



# Guidance under the Communications (Access to Infrastructure) Regulations 2016

Guidance  
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# About this document

This document sets out Ofcom's guidance under the Communications (Access to Infrastructure) Regulations, which came into effect on 31 July 2016. These Regulations implement the Broadband Cost Reduction Directive which sets out measures to reduce the cost of deploying high-speed electronic communications networks.

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## Section 1

# Scope

### What does this guidance cover?

- 1.1 Under Regulation 21 of the Communications (Access to Infrastructure) Regulations 2016<sup>1</sup> (the ATI Regulations) Ofcom is required to issue guidance. This statement comprises guidance for the purposes of those Regulations.
- 1.2 The guidance explains how Ofcom expects to handle disputes referred to it in accordance with ATI Regulation 12. Broadly, this document sets out:
- the form and manner in which disputes should be referred to Ofcom;
  - the process to be followed and the information/evidence Ofcom requires in order to determine at the outset whether the statutory grounds for a dispute referral are met;
  - the kind of information Ofcom might expect the parties in dispute (Parties) to submit to Ofcom during the course of proceedings to enable Ofcom properly to determine the dispute;
  - the remedies available to Ofcom in any given case; and
  - some of the considerations Ofcom is likely to take into account to determine a dispute.
- 1.3 It should be noted that Ofcom is responsible for resolving other types of dispute, in particular those which may be referred to it under sections 185 – 191 of the Communications Act 2003. Separate guidelines exist in relation to such disputes,<sup>2</sup> and a review of those guidelines will be undertaken shortly.

### Status and purpose of this guidance

- 1.4 This guidance has two main purposes. The first is to set out the form and manner in which dispute references should be made and the process that Ofcom is likely to take in resolving disputes (we discuss this in Section 2 and Appendix 1). The second is to provide stakeholders, who may wish to make use of the rights created by the ATI Regulations or be subject to obligations created by the ATI Regulations, with guidance on the considerations that Ofcom is likely to take into account in resolving any disputes (we discuss this in Sections 3 to 8). This guidance is intended to assist Parties in reaching commercial agreement on issues falling under the ATI Regulations. It should be noted however, that while the guidance sets out the

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<sup>1</sup> 2016 No. 700 Electronic Communications, The Communications (Access to Infrastructure) Regulations 2016: <http://www.legislation.gov.uk/uksi/2016/700/made>. The ATI Regulations implement the Broadband Cost Reduction Directive 2014 (the Directive): [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2014.155.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2014.155.01.0001.01.ENG).

<sup>2</sup> Dispute Resolution Guidelines, Ofcom's guidelines for the handling of regulatory disputes, 7 June 2011: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0020/71624/guidelines.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0020/71624/guidelines.pdf)

considerations likely to be relevant under the ATI Regulations, each referral will be assessed on its facts, case by case.

1.5 This guidance is organised as follows:

- Section 2 provides an overview of how Ofcom intends to discharge its dispute resolution function, including details of how to refer a dispute to Ofcom and the processes Ofcom will follow in resolving a dispute.
- Section 3 provides information on the considerations relevant to disputes relating to the provision of information about physical infrastructure.
- Section 4 provides information on the considerations relevant to disputes relating to the conduct of a survey of physical infrastructure.
- Section 5 provides information on the considerations relevant to disputes relating to obtaining access to physical infrastructure.
- Section 6 provides information on the considerations relevant to disputes relating to obtaining access to in-building infrastructure.
- Section 7 provides information on the considerations relevant to disputes relating to the provision of information about civil works.
- Section 8 provides information relevant to disputes relating to the co-ordination of civil works funded from public funds.
- Appendix 1 provides the form for submitting a dispute.

1.6 The guidance sets out Ofcom's general approach to dispute resolution in the areas covered by the guidance. This guidance is not a substitute for any regulation or law and is not legal advice. It does not have binding legal effect. Where Ofcom departs from the approach set out in these guidelines, we will be prepared to explain why. The guidance will be kept under review and amended as appropriate in the light of further experience and developing law and practice and any change to Ofcom's powers and responsibilities.

## **Interaction with significant market power regulation**

1.7 It is important to distinguish between obligations under the ATI Regulations/Directive and network access that may be required pursuant to the European framework for electronic communications networks and services. Under the EU Regulatory Framework For Electronic Communications (the European Framework)<sup>3</sup>, Ofcom is required to review certain markets periodically, and where an operator is found to have significant market power (SMP) in a relevant market, we are required to impose SMP conditions on that operator to address the competition problems arising from the SMP. These conditions usually include a requirement for the SMP operator to offer network access (which may include access to its physical infrastructure), as well as obligations relating to the pricing and terms of such access. Access to physical infrastructure under the ATI Regulations/Directive is intended to reduce the cost of deploying high-speed electronic communications network. The ATI Regulations/Directive create a series of rights and corresponding obligations which it

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<sup>3</sup> As set out in Directives 2002/21/EC, 2002/19/EC, 2002/20/EC, 2002/22/EC, 2002/58/EC and 2002/77/EC.

is envisaged will provide a basis for commercial negotiations, and where agreements cannot be reached the ATI Regulations/Directive provide for a dispute resolution regime to resolve disagreements. The obligations created by the ATI Regulations/Directive are not related to any finding of SMP, nor intended to address competition problems in markets.

1.8 The Directive makes clear that the rights under the Directive are without prejudice to the European Framework<sup>4</sup>. It states that *“[i]n 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 for”* in the Directive. This means that:

- Obligations imposed under the European Framework requiring the provision of network access to physical infrastructure are not restricted by the ATI Regulations. So for example if there is a requirement in an SMP condition that goes beyond what is required under the ATI Regulations, the operator subject to that requirement cannot refuse to comply with the SMP condition on the basis that it already has an obligation to provide access to infrastructure under the ATI Regulations.
- Obligations imposed under the European Framework do not restrict the obligations under the ATI Regulations. To the extent that the ATI Regulations establish a broader right to access to physical infrastructure than exists under an SMP condition, this is not limited by the scope of that SMP condition.

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<sup>4</sup> Recital 12, the Directive.

## Section 2

# Ofcom's dispute resolution function

## Introduction

- 2.1 Under ATI Regulation 12, a dispute may be referred to Ofcom either by the person making a request under the ATI Regulations (a network provider<sup>5</sup>) or the person to whom the request was made under the ATI Regulations (an infrastructure operator<sup>6</sup> or rights holder<sup>7</sup>)<sup>8</sup>. Such persons are referred to in this guidance as 'Parties'. Disputes may concern a request made by a network provider under ATI Regulations 4, 5, 6<sup>9</sup>, 7, 8 or 9.
- 2.2 In accordance with ATI Regulation 12, dispute referrals must not be made until there is no realistic prospect of the dispute being resolved without that reference to Ofcom. A dispute exists:
- where a request has been refused in whole or in part,
  - where the terms under which the request is to be granted cannot be agreed, or
  - where there has been no response to the request within the time limit given in the ATI Regulations for responding (in this case only a network provider making the request may refer the dispute).
- 2.3 ATI Regulation 12(6) provides that a Party who wishes to refer a dispute to Ofcom must do so in the manner it sets out.
- 2.4 ATI Regulation 13 requires Ofcom to consider any dispute referred to it under ATI Regulation 12 and make a determination for resolving it. ATI Regulations 12 and 13

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<sup>5</sup> Network provider is defined in the ATI Regulations as an *"undertaking providing or authorised to provide a public electronic communications network (within the meaning of section 151(1) of the [Communications] 2003 Act)."* Where we refer to network providers throughout this guidance, we mean the term as defined in the ATI Regulations. The Directive refers to *"undertakings providing or authorised to provide public communications networks."*

<sup>6</sup> Infrastructure operator is defined in the ATI Regulations as *"(a) a network provider; (b) an undertaking providing physical infrastructure intended to provide a service of production, transport, transmission or distribution of- (i) gas; (ii) electricity, including public lighting; (iii) heating; or (iv) water, including disposal or treatment of waste water and sewage, and drainage systems; or (c) an undertaking providing physical infrastructure intended to provide transport services, including railways, roads, ports and airports."* Where we refer to infrastructure operators throughout this guidance, we mean the term as defined in the ATI Regulations. The Directive refers to network operators which are defined as *"an undertaking providing or authorised to provide public communications networks as well as an undertaking providing a physical infrastructure intended to provide: (a) a service of production, transport or distribution of: (i) gas; (ii) electricity, including public lighting; (iii) heating; (iv) water, including disposal or treatment of waste water and sewage, and drainage systems; (b) transport services, including railways, roads, ports and airports."*

<sup>7</sup> Rights holder is defined in the ATI Regulations as *"any person who holds a right to use- (a) an access point; or (b) in-building physical infrastructure."*

<sup>8</sup> In accordance with ATI Regulation 12(5), only network providers may refer disputes to Ofcom where there has been no response to a request within the time limit given in the regulation for responding.

