this question, CityFibre urges Ofcom to provide clarity on this point in a pro-active manner rather than go through the lengthy appeal process. Lack of clarity about the scope of the ATI could substantially delay the benefits of the ATI in the UK market.
- 4.1.7 Further, clarity regarding whether the ATI are applicable in the business connectivity market is critical to the current appeal process in front of the CAT, in which both BT and CityFibre are appealing Ofcom's decisions. It would seem that, when preparing the BCMR Statement, Ofcom assumed that the ATI would be applicable in the business connectivity market. Therefore, if that is not the case, it is critical that this is known to all parties in the appeal as well as to the CAT panel in advance of the CAT hearings.
- 4.1.8 Paragraph 5.5 of the Consultation sets out the information Ofcom would expect to be included in a request for access. CityFibre notices that this list does not include any information as to the purpose of the access – i.e. whether the access is for the purpose of providing high-speed electronic communications networks and services, as required under the ATI. CityFibre considers that, regardless of the outcome of the scope definition discussed above, it should be mandatory that any access request includes a statement from the network provider that the request is in accordance with the ATI and for the purpose specified in the ATI.
- 4.1.9 CityFibre notes that where other provisions under the ATI (including the right to request information and to request a survey) are subject to a non-discrimination provision, the provisions for access to physical infrastructure is not. Whilst this is important for a wide range of terms of how the access provided, it is particularly important for the setting of charges for access.
- 4.1.10 Paragraph 5.15 of the consultation, however, refers to Recital 19 of the Directive in which provides for the ability of infrastructure provider to recover costs and to take into account the

² For example, Ofcom's consultation document refers to Recital 19 of the Directive (in footnote 20 to the consultation document) in which there is a direct reference to the Digital Agenda.

any previous imposition of remedies by a national regulatory authority. Recital 19 further provides that the setting of charges should take into account the likely impact on the infrastructure provider's business plan.

- 4.1.11 As duct and pole access is presently imposed on BT as an SMP remedy in the fixed access market, but not in the business connectivity market, CityFibre urges Ofcom to provide up-front clarity (rather than await a lengthy and costly dispute procedure) on how Ofcom would approach a dispute on pricing of access to BT's ducts and whether that would vary depending on the ultimate use of the network built using the access (e.g. whether it is to serve the fixed access market, the business connectivity market or both).
- 4.1.12 Further, although there is no non-discrimination provision regarding the access terms conditions and charges under the ATI, would Ofcom expect that access under the ATI (to infrastructure operated by a network provider that is subject to ex-ante duct and pole SMP access remedies under the Communications Act) should be consistent and aligned with the terms mandated under the ex-ante SMP regulation? CityFibre understands that access rights under the ATI do not replace or override existing SMP remedies, however, should access be requested to infrastructure operated by a network provider subject to SMP remedies for very similar or identical infrastructure, but in a different downstream market, would Ofcom consider that the SMP terms would set a precedent for how charges and other terms for access under the ATI should be set?
- 4.1.13 With regards to setting charges for access to infrastructure operated by network providers that are not subject to any SMP remedies, CityFibre consider it correct that Ofcom cannot provide up-front guidance on what would be considered a fair and reasonable price. It would however be useful for Ofcom to state clearly the extent to which they consider that decisions made by Ofcom in resolving disputes relating to access to non-SMP network providers' infrastructure, would set precedents upon which Ofcom would wish parties to rely in order to limit the number of future disputes referred to Ofcom.
- 4.1.14 In paragraph 5.28 of the consultation, Ofcom state that the impact of taking into account the objectives set out in Article 8 of the Framework Directive, will depend on the specific circumstances of each dispute. CityFibre considers that Ofcom, in the interest of reducing the number of disputes referred to them, could and should provide more clarity on how they expect this provision to affect their analysis and decisions. CityFibre understand that Ofcom cannot provide certainty, but some guidance would help save time, money and resources for all parties including Ofcom and therefore Ofcom should make all efforts to provide some guidance in this respect.
- 4.1.15 In paragraph 5.29, Ofcom set out the reasons for which an infrastructure operator may refuse access to its infrastructure. Whilst these reasons are as set out in the ATI, CityFibre believes that there is a grey area for which Ofcom should provide up-front clarity. This is the situation where an infrastructure operator is requested to provide access in an area where an SMP network operator is subject to SMP-based access remedies to similar infrastructure. CityFibre considers that it would be contrary to the spirit of the ATI if Ofcom were to determine that a non-SMP network operator should provide access to its infrastructure under the ATI, when SMP-based access to another similar infrastructure is already available to the access seeking network operator. We would welcome Ofcom's early clarification in this regard. Clearly, without such clarification, the risk is that access requests will be made purely for tactical purposes, such as to blunt incentives by alternative infrastructure operators to build their networks.
- 4.1.16 In paragraph 5.31 of the consultation, Ofcom refer to a request for 'information' when perhaps that should have been a request for 'access'?

- 4.1.17 Paragraphs 5.36 to 5.38 address the situation of an infrastructure operator refusing access due to lack of available space in the relevant physical infrastructure. CityFibre understands the spirit of the ATI to make use of unused (often old) physical infrastructure in order to reduce the cost burden of rolling out new fibre networks, not to mandate access to new infrastructure that has been built very recently for the explicit purpose of providing fibre connectivity in the furtherance of the Digital Agenda.
- 4.1.18 It would therefore be extremely helpful if Ofcom's guidelines were to make this clear. Substantial investment in new physical infrastructure is currently being made by relatively new market players, for which funding needs to be secured at regular intervals. The risk of being subject to mandatory access on terms to be determined by a regulatory body (and for which there are only very vague guidelines) will certainly be considered carefully by potential investors and, unless there is clarity that the objective of the ATI is not to effectively expropriate newly built physical infrastructure for which there are business plan that require the duct space provided for in the infrastructure, even if that utilisation may be one or more years away due to the time it takes to roll out networks and then subsequently to roll out services to different customer segments.