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By email to melanie.everitt@ofcom.org.uk

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Dear Melanie,

Openreach Response to Ofcom’s Consultation on the Draft Guidelines implementing the Access to the Infrastructure (ATI) Regulations¹, transposing the Broadband Cost Reduction Directive (the Directive)²

We welcome the opportunity to respond to this consultation which sets out Ofcom’s draft guidelines (the “**Draft Guidelines**”) on various issues including how stakeholders should refer a dispute to Ofcom under the ATI Regulations; and, the issues Ofcom are likely to take into consideration in any such dispute. Our comments on the proposed guidelines are as follows

Section 1: Scope

1.8 We have two important comments in relation to paragraph 1.8 of the Draft Guidelines. These comments are the following:

First, paragraph 1.8 repeats parts of Recital 12 of the Directive that provides that “*the rights under the Directive are without prejudice to the Union regulatory framework*”. Paragraph 1.8 also sets out in two bullet points what Ofcom believes this part of Recital 12 means in practice. We note that

¹ <http://www.legislation.gov.uk/ukxi/2016/700/made>

² <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0061&from=en>

Recital 12 sets out other important considerations in terms of scope that are not referred to by Ofcom in paragraph 1.8. Ofcom appears to have made references to only parts of Recital 12 (and not the entire Recital 12). For example, an important part of Recital 12 that is not referred to by Ofcom in paragraph 1.8 is the following: *“In the light of the lex specialis principle, when more specific regulatory measures in conformity with Union law apply, those should prevail over the minimum rights and obligations provided in this Directive”*. We believe that the part of Recital 12 quoted by Ofcom is misleading if it is not read and interpreted in conjunction with the first sentence of Recital 12 quoted above. Given that the Draft Guidelines contains a section that explains the scope of the Directive, we believe, that this section and its paragraph 1.8 must set out in clear terms how Ofcom interprets the first sentence of Recital 12 and the principle of “lex specialis” mentioned in that sentence in conjunction with the other parts of Recital 12.

Second, we consider that in their proposed Guidelines, Ofcom should be clearer under what conditions the ATI Regulations will apply and provide further clarity on how access under the Regulations and other forms of passive access will interact with each other, in particular with the Passive Infrastructure Access (PIA) product. To the extent that the ATI Regulations establish a broader range of access than those required under the current SMP remedies, we take the view that in relation to this broader range of access, we are able to charge an access price in compliance with Regulation 16 of the ATI Regulations and not be constrained by price controls currently in place for existing SMP products. We would welcome Ofcom’s clarification on this point.

Section 2: Dispute resolution function

2.4 Provides that: *“ATI Regulation 13 requires Ofcom to consider any dispute referred to it under ATI Regulation 12 and make a determination for resolving it”*. It would be helpful if the Guideline document would clarify that once it receives a dispute falling within ATI Regulation 12, Ofcom has a legal obligation to consider it and make a determination. This is in contrast to the dispute resolution regime under the Access and Framework directives where Ofcom takes the view that it can decide not to investigate and/or make a determination when the services involved are non-SMP products.

2.11 “Resolution Phase”, the third bullet point provides that *“in disputes relating to a request made under ATI regulation 6 (access to physical infrastructure), Ofcom **normally** (emphasis added) expects to issue the Parties with a document setting out its provisional view on the matters in dispute”*and that *“in other disputes Ofcom normally expects not to consult with the Parties ahead of making its decision but may choose to consult with Parties on an exceptional basis”*.

We are very concerned by Paragraph 2.11. We take the view that in every instance, irrespective of the subject matter of the dispute, Ofcom must set out its provisional views in a document and must consult (in every instance) with the Parties to the dispute. This step is necessary to ensure that Ofcom makes a thorough assessment of the issues in dispute and that its decision is based on an assessment of the facts that is sound and robust. We note that this process has proved to be very helpful in a number of cases. In some of those cases, for example, Ofcom made in the final dispute determination a decision that was radically different from the draft decision it intended to make as a result of the information it had received from the parties to the dispute during the “provisional” stage. Removing this step would be a mistake and would most likely increase the risk of appeals to the Competition Appeal Tribunal.

2.4, 2.17-19 ATI Regulation 13 sets out strict timescales within which Ofcom must resolve a dispute; resolution must be “made as soon as is reasonably practicable and, *except in exceptional circumstances*” within a 4 or 2 month time period depending under which regulation the dispute

refers to. It would be helpful and provide certainty to all parties, in particular for disputes involving access to new builds, if Ofcom could provide guidance of what it might consider to be 'exceptional circumstances' in this context. In particular, it would be helpful if Ofcom could explain whether "exceptional circumstances" under the dispute resolution regime in the Access and Framework directives would be the same in the context of those regulations.

Section 3: Information about physical infrastructure

3.3: Form of requests. Both the Directive and the ATI Regulations (4.1(c) reference that information (and access) regarding physical infrastructure of network operators must be provided where access is required "with a view to deploying elements of high speed electronic communications networks". Therefore, before we respond to requests for relevant 'disclosable information' under the ATI regulations, we think it is entirely reasonable to seek information from the requesting network operator regarding their network plans. This is consistent with the DCMS Government Consultation Response³ where they 'support reasonable measures to verify the credentials of the requestor'.

To reinforce the principles of both the Directive and the ATI Regulations we suggest that Ofcom adds the following bullet to those listed at para 3.3 of the Draft Guidelines

- A clear description of the intended deployment of the high speed network elements within the geographic area for which infrastructure information is sought

Section 4: Surveys about Physical Infrastructure

4.5 Terms concerning survey activities. To confirm, that where a request for a survey is made (to be carried out either by the requestor or Openreach) then Openreach has existing processes and procedures that it will evoke to facilitate such a request. These procedures will require CPs to be established for the product they intend to buy and accredited to the minimum standard required to operate in or on the network. These procedures may also require the network provider to provide a description of the high speed network elements it intends to deploy in the geographic area where the survey is being conducted.

Section 5: Access to Physical Infrastructure

5:18- 5:28 Costs incurred in providing infrastructure access. To the extent that the ATI Regulations establish a broader range of access scenarios than those required under the current SMP remedies, Openreach when setting any access price for products provided in non-SMP markets will charge for such access under the proposals set out under Regulation 16.

5.28: Article 8 of the Framework Directive

Paragraph 5.28 provides that "*in disputes about access to physical infrastructure where the infrastructure operator is a network provider, Ofcom are required to take into account the objectives set out in Article 8 of the Framework Directive*" and that "*what this means in practice will likely depend on the specific circumstances of each dispute*".

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/534619/2016_07_04_Government_Response_FINAL.pdf

We agree with Ofcom that the application of this requirement is to a large extent dependent on the facts of the disputes. Assuming that Ofcom confirms its intention not to provide detailed guidance on how it will apply this requirement in each dispute, we believe that to ensure certainty Ofcom should confirm in the Guideline document that it will apply in the context of the Regulations the Supreme Court judgment in the ladder charges case⁴. We note that this judgment sets out the Supreme Court's views on how Article 8 applies to dispute resolutions and in situations where the parties to the dispute do not have SMP. There is no reason therefore why the Supreme Court judgment should not apply also to dispute resolutions in the context of the Regulations.

We hope you find these comments useful and would be very happy to discuss in more detail as required.

Yours sincerely,



Katherine Roche
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Openreach

⁴ Case [2014] UKSC 42: British Telecommunications PLC v/ Telefonica and Others