<sup>9</sup> In relation to disputes brought to Ofcom under ATI Regulation 6, Ofcom is required to resolve the disputes in accordance with ATI Regulation 16.



are silent as to whether the request in dispute relates to a new agreement or existing agreement. We can envisage being referred disputes relating to a new agreement or an amendment to an existing agreement. Irrespective of whether the request relates to a new agreement or an amendment to an existing agreement, we would need to be satisfied that the request in dispute concerns a request made under ATI Regulation 4, 5, 6, 7, 8 or 9.

- 2.5 Ofcom must determine any dispute referred to it as soon as reasonably practicable and, except in exceptional circumstances,
- in the case of a dispute relating to a request made under ATI Regulation 6 (access to physical infrastructure), within four months of the receipt of a complete reference; or
  - in the case of a dispute relating to a request made under ATI Regulation 4 (information about physical infrastructure), 5 (surveys of physical infrastructure), 7 (access to in-building infrastructure), 8 (information about civil works), and 9 (coordination of civil works funded from public funds), within two months of the receipt of a complete reference.
- 2.6 ATI Regulation 17 provides that Ofcom may request specified information that it requires for the purpose of considering and determining a dispute.
- 2.7 ATI Regulation 15 provides that before making a determination, Ofcom must consult any person who has functions of a public nature that Ofcom consider relevant. If Ofcom are considering whether a request (or part of it) was correctly refused on national security grounds, Ofcom must only consult the appropriate Minister of the Crown and follow the opinion given.

## Referral of disputes

- 2.7 Appendix 1 sets out details on the form and manner in which the Parties must refer a dispute to Ofcom in order to comply with the requirements under ATI Regulation 12(6).
- 2.8 A dispute cannot be referred to Ofcom until there is no realistic prospect of the dispute being resolved without that reference. Ofcom requires the Parties to provide evidence that they have each made genuine efforts to enter into good faith negotiations and that the terms under which the request is to be granted cannot be agreed, that the request has been refused by the infrastructure operator or rights holder or that there has been no response to the request within the time limit for responding.

## Dispute resolution process

- 2.9 This section sets out details of the two key stages of the process for determining disputes referred to Ofcom, including what is required of Parties and what they can expect from Ofcom. Where appropriate, this section also provides high level indicative timescales.

### Overview

- 2.10 Before submitting a dispute reference, Ofcom encourages any Party thinking of making a dispute reference, to contact Ofcom first to discuss its plans and submit a draft reference. If Parties do submit a draft reference, Ofcom will consider whether

the draft reference is likely to comply with the requirements set out in Appendix 1 and will advise the Party accordingly. We believe this is likely to make the dispute reference process more efficient for both Ofcom and the Party.

2.11 Ofcom's formal process for resolving disputes has two phases:

- **Enquiry Phase:** This phase commences once a dispute is referred to Ofcom under ATI Regulation 12. Our first step will be to consider if the dispute reference is complete by reference to the requirements set out in Appendix 1. Where this is the case we will then go on to consider if the statutory grounds for referring a dispute have been met, which in particular requires evidence of a failure to reach commercial agreement or response to requests. We will invite the views of the Party who is subject to the dispute. At the end of the phase Ofcom will confirm if the statutory grounds for a dispute have been met, and where these have, it will set out the issues which will be considered during the dispute. The Parties will be informed of Ofcom's decision. We will also publish a summary of the dispute on Ofcom's website.<sup>10</sup> Typically the Enquiry Phase will last around 10 to 15 working days, depending on the nature of the dispute.
- **Resolution Phase:** Ofcom will investigate and determine the dispute in the Resolution Phase. Ofcom will, where necessary, gather information and will also, if appropriate, consult any person who has functions of a public nature it considers relevant. Where Ofcom receives a dispute involving a request that has been refused on the grounds of national security, Ofcom will only consult the appropriate Minister of the Crown and follow the opinion given in resolving the dispute. Before making a decision on the merits of the dispute and publishing its decision, in disputes relating to a request made under ATI Regulation 6 (access to physical infrastructure), Ofcom normally expects to issue the Parties with a document setting out its provisional view on the matters in dispute (Provisional Conclusions) and invite their representations (except in the case of disputes concerning matters of national security). In other disputes<sup>11</sup> 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.

### Key activities within each Phase

2.12 In Figure 1.1 we show the main milestones and activities within a dispute process. Most activities are the same for all disputes under the ATI Regulations. Where appropriate, distinctions are made for the relevant ATI Regulations in the figure below.

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<sup>10</sup> Ofcom will publish details of disputes on its Competition and Consumer Enforcement Bulletin: <https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins>.

<sup>11</sup> Disputes relating to a request made under ATI Regulation 4 (information about physical infrastructure), 5 (surveys of physical infrastructure), 7 (access to in-building infrastructure), 8 (information about civil works), and 9 (coordination of civil works funded from public funds).

**Figure: 1.1 Key milestones and activities for Ofcom and Parties**

<b>Milestone</b>	<b>Ofcom</b>	<b>Party<sup>12</sup></b>
<b>1 Enquiry Phase</b> (Typically this phase will last around 10 to 15 working days, depending on the nature of the dispute.)		
Party refers dispute under the ATI Regulations	Ofcom acknowledges receipt of dispute reference	Referring Party refers dispute to Ofcom including identification of confidential information
Ofcom assesses dispute	Ofcom assesses whether the dispute reference is complete against the requirements set out in Appendix 1 and clarifies with the referring Party any aspects of the reference (including asking any clarification questions).  If the dispute reference is not complete, the referring Party is notified and provided with reasons as to why not. The Enquiry Phase is closed in this scenario (Ofcom does not publish any information about such a dispute during the Enquiry Phase.)	
Dispute is sent to the Party who is the subject of the dispute for representations on the dispute	If the dispute is complete then Ofcom considers if the statutory grounds have been met.  Ofcom sends the dispute to the Party who is the subject of the dispute and requests any representations and asks any clarification questions. Normally five working days will be given for any representations and responses to any clarification questions.	Party who is the subject of the dispute engages in initial contact and provides comments on the dispute and answers any questions raised.
Information clarification	Ofcom asks any outstanding questions from the Parties.	Parties respond to any further questions within specified timescales.

<sup>12</sup> Person making the request (network provider) or person to whom the request was made (infrastructure operator or rights holders) except for disputes where there has been no response to a request within the time limit given in the regulation for responding where only network providers can bring disputes to Ofcom.

<p>Ofcom informs Parties of the outcome of Enquiry Phase including the issues in dispute.</p> <p>Where Ofcom opens a dispute, shortly after informing the Parties, Ofcom will publish a summary of the dispute.</p>	<p>Ofcom confirms that there is a dispute where on the basis of the information provided it is clear that:</p> <p>(1) there is no realistic prospect of the dispute being resolved without the reference;</p> <p>(2) the request in dispute has been:</p> <ul style="list-style-type: none"> <li>(a) refused in whole or in part</li> <li>(b) the terms under which the request is to be granted cannot be agreed; or</li> <li>(c) there has been no response to the request within the time limit given for responding.</li> </ul> <p>(3) a dispute is made in the manner required by Ofcom.</p> <p>If Ofcom opens a dispute case, Ofcom will confirm the issues of the dispute which it will focus on in the Resolution Phase.</p>	
<b>2 Resolution Phase</b>		
<p>Information gathering as required</p>	<p>Ofcom normally expects to gather information as part of its investigation into the issues in dispute.</p> <p>In accordance with ATI Regulation 17, Ofcom may require a person to provide specified information in a specified manner and within a specified period for the purpose of considering the dispute and making a determination.</p> <p>The specified period must be reasonable and in fixing this time period, Ofcom must have regard, in particular, to:</p> <ul style="list-style-type: none"> <li>(a) the information that is required;</li> <li>(b) the nature of the dispute; and</li> <li>(c) the time limits for making a determination.</li> </ul> <p>Where Ofcom requests information from the Parties, Ofcom normally expects to allow between three to 10 working days for Parties to respond to the requests.</p> <p>In cases of disputes relating to non-communications infrastructure, Ofcom may consider it appropriate to request information and advice from persons of a public nature which may include other regulators. Where Ofcom requests information from such persons, such bodies can also normally expect to have between three to 10 working days to respond to any such requests. Ofcom plans to informally engage with such bodies ahead of sending information requests under ATI Regulation 17.</p>	<p>Parties/persons of a public nature respond to any specific information requests within specified manner and timeframe.</p>
<p>Consultation process</p>	<p>Ofcom will consult any person who has functions of a public nature it considers relevant.</p>	

	<p>Where Ofcom is required to consider a request (or any part) which has been refused under matters of national security, Ofcom must only consult the appropriate Minister of the Crown.</p> <p>Before making a decision on the merits of the dispute and publishing its decision, in disputes relating to a request made under ATI Regulation 6 (access to physical infrastructure), Ofcom normally expects to issue the Parties with its Provisional Conclusions and invite their representations. On a case by case basis Ofcom will also consider whether to publish its Provisional Conclusions and invite representations from other stakeholders. This is likely to be limited to cases where it is clear that the matters in dispute could have implications for other infrastructure operators and network providers.</p> <p>In other disputes<sup>13</sup> Ofcom normally expects not to consult with the Parties (or to publish for wider stakeholders) ahead of making its decision but may choose to consult with Parties (and wider stakeholders) on an exceptional basis.<sup>14</sup></p> <p>If persons invited to make representations during Ofcom’s consultation process do not make representations within the timeframe specified, while Ofcom will do its best to take all representations into account, there is a risk that those representations will not be taken into account by Ofcom in reaching its decision on the dispute.</p>	
<p>Receipt of representations from consultation process</p>	<p>Ofcom receives responses to its consultation process including, where appropriate, to its Provisional Conclusions.</p> <p>In disputes concerning national security, where Ofcom must only consult the appropriate Minister of the Crown, Ofcom will follow the opinion given in reaching its conclusion on the dispute.</p>	<p>Where Parties are invited to and make representations to Ofcom’s Provisional Conclusions, Parties should provide a non-confidential version which can be published on Ofcom’s website at the end of a dispute case.</p>

<sup>13</sup> Disputes relating to a request made under ATI Regulation 4 (information about physical infrastructure), 5 (surveys of physical infrastructure), 7 (access to in-building infrastructure), 8 (information about civil works), and 9 (coordination of civil works funded from public funds).

<sup>14</sup> This could potentially arise for example, if there are complex technical questions in the dispute (e.g. questions arising out of the conduct of an infrastructure survey).

<p>Consideration is given to representations received during the consultation process.</p> <p>Further information gathering and analysis is undertaken as required.</p>	<p>Ofcom considers responses received during the consultation process.</p> <p>Further information from Parties/public bodies may be requested at this time (information gathering is discussed above).</p>	<p>Parties/public bodies respond to information requests within specified timeframe.</p>
<p>Ofcom issues its final decision on a dispute in the form of a Final Determination, with an explanatory statement.</p>	<p>Parties and any person who has functions of a public nature that Ofcom considers relevant are provided with the Final Determination (including a statement of Ofcom's reasons).</p> <p>Ofcom also publishes a non-confidential version of its final decision on its website.</p> <p>Shortly thereafter, Ofcom will also publish non-confidential versions of the dispute reference, initial comments on dispute referral and non-confidential comments received during the consultation process.</p>	<p>The ATI Regulations impose a duty on the Parties to comply with the Final Determination. This duty is enforceable in civil proceedings by Ofcom or by a person who is or might be affected by a failure to comply with the duty.</p>

### **Consulting persons who have functions of a public nature that Ofcom consider appropriate and seeking views from the appropriate Minister of the Crown**

- 2.13 Under ATI Regulation 15, before making a determination, Ofcom must consult any person who has functions of a public nature that Ofcom consider relevant.
- 2.14 In order to assist Ofcom establish whether there are any such persons in the context of a dispute, the Parties should include in any dispute reference their views on whether there are any persons who have functions of a public nature relevant to the dispute referred (as set out in Appendix 1). Ofcom will take those views into account when deciding which persons if any are relevant. Once Ofcom has established which persons, if any, are relevant, Ofcom will engage with such bodies throughout the dispute resolution process as appropriate.
- 2.15 We consider it likely relevant persons will include the regulators in the relevant infrastructure sector such as those set out below, and Government departments with responsibilities for the infrastructure concerned:
- the Civil Aviation Authority;
  - the Gas and Electricity Markets Authority;
  - the Office of Rail and Road;
  - the Water Services Regulation Authority;
  - the Water Industry Commission for Scotland;
  - the Drinking Water Quality Regulator for Scotland;

- Scottish Environment Protection Agency; and
- the Northern Ireland Authority for Utility Regulation.

2.16 If Ofcom is considering whether a request (or any part) was correctly refused on national security grounds, ATI Regulation 15(3) provides that the only person consulted in respect of whether a request was correctly refused on national security grounds must be the appropriate Minister of the Crown. Having consulted the appropriate Minister of the Crown, Ofcom must follow the opinion given.

### **Statutory time limit and exceptional circumstances**

2.17 Ofcom has a duty under the ATI Regulations to make a determination to resolve disputes under ATI Regulation 12 as soon as reasonably practicable and except in exceptional circumstances, in the case of a dispute relating to a request made under ATI Regulation 6, within four months of the receipt of a complete reference, and in the case of a dispute relating to a request made under ATI Regulations 4, 5, 7, 8, and 9, within two months of the receipt of a complete reference.

2.18 If appropriate, Ofcom will on a case by case basis consider whether there are exceptional circumstances, including in light of any representations which have been made to it. We consider that exceptional circumstances should be construed narrowly on the facts of each particular case.

2.19 Where Ofcom does find that exceptional circumstances exist, such that it will not resolve a dispute within two or four months from the date of receipt of a complete reference, Ofcom will nevertheless seek to resolve the dispute as soon as reasonably practicable after the two or four month deadline has elapsed.

### **Providing versions of documents for publication**

2.20 When a Party refers a dispute to Ofcom, it must provide (i) a version of the dispute reference which can be shared with the Party who is the subject of the reference, and (ii) a version which can be published on Ofcom's website after the closure of any dispute case.

2.21 When the Party who is the subject of the dispute, makes representations to Ofcom, it must (i) provide a version of those representations which can be shared with the disputing Party, and (ii) a non-confidential version which can be published on Ofcom's website after the closure of any dispute case.

2.22 We will require Parties to justify any claims of commercial confidentiality, and will not entertain blanket claims.

### **Who to contact at Ofcom**

2.23 As set out in Appendix 1, potential disputing Parties in the first instance should contact the Competition Group's Investigations team at: [competition.complaints@ofcom.org.uk](mailto:competition.complaints@ofcom.org.uk). Where appropriate, the Parties will be given the contact details for a case leader who will then be their point of contact for the Enquiry and Resolution Phases of any dispute case.

## Remedies

2.24 Parties are encouraged to set out the remedies which they consider to be appropriate to resolve the issues raised by the dispute. These should be in line with ATI Regulation 14 which sets out Ofcom's powers in resolving disputes. Ofcom will consider on a case by case basis what remedy is appropriate to resolve the dispute.

2.25 Ofcom's powers to resolve a dispute are:

- to make a declaration setting out the rights and obligations of Parties to the dispute;
- to give a direction fixing the terms of transactions between Parties to the dispute;
- to give a direction imposing an obligation on Parties to the dispute to enter into a transaction between themselves on the terms fixed by Ofcom; and
- to require a Party to pay certain costs (discussed further at paragraphs 2.26-2.28).

### Ofcom's powers to award costs

2.26 Ofcom has powers in relation to awarding certain costs. Under ATI Regulation 14 Ofcom has the power:

- to require a Party to the dispute to pay all or part of another Party's reasonable costs and expenses in connection with the dispute;
- to require a Party to pay all or part of Ofcom's reasonable costs and expenses in dealing with the dispute; and
- to require a Party to pay all or part of the reasonable costs and expenses incurred by a person consulted under ATI Regulation 15(2).

2.27 The factors Ofcom may take into account in deciding to recover its own costs and expenses and/or require payment of another Party's costs and the methodology and process that will be used to calculate amounts to be recovered/paid are those set out in our existing guidelines on the payment of costs and expenses in regulatory disputes.<sup>15</sup>

2.28 Under ATI Regulation 14, Ofcom also has the power to require a Party to pay some or all of costs incurred by a public body that Ofcom has consulted under ATI Regulation 15(2). In deciding whether to award costs in these circumstances, Ofcom will apply the same principles that it applies to the recovery of its own costs.

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<sup>15</sup> Payment of costs and expenses in regulatory disputes, Guidance on Ofcom's approach, 4 September 2013: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0023/47093/guidance.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0023/47093/guidance.pdf).



## Section 3

# Information about physical infrastructure

## Introduction

- 3.1 ATI Regulation 4 concerns requests for information about physical infrastructure. In this section we provide guidance on: requests for information about physical infrastructure; responses to requests for information about physical infrastructure; and refusals to requests for information about physical infrastructure.

## Requests for information about physical infrastructure

- 3.2 ATI Regulation 4(1) provides that a network provider may make a request to an infrastructure operator for disclosable information about its existing physical infrastructure provided the request is in writing and is limited to a specified geographical area in which the network provider is envisaging deploying elements of high-speed electronic communications network. A dispute relating to a request under ATI Regulation 4(1) may be referred to Ofcom under ATI Regulation 12.

## Form of requests

- 3.3 In considering any disputes concerning whether a request from a network provider is sufficient to give rise to an obligation on an infrastructure operator under ATI Regulation 4(1), Ofcom considers that a written request containing the following information would be likely to be sufficient:
- A statement specifying that a request for information about physical infrastructure is being made under ATI Regulation 4.
  - The name of the undertaking making the request. Requests should be made by an officer of the network provider.
  - The name and contact details of the person responsible for the request.
  - A clear description of the geographic area for which infrastructure information is requested. Requests should be as specific as possible so as to minimise the burden on infrastructure operators and could for example list street names, post codes and/or geographic coordinates.
  - A clear description of the infrastructure information sought.

## Responses to requests for information about physical infrastructure

- 3.4 ATI Regulation 4(3) requires that an infrastructure operator must, not later than two months following the date of receipt of a request for infrastructure information under ATI Regulation 4(1) make available on proportionate, non-discriminatory and transparent terms, the following information that it holds to the extent requested:
- the location, route, type and current use of the infrastructure in the area specified by the requester; and

- a contact point for any further requests about the infrastructure.

### **Format of responses**

- 3.5 The ATI Regulations do not specify the format in which infrastructure information should be provided and there is no obligation for infrastructure operators to translate information into other formats if requested by network providers e.g. to digitise paper records.
- 3.6 In order to minimise the need for infrastructure operators to implement new systems and processes, we do not consider it appropriate to specify the format for responses in detail.
- 3.7 Generally, we would expect infrastructure operators to provide infrastructure information in the format that it is held except where changes are necessary to respond efficiently or where proprietary formats would impair requesters' ability to use the information.
- 3.8 Some infrastructure operators may already have systems and processes for providing information about their infrastructure to third-parties e.g. to handle requests from street-works contractors. In some cases, these arrangements may be suitable for responding to requests under ATI Regulation 4(1).

### **Content of responses**

- 3.9 Whilst most infrastructure operators hold information about their physical infrastructure, the level of detail and accuracy of the information may vary according to infrastructure operators' requirements and historical practice.
- 3.10 There is no obligation for infrastructure operators to obtain information in addition to that already held, for example by surveying unmapped sections of their infrastructure. We would therefore be likely to consider infrastructure operators to have discharged their obligations under ATI Regulation 4(3) provided they provide all of the relevant infrastructure information they hold, even if that information is incomplete. In this context we note there is a separate right for a network provider to request a survey of infrastructure (see section 4 of this guidance).
- 3.11 In assessing any disputes on the failure to respond adequately to requests for information about physical infrastructure, we would expect to:
- firstly determine what information the infrastructure operator holds concerning the area specified by the requestor and whether that has been provided to the network provider; and
  - secondly, where information exists that has not been provided, consider whether that information has been withheld for a reason falling within ATI Regulations 4(4), 4(5) or 10(1).

### **Terms concerning provision of physical infrastructure information**

- 3.12 ATI Regulation 4(3) requires infrastructure information requested to be provided on proportionate, non-discriminatory and transparent terms. In considering any dispute as to whether this requirement is met, Ofcom's assessment is likely to include the following considerations.

### Proportionate terms

- 3.13 In assessing whether the terms on which an infrastructure provider proposes to provide infrastructure information to a network provider are proportionate, Ofcom will consider whether the proposed terms go further than is necessary to protect the infrastructure provider's rights in the context of the information being disclosed.

### Non-discriminatory terms

- 3.14 Non-discrimination obligations ensure that a supplier offers equivalent conditions in equivalent circumstances.
- 3.15 When considering whether the terms on which an infrastructure operator proposes to provide infrastructure information to a network provider are non-discriminatory, Ofcom will consider if the network provider's circumstances are sufficiently similar to those of other network providers such we would expect them to be offered the same terms or if there are differences that could objectively justify treating the customers differently.

### Transparent terms

- 3.16 Transparency obligations ensure that the terms offered by a supplier are clear to purchasers of a service.
- 3.17 When considering whether the terms on which an infrastructure operator proposes to provide infrastructure information to a network provider are transparent, Ofcom will consider whether the proposed terms are clear and unambiguous.

### Terms as to confidentiality

- 3.18 ATI Regulation 11 imposes a duty on network providers concerning information acquired from infrastructure operators or rights holders under the ATI Regulations to:
- use the information solely for the purpose for which it was supplied, restrict access to only those persons who require it for that purpose and to respect at all times the confidentiality of the information provided; and
  - not to pass such information to, or allow it to be used by, any other person within the network provider or otherwise.
- 3.19 Given the existence of this duty, in assessing whether terms as to confidentiality are proportionate, non-discriminatory and transparent, Ofcom will consider the extent to which it is necessary for infrastructure operators to impose terms on network providers to address confidentiality over and above this duty. Such terms are likely to be appropriate where residual concerns in respect of the use of infrastructure information can be identified that are not adequately protected by ATI Regulation 11.

### **Charges for information**

- 3.20 Any charges made by an infrastructure operator for infrastructure information must be proportionate. In assessing the proportionality of any such charges, Ofcom anticipates taking into account the following considerations.
- 3.21 Infrastructure operators should be permitted to recover any efficiently incurred costs in providing information to network providers which request information. In most

cases, we would expect charges to reflect only the costs caused by retrieving and providing information.

- 3.22 Infrastructure operators should be permitted to recover costs associated with changes to systems and processes that are necessary to respond to requests efficiently. We do not consider it appropriate to prescribe how such costs should be recovered; however, it may be appropriate to spread these costs over multiple requests rather than, for example, recovering them from the access seeker making the first request.

## Refusals to requests for information about physical infrastructure

- 3.23 ATI Regulations 4(4) and 4(5) specify that infrastructure operators may refuse requests for infrastructure information under ATI Regulation 4(1) on certain grounds. The grounds for refusal are limited to:

- exempt infrastructure as listed in Schedule 1 to the ATI Regulations;
- cases where disclosure of infrastructure information would, or would be likely to, prejudice:
  - the security or integrity of any network;
  - a duty of confidentiality owed by the infrastructure operator to another person;
  - operating or business secrets of any person; or
  - safety or public health.

- 3.24 ATI Regulation 10 further requires infrastructure operators or rights holders to refuse requests where complying with the request would be prejudicial to national security. Before responding to requests that it may be required to refuse under ATI Regulation 10 infrastructure operators or rights holders are required to seek the opinion of the appropriate Minister of the Crown.<sup>16</sup>

- 3.25 ATI Regulation 10(6) specifies that the opinion provided by the appropriate Minister of the Crown must, as a minimum, include a statement as to the extent to which (if at all) the request should be refused on national security grounds; and it must not include information the disclosure of which might prejudice national security. In such situations we expect the infrastructure operator or rights holder to contact a representative of the lead government department for the sector concerned, and possibly other relevant members of Government or its agencies.

- 3.26 When deciding whether to refuse a request, infrastructure operators or rights holders are required to follow the opinion of the appropriate Minister of the Crown, including in relation to the information (if any) that may be given to the requester concerning the reasons why the request has been refused.

- 3.27 ATI Regulation 4(6) requires that refusals must be notified to those requesting information within two months of receipt of a request for information under ATI

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<sup>16</sup> The appropriate Minister of the Crown is the Minister who exercises those functions of a public nature most relevant to whether, or to what extent, the request must be refused on national security grounds.

Regulation 4(1). ATI Regulations 4(6) and 4(7) further provide that the infrastructure operator specify:

- that the request has been refused or set out the extent of the refusal; and
- the grounds for refusing and reasons those grounds apply, except where disclosing the grounds and reasons would or would be likely to prejudice the grounds or reasons for refusal.

### **Form of refusal notices**

3.28 We consider that a written notice containing the following information would be sufficient to satisfy the requirements of ATI Regulation 4(6):

- The name of the undertaking issuing the refusal notice. Notices should be made by an officer of the infrastructure operator.
- The name and contact details of the person responsible for the notice.
- Details of the request including the name of the undertaking that made the request, the date of the request and any identifying reference provided by the requester as appropriate.
- A statement specifying that a request for information about physical infrastructure is being refused under Regulation 4(5) of the ATI Regulations.
- Subject to ATI Regulation 4(7) and 10(8), the grounds and reasons for refusing the request.

### **Grounds for refusals**

3.29 Where the reasons for refusing to disclose infrastructure information is that it comprises an operating or business secret, we would expect infrastructure providers to be able to demonstrate that there are genuine concerns that are not addressed by ATI Regulation 11 or which cannot be mitigated by additional contractual terms such as non-disclosure agreements.

3.30 In the event of a dispute being referred to Ofcom relating to a refusal of a request under ATI Regulation 4 where the infrastructure operator does not fully disclose its grounds or reasons, Ofcom would expect that the full grounds and reasons for refusing the request should be provided to Ofcom subject to not prejudicing national security.

## Section 4

# Surveys about physical infrastructure

## Introduction

- 4.1 ATI Regulation 5 concerns on-site surveys of physical infrastructure. In this section we provide guidance on: requests for on-site surveys of physical infrastructure; responses to requests for on-site surveys of physical infrastructure; refusals to requests for on-site surveys of physical infrastructure; and form of refusal notices.

## Requests for on-site surveys of physical infrastructure

- 4.2 ATI Regulation 5(1) provides that a network provider may make a request to an infrastructure operator for an on-site survey of elements of its physical infrastructure provided that request is in writing, specifies the elements of the operator's infrastructure to which the request relates and is made with a view to deploying elements of high-speed electronic communications networks to which the elements to be surveyed are relevant. A dispute relating to a request under ATI Regulation 5(1) may be referred to Ofcom under ATI Regulation 12.

## Form of request

- 4.3 In considering any disputes concerning whether a request from a network provider is sufficient to give rise to an obligation on an infrastructure operator under ATI Regulation 5(1), Ofcom considers that a written request containing the following information would be likely to be sufficient:
- A statement specifying that a request for an on-site survey is being made under ATI Regulation 5.
  - The name of the undertaking making the request. Requests should be made by an officer of the network provider.
  - The name and contact details of the person responsible for the request.
  - A clear description of the specific elements of the physical infrastructure for which the on-site survey is requested. Requests should be as specific as possible so as to minimise the burden on infrastructure operators and could for example, list infrastructure identifiers previously supplied by the infrastructure operator or alternatively street names, post codes and/or geographic coordinates of the physical infrastructure.

## Responses to requests for on-site surveys of physical infrastructure

- 4.4 ATI Regulation 5(2) requires that an infrastructure operator must, not later than one month following the date of receipt of a request under ATI Regulation 5(1), grant an on-site survey on proportionate, non-discriminatory and transparent terms.

## Terms concerning survey activities

- 4.5 Subject to the requirement to offer proportionate, non-discriminatory and transparent terms, infrastructure operators may impose terms concerning the conduct of on-site surveys and survey information. These terms could for example include:
- responsibility for survey activities – survey activities could be carried out by the network provider, the infrastructure operator, jointly by both parties or an agreed third party;
  - conditions concerning survey activities such as:
    - qualifications, certification or training requirements for surveyors;
    - requirement for named individuals to undertake surveys;
    - operational processes for survey activities; and
    - work notification requirements or work permit processes.
- 4.6 ATI Regulation 11 imposes a duty of confidentiality on network providers concerning information acquired from infrastructure operators under the ATI Regulations as discussed at paragraph 3.18.
- 4.7 In assessing any disputes on the terms on which surveys are provided we would likely take into account the factors discussed at paragraphs 3.13-3.19.

## Charges for on-site surveys

- 4.8 Any charges made by an infrastructure operator for on-site surveys must be, among others, proportionate. In assessing the proportionality of any such charges, Ofcom anticipates that infrastructure operators should be permitted to recover efficiently incurred costs associated with granting and undertaking surveys.

## Refusals to requests for on-site surveys of physical infrastructure

- 4.9 ATI Regulations 5(3), 5(4) and 5(5) specify that infrastructure operators may refuse requests for surveys under Regulation 5(1) on certain grounds. The grounds for refusal are limited to:
- exempt infrastructure as listed in the Schedule 1 to the ATI Regulations;
  - cases where granting a survey would, or would be likely to prejudice:
    - the security or integrity of any network;
    - a duty of confidentiality owed by the infrastructure operator to another person;
    - operating or business secrets of any person; or
    - safety or public health.
  - it is not reasonably possible to comply with the request.

- 4.10 As discussed further at Section 3, paragraphs 3.24-3.26, ATI Regulation 10 requires infrastructure operators or rights holders to refuse requests where complying with the request would be prejudicial to national security. ATI Regulation 10 sets out the steps that must be followed before any such refusal is made including an opinion must be sought from the appropriate Minister of the Crown which must be followed.
- 4.11 ATI Regulation 5(6) requires that refusals must be notified to requesters within one month of receipt of a request for information under ATI Regulation 5(1). ATI Regulations 5(6) and 5(7) further provide that the infrastructure operator must specify the grounds for refusing and those grounds apply, except where disclosing its grounds and reasons would or would be likely to prejudice those grounds or reasons for refusal.

### **Form of refusal notices**

- 4.12 We consider that a written notice containing the following information would be sufficient to satisfy the requirements of ATI Regulation 5(6):
- The name of the undertaking issuing the refusal notice. Notices should be made by an officer of the infrastructure operator.
  - The name and contact details of the person responsible for the notice.
  - Details of the request including the name of the undertaking that made the request, the date of the request and any identifying reference provided by the requester as appropriate.
  - A statement specifying that a request for a physical infrastructure survey is being refused under ATI Regulation 5(5).
  - Subject to ATI Regulation 5(7) and 10(6), a statement specifying which of the specified grounds for refusal that it relies on.
  - Subject to ATI Regulation 5(7) and 10(8), reasons for refusing the request.

### **Grounds for refusals**

- 4.13 Infrastructure operators should seek to address concerns about network security, network integrity, confidentiality, safety or public health by the imposition of contractual terms concerning the conduct or surveys and the use of survey information. We would expect infrastructure operators that refuse to disclose information under ATI Regulation 5(6) for one of these reasons to be able to demonstrate that there are genuine concerns that cannot be mitigated by such means.
- 4.14 In the event of a dispute being referred to Ofcom relating to a refusal of a request under ATI Regulation 5 where the infrastructure operator does not fully disclose its reasons, Ofcom would expect that the full reasons for refusing the request should be provided to Ofcom subject to not prejudicing national security.



## Section 5

# Access to physical infrastructure

## Introduction

- 5.1 ATI Regulation 6 concerns access to physical infrastructure. In this section we provide guidance on: the scope of ATI Regulation 6; requests for access to physical infrastructure; responses to requests for access to physical infrastructure; and refusals to requests for access to physical infrastructure.

## Scope of usage in ATI Regulation 6

- 5.2 ATI Regulation 6(1) establishes a right for network providers to request access to infrastructure operators' physical infrastructure with a view to deploying elements of high-speed electronic communications networks within that infrastructure. "*High-speed*" in relation to an electronic communications network means a network capable of delivering access to broadband services at speeds of at least 30 megabits per second (30Mbit/s).<sup>17</sup>
- 5.3 Most access is likely to be for the purposes of deploying optical fibre networks. However, other types of network such as hybrid fibre-coax or copper networks may be deployed provided they are capable of delivering access to broadband services at speeds of at least 30Mbit/s.
- 5.4 We also note that while the ATI Regulations state that they are to apply to networks capable of delivering access to broadband services at speeds of at least 30Mbit/s, the regulations are silent as to specific customers (e.g. residential versus business customers), technical interfaces, network architecture (e.g. point-to-point versus point-to-multipoint) or network segments.

## Requests for access to physical infrastructure

- 5.5 ATI Regulation 6(1) provides that a network provider may make a request to an infrastructure operator for access to its physical infrastructure, with a view to deploying elements of high-speed electronic communications networks provided the request is in writing, specifies the infrastructure to which the request relates, specifies the network elements the network provider intends to deploy and specifies the timeframe required for deploying those elements. A dispute relating to a request under ATI Regulation 6(1) may be referred to Ofcom under ATI Regulation 12.

## Form of requests

- 5.6 In considering any disputes concerning whether a request from a network provider is sufficient to give rise to an obligation on an infrastructure operator under ATI Regulation 6(1), Ofcom considers that a written request containing the following information would be likely to be sufficient:

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<sup>17</sup> These considerations would equally apply to the rights under ATI Regulations 4,5,7,8 and 9 which are all expressed with reference to deploying elements of high-speed electronic communications networks.

- A statement specifying that a request for access to physical infrastructure is being made under ATI Regulation 6.
- The name of the undertaking making the request. Requests should be made by an officer of the network provider.
- The name and contact details of the person responsible for the request.
- A clear description of the infrastructure to which the request for access relates. Requests should be as specific as possible so as to minimise the burden on infrastructure operators and could for example, list infrastructure identifiers previously supplied by the infrastructure operator or alternatively street names, post codes and/or geographic coordinates of the physical infrastructure.
- A clear description of the network elements it proposes to deploy and the timeframe required for deploying those elements.

## Wayleaves

- 5.7 ATI Regulation 3 specifies that the ATI Regulations are not to be taken to prejudice the property rights of any other person. The ATI Regulations are also expressed to be without prejudice to rights and obligations arising under the code set out in Schedule 2 to the Telecommunications Act 1984 (the Electronic Communications Code).
- 5.8 We would expect these provisions mean that where a network provider seeks access to physical infrastructure under the ATI Regulations, there is still a requirement for that network provider to obtain a wayleave for access to the property in which infrastructure is installed.
- 5.9 We would also expect that the ATI Regulations do not provide a mechanism for resolving disputes between network providers and rights holders concerning wayleaves. In cases where commercial agreement cannot be reached concerning wayleaves, Code Operators (communications providers that are subject to the Electronic Communications Code) should continue to use the current arrangements under section 5 of the Electronic Communications Code to apply to the court to set the terms of the wayleave.

## Responses to requests for physical infrastructure

- 5.10 ATI Regulation 6(2) requires that an infrastructure operator must, within two months following the date of receipt of a request for access under ATI Regulation 6(1), agree to provide access on fair and reasonable terms.

## Terms concerning access to physical infrastructure

- 5.11 Subject to the requirement to offer fair and reasonable terms, infrastructure operators may impose terms concerning the access to physical infrastructure. These terms could for example include:
- conditions concerning access to physical infrastructure such as:
    - work scheduling, notification or permit processes;

- qualifications, certification or training requirements for persons who access the physical infrastructure and who may undertake work; and
  - technical specifications and operational processes concerning the types of network elements that may be deployed and their installation and repair.
- 5.12 In assessing any disputes on the terms, other than charges, on which access to physical infrastructure is provided we would likely take into account the factors discussed at paragraphs 3.13-3.19.

### **Charges for access to physical infrastructure**

- 5.13 A dispute relating to whether the price for access to physical infrastructure offered by the infrastructure operator is fair and reasonable may be referred to Ofcom under ATI Regulation 12.
- 5.14 ATI Regulation 14(2)(b) gives Ofcom the power to resolve a dispute in respect of access to physical infrastructure by giving a direction fixing the terms of transactions between the Parties to the dispute, which might include the price<sup>18</sup> of access. The following types of dispute may be referred to us under ATI Regulation 12 where we will be required to include in our determination an assessment of what is a fair and reasonable price:
- disputes where the infrastructure operator has offered a price of access and the access seeker contends that this is not fair and reasonable; and
  - disputes where no price for access has been offered.<sup>19</sup>
- 5.15 In the first type of dispute, we will assess whether the price offered is fair and reasonable. In the second type of dispute, we will assess what the fair and reasonable price is. In each case, we will apply the same considerations (see below).<sup>20</sup>
- 5.16 In fixing any terms as to price for access ATI Regulation 16 provides that Ofcom must:
- ensure that the infrastructure operator has a fair opportunity to recover its costs; and
  - take into account the impact of the access on the infrastructure operator's business plan, including investments made by the operator, in particular in the

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<sup>18</sup> In what follows, when we refer to "*price*" we mean the charges for access to physical infrastructure. For the avoidance of doubt, we do not mean to imply that the structure of these charges can only take the form of a single uniform price.

<sup>19</sup> For the avoidance of doubt, in disputes where the infrastructure operator has offered a price during negotiations but the access seeker does not dispute this price, the fairness and reasonableness of this price will not form part of the issues in dispute.

<sup>20</sup> This does not mean that the price offered by the infrastructure operator has to be equal to the price we would impose if we were determining a price for access in order for it to be considered fair and reasonable. In principle, a range of prices and pricing approaches might satisfy the considerations we are required to take into account.

physical infrastructure used for the provision of high-speed electronic communications services.<sup>21</sup>

- 5.17 In disputes referred under ATI Regulation 12 where the infrastructure operator is a network provider, Ofcom is required under ATI Regulation 16(3) to take into account the objectives set out in Article 8 of the Framework Directive.
- 5.18 In what follows, we set out how we expect to apply the criteria in practice. However, the precise approach followed in a particular dispute will depend on the specific circumstances of that dispute.

### Costs incurred in providing access

- 5.19 The access price should enable the infrastructure operator to recover, at least, any incremental costs incurred in facilitating and providing access. These might include upfront costs incurred to facilitate multiple transactions to provide access (e.g. system development costs), upfront costs incurred to facilitate a particular transaction to provide access (e.g. approving plans, inspecting installation), ongoing costs associated with a particular transaction to provide access (e.g. higher ongoing maintenance costs as a result of providing access).<sup>22</sup> The access price may also allow for a reasonable return on the activity of facilitating and providing access. Ofcom expects any incremental costs to be efficiently incurred.
- 5.20 Ofcom would expect the infrastructure operator to be able to provide a breakdown of these costs and, where it has offered a price, how these costs are reflected in that price.
- 5.21 With respect to upfront costs incurred to facilitate multiple transactions, it may be appropriate to spread these costs over multiple access seekers rather than, for example, recovering them from the access seeker making the first request. Moreover, where it is sufficiently demonstrated that costs incurred will benefit the infrastructure operator, it may be appropriate for the infrastructure operator to bear a proportion of these costs (for example, the infrastructure operator may benefit from improvements to systems).

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<sup>21</sup> These criteria should be read in light of Recital 19 to the Directive which provides “*When determining prices for granting access, the dispute settlement body should ensure that the access provider has a fair opportunity to recover its costs incurred in providing access to its physical infrastructure, taking into account specific national conditions and any tariff structures put in place to provide a fair opportunity for cost recovery taking into account any previous imposition of remedies by a national regulatory authority. In so doing, the dispute settlement body should also take into account the impact of the requested access on the business plan of the access provider, including the investments made by the access provider to whom the access is requested, in particular investments made in the physical infrastructure to which the access is requested. In the specific case of access to physical infrastructures of public communications network providers, the investments made in such infrastructure may directly contribute to the objectives of the Digital Agenda and downstream competition may be influenced by free-riding. Hence, any access obligation should fully take into account the economic viability of those investments based on their risk profile, any time schedule for the return on investment, any impact of access on downstream competition and consequently on prices and return on investment, any depreciation of the network assets at the time of the access request, any business case underpinning the investment, in particular in the physical infrastructures used for the provision of high-speed electronic communications services, and any possibility previously offered to the access seeker to co-deploy.*”

<sup>22</sup> In cases where incremental costs are contingent on certain events, it may be appropriate for infrastructure operators to set a price that is contingent on such events. For example, additional maintenance costs may only arise in certain circumstances that are hard to predict.

## Impact of the access on the infrastructure operator's business plan

- 5.22 Ofcom are also required to take into account the impact of access on the infrastructure operator's business plan. If the infrastructure operator claims that any such impacts exist, Ofcom will consider whether – and if so, to what extent – the access price should compensate the infrastructure operator for these impacts. In particular, consideration will be given to whether access undermines the infrastructure operator's fair opportunity to recover its costs.
- 5.23 There are various ways in which access could have an impact on an infrastructure operator's business plan.
- 5.24 ATI Regulation 16 requires Ofcom to take into account the impact of access on the operator's business plan, including the investments made by the operator, in particular in the physical infrastructure used for the provision of high-speed electronic communications services. For example, an infrastructure operator which is also a network provider may face greater downstream competition as a result of granting access, which could reduce the profitability of the investment in the physical infrastructure in a way that undermines its viability. Therefore, Ofcom considers that the price of access should ensure that the viability of investments in physical infrastructure is not undermined.
- 5.25 While ATI Regulation 16 refers to the impact of access on the operator's business plan, it does not specifically identify types of impact beyond those in the physical infrastructure used for the provision of high-speed electronic communications services. Ofcom will consider the relevance of other impacts in the context of specific disputes. We expect that this will typically arise in cases where the infrastructure operator is a network provider. For example, greater downstream competition may have an impact on an infrastructure operator's ability to recover its investments in something other than the physical infrastructure to which access is provided.
- 5.26 Ofcom recognises that there may be circumstances where access to non-telecoms infrastructure<sup>23</sup> could have an impact on the infrastructure operator's business plan that may need to be compensated for in the access price. For example, in circumstances where the infrastructure operator could demonstrate plans to use the relevant infrastructure itself, while it would be entitled to refuse access (see paragraphs 5.30-5.32), it may instead be willing to offer access if the price reflects the impact on its own plans to use the relevant infrastructure.
- 5.27 In evaluating any relevant impacts on the infrastructure operator's business plan, Ofcom will have regard to the factors set out in Recital 19 to the Directive (set out in footnote 21).
- 5.28 Where the infrastructure operator claims that access will have an impact on its business plan, Ofcom would expect it to be able to provide evidence to support this claim. For example, where the claim is that access will impact the economic viability of an investment, this evidence might include business plans underpinning the investment, as well as information on the potential scale of the impact and the likelihood that this will materialise. We are less likely to take into account impacts that are not sufficiently evidenced.

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<sup>23</sup> Infrastructure which is not operated by a network provider.

## Article 8 of the Framework Directive

5.29 In disputes about access to physical infrastructure referred to Ofcom under ATI Regulation 12, where the infrastructure operator is a network provider, Ofcom are required by ATI Regulation 16(3) to also take into account the objectives set out in Article 8 of the Framework Directive. What this means in practice will likely depend on the specific circumstances of each dispute.

## Refusals to requests for access to physical infrastructure

5.30 ATI Regulations 6(3) and 6(4) specify that infrastructure operators may refuse requests for access under Regulation 6(1) that they consider to be unreasonable, based on objective, transparent and proportionate criteria, such as:

- the technical suitability of the physical infrastructure to host any of the network elements;
- the availability of space in the physical infrastructure to host the network elements, taking into account the infrastructure operator's sufficiently demonstrated future needs;
- safety or public health concerns;
- the security or integrity of any network;
- the risk that the proposed electronic communications services would seriously interfere with the provision of other services over the physical infrastructure; or
- the availability of viable alternative means of wholesale access to the physical infrastructure provided by the same infrastructure operator and suitable for the provision of high-speed electronic communications networks, provided that such access is offered on fair and reasonable terms.

5.31 As discussed further at Section 3, paragraphs 3.24-3.26, ATI Regulation 10 requires infrastructure operators or rights holders to refuse requests where complying with the request would be prejudicial to national security. ATI Regulation 10 sets out the steps that must be followed before any such refusal is made including an opinion must be sought from the appropriate Minister of the Crown which must be followed.

5.32 ATI Regulation 6(4) requires that refusals must be notified to requesters within two months of receipt of a request for access under ATI Regulation 6(1). ATI Regulations 6(4) and 6(5) further provide that the infrastructure operator must specify:

- that the request has been refused or set out the extent of the refusal; and
- the grounds for refusing and the reasons those grounds apply, except where disclosing the grounds and reasons would or would be likely to prejudice the reasons for refusal.

## Form of refusal notices

5.33 We consider that a written notice containing the following information is likely to be sufficient to satisfy the requirements of ATI Regulation 6(4):

- The name of the undertaking issuing the refusal notice. Notices should be made by an officer of the infrastructure operator.
- The name and contact details of the person responsible for the notice.
- Details of the request including the name of the undertaking that made the request, the date of the request and any identifying reference provided by the requester as appropriate.
- A statement specifying that a request for access to physical infrastructure is being refused under ATI Regulation 6(3).
- Subject to ATI Regulations 6(5) and 10(8), a statement specifying reasons for refusing the request.

### **Refusals relating to technical suitability**

- 5.34 If the refusal relates to the technical suitability (ATI Regulation 6(3)(a)), of the physical infrastructure to host network elements, as a minimum, we would expect the infrastructure operator to set out whether the refusal is due to issues related with:
- physical obstructions to existing and/or future services;
  - disruptions that cause the existing and/or future services to be dysfunctional, impaired or interrupted; or
  - other aspects of technical suitability.
- 5.35 In relation to refusals relating to technical suitability, we expect the infrastructure operator to provide detailed information why the infrastructure is not technically suitable to host the network elements. This could include details of the nature of the physical obstruction and/or type of disruption, the reasons why they exist, and the reasons why the infrastructure operator could not put in place mitigations.
- 5.36 A possible cause of disruption, for example, is interference of electromagnetic nature. In that case, we expect the refusal to include the technical details of the elements interfering with the network elements planned to be deployed by the network provider and the spectrum bands in Hz which would be interfering. In assessing such refusal, we would consider the technical specifications of the existing elements in the infrastructure and whether there are alternative solutions, such as moving the interfering elements elsewhere, that the infrastructure operator could have reasonably offered.

### **Refusals relating to availability of space**

- 5.37 If the refusal relates to the availability of space (ATI Regulation 6(3)(b)) in the physical infrastructure to host network elements, we would expect the infrastructure operator to explain whether the issues relate to the space occupied by current services or the operator's future plans.
- 5.38 In relation to the availability of space for current services, we expect the infrastructure operator to provide details of the space occupied by the current services and whether the services are currently active. For example, in cases of access to existing telecom infrastructure, there could be circumstances where the network provider seeks to access ducts fully occupied by existing cables, but these cables are not used to

provide any service. In such cases, we would consider whether the infrastructure operator has sufficiently demonstrated any future need for the inactive infrastructure or the space occupied by such infrastructure. For example, we might consider its plans to activate services on the existing infrastructure and the timescales for activation if these are available or whether it intends to free space in the foreseeable future.

- 5.39 If space is available but the infrastructure owner refuses to provide access on the basis that it has plans to deploy its own services in the future, we would consider the future deployment plans of the infrastructure owner. In this respect, AT1 Regulation 6(3) sets out that the infrastructure operator's future needs must be "*sufficiently demonstrated*". In considering this, we would expect to take into account the infrastructure operator's original business plan, which underpinned the investment in the relevant infrastructure, and any utilisation assumptions, together with any other information on plans for future deployments which was available.



## Section 6

# Access to in-building infrastructure

## Introduction

6.1 ATI Regulation 7 concerns access to in-building physical infrastructure. In this section we provide guidance on: the scope of ATI Regulation 7; requests for access to in-building physical infrastructure; responses to requests for access to in-building physical infrastructure; and refusals to requests for access to in-building physical infrastructure.

## Scope of in-building infrastructure

6.2 In-building physical infrastructure is defined in the ATI Regulations as:

“physical infrastructure or installations at the end-user’s location, including elements under joint ownership, intended to host wired or wireless access networks, where such access networks are capable of delivering electronic communications services and connecting the access point of the building with the network termination point”.

6.3 Therefore, the right to request access under ATI Regulation 7 to in-building physical infrastructure is likely to include access to risers, access points and other physical infrastructure that could facilitate the deployment of elements of high speed broadband networks within buildings.

6.4 ATI Regulation 7 does not encompass elements of communications networks or other networks installed within buildings. It does not therefore confer any rights concerning in-building cabling installed by the building owner or third-parties.

## Requests for access to in-building physical infrastructure

6.5 ATI Regulation 7(1) provides that a network provider may make a request to a rights holder for access to its in-building physical infrastructure and any access point, provided the request is in writing, specifies the location to which the request relates and is made with a view to deploying elements of a high-speed electronic communications network using that access point or infrastructure. A dispute relating to a request under ATI Regulation 7(1) may be referred to Ofcom under ATI Regulation 12.

## Form of requests

6.6 In considering any disputes concerning whether a request from a network provider is sufficient to give rise to an obligation on a rights holder under ATI Regulation 7(1), Ofcom considers that a written request containing the following information would be likely to be sufficient:

- a statement specifying that a request for access to in-building physical infrastructure is being made under ATI Regulation 7;
- the name of the undertaking making the request. Requests should be made by an officer of the network provider;

- the name and contact details of the person responsible for the request;
- the name and address of the building to which access is being sought; and
- where known, a clear description of the elements of the in-building infrastructure to which access is being sought, for example building access points or risers.

## **Wayleaves**

- 6.7 ATI Regulation 3 specifies that the ATI Regulations are not to be taken to prejudice the property rights of any other person. The ATI Regulations are also expressed to be without prejudice to the rights and obligations arising under the Electronic Communications Code.
- 6.8 We would expect these provisions mean that where a network provider seeks access to in-building physical infrastructure under the ATI Regulations, there is still a requirement for that network provider to obtain a wayleave for access to the property in which in-building infrastructure is installed.
- 6.9 We would also expect that the ATI Regulations do not provide a mechanism for resolving disputes between network providers and rights holders concerning wayleaves. In cases where commercial agreement cannot be reached concerning wayleaves, Code Operators (communications providers that are subject to the Electronic Communications Code) should continue to use the current arrangements under section 5 of the Electronic Communications Code to apply to the court to set the terms of the wayleave.

## **Responses to requests for access to in-building physical infrastructure**

- 6.10 ATI Regulation 7(2) requires that a rights holder must, not later than two months following the date of receipt of a request for access under ATI Regulation 7(1), agree to provide access on fair and non-discriminatory terms (unless ATI Regulation 7(3) applies).

## **Terms concerning access to in-building physical infrastructure**

- 6.11 In assessing whether the terms offered by rights holders are fair and non-discriminatory, we would likely take into account the factors discussed at paragraphs 3.13-3.17. When considering the fairness of any charges for access, we would likely take into account the factors set out at paragraph 5.16. In particular, we expect the rights holder to be able to recover any costs incurred in the provision of access.
- 6.12 In assessing whether any terms imposed as to confidentiality are fair and non-discriminatory, Ofcom will take into account the considerations discussed at paragraphs 3.18-3.19.

## **Refusals to requests for access to in-building physical infrastructure**

- 6.13 ATI Regulation 7(3) provides that rights holder may only refuse requests for access under ATI Regulation 7(1) on the following grounds:

- it would be technically possible and economically efficient for the network provider to install additional in-building physical infrastructure; or
  - the request cannot reasonably be met.
- 6.14 As discussed further at Section 3, paragraphs 3.24-3.26, ATI Regulation 10 requires infrastructure operators or rights holders to refuse requests where complying with the request would be prejudicial to national security. ATI Regulation 10 sets out the steps that must be followed before any such refusal is made including an opinion must be sought from the appropriate Minister of the Crown which must be followed.
- 6.15 ATI Regulation 7(4) requires that refusals must be notified to requesters within two months of receipt of a request for information under Regulation 7(1). Regulation 7(4) further provides that the rights holder must specify:
- that the request has been refused or set out the extent of the refusal; and
  - the grounds for refusing and the reasons for its refusal.

### **Form of refusal notices**

- 6.16 We consider that a written notice containing the following information is likely be sufficient to satisfy the requirements of ATI Regulation 7(4):
- The name of the undertaking issuing the refusal notice. Notices should be made by an officer of the rights holder.
  - The name and contact details of the person responsible for the notice.
  - Details of the request including the name of the undertaking that made the request, the date of the request and any identifying reference provided by the requester as appropriate.
  - A statement specifying that a request for access to in-building physical infrastructure is being refused under ATI Regulation 7(4) and if appropriate, setting out the extent of the refusal.
  - Subject to ATI Regulation 10(8) the grounds for refusing and reasons for refusing the request.

## Section 7

# Information about civil works

## Introduction

- 7.1 ATI Regulation 8 concerns the right to access information about civil works. In this section we provide guidance on: requests for information about civil works; responses to requests for information about civil works; publication of responses to requests for information about civil works; and refusals to requests for information about civil works.

## Requests for information about civil works

- 7.2 ATI Regulation 8(1) provides that a network provider may make a request to an infrastructure operator for information concerning civil works (including where works have already commenced) relating to an infrastructure operator's physical infrastructure in a specified geographic area, provided the request is in writing, is limited to a specified geographical area and is made because the network provider is envisaging deploying elements of high-speed electronic communications networks. A dispute relating to a request under ATI Regulation 8(1) may be referred to Ofcom under ATI Regulation 12.

## Form of requests

- 7.3 In considering any disputes concerning whether a request from a network provider is sufficient to give rise to an obligation on an infrastructure operator under ATI Regulation 8(1), Ofcom considers that a written request containing the following information would be likely to be sufficient:
- A statement specifying that a request for information about civil works is being made under ATI Regulation 8.
  - The name of the undertaking making the request. Requests should be made by an officer of the network provider.
  - The name and contact details of the person responsible for the request.
  - A clear description of the planned civil works about which it seeks information. Requests should be as specific as possible so as to minimise the burden on infrastructure operators and could for example, list notification or permit references from street works registers, street names, post codes and/or geographic coordinates.

## Responses to requests for information about civil works

- 7.4 ATI Regulation 8(3) requires that an infrastructure operator must, not later than two weeks following the date of receipt of a request for civil works information under Regulation 8(1) make available the following information about its physical infrastructure (to the extent requested), on proportionate, non-discriminatory and transparent terms:
- the location, and type of the works;

- the network elements involved;
- their estimated start date and duration; and
- a contact point for any further requests about the works.

### **Relationship with existing arrangements for publication of information about civil works**

- 7.5 Where information is requested under ATI Regulation 8, it may be that this information is already available pursuant to other regulatory obligations concerning the publications of information for civil works.
- 7.6 Given that ATI Regulation 8(5) provides that where information is already publicly available, an infrastructure operator may refuse to disclose that information, network providers should in the first instance obtain information about planned civil works from street works registers and planning registers.
- 7.7 As a result, ATI Regulation 8(1) should be used to obtain information about civil works that is not already publicly available such as:
- additional information about notified civil works that has not already been published by street authorities and planning authorities; and
  - information about civil works that infrastructure operators plan to notify to street authorities or planning authorities in the next 6 months.

### **Terms concerning information about civil works**

- 7.8 In assessing whether the terms offered by infrastructure operators are proportionate, non-discriminatory and transparent we would likely take into account the factors discussed at paragraphs 3.13-3.17.

### **Terms as to confidentiality**

- 7.9 In assessing whether any terms imposed as to confidentiality are proportionate, non-discriminatory and transparent, Ofcom will take into account the considerations discussed at paragraphs 3.18-3.19.

### **Publication of responses to requests for information about civil works**

- 7.10 ATI Regulation 8(9) requires infrastructure operators to make publicly available in electronic form any information made available in response to requests under ATI Regulation 8(1). This obligation is subject to ATI Regulation 8(10) that permits an infrastructure operator to limit the information it makes publicly available to the extent that it would, or would be likely to prejudice the matters listed as grounds for refusals of requests in ATI Regulation 8(6).

### **Refusals to requests for information about civil works**

- 7.11 ATI Regulations 8(4), 8(5) and 8(6) specify that infrastructure operators may refuse requests for infrastructure information under Regulation 8(1) on certain grounds. The grounds for refusal are limited to:

- where the works are of a description set out in Schedule 2 to the ATI Regulations;
- where information is already publicly available;
- cases where disclosure of civil works information would, or would be likely, to prejudice:
  - the security or integrity of any network;
  - a duty of confidentiality owed by the infrastructure operator to another person;
  - operating or business secrets of any person; or
  - safety or public health.

7.12 As discussed further at Section 3, paragraphs 3.24-3.26, ATI Regulation 10 requires infrastructure operators or rights holders to refuse requests where complying with the request would be prejudicial to national security. ATI Regulation 10 sets out the steps that must be followed before any such refusal is made including an opinion must be sought from the appropriate Minister of the Crown which must be followed.

7.13 ATI Regulation 8(7) requires that refusals must be notified to requesters within two weeks of receipt of a request for information under ATI Regulation 8(1). ATI Regulations 8(7) and 8(8) further provide that the infrastructure operator must specify:

- that the request has been refused or the extent of the refusal; and
- the grounds for refusing and the reasons for its refusal, except where disclosing the grounds or reasons would or would be likely to prejudice one of the grounds for refusal.

### **Form of refusal notices**

7.14 We consider that a written notice containing the following information would be sufficient to satisfy the requirements of ATI Regulation 8(7):

- The name of the undertaking issuing the refusal notice. Notices should be made by an officer of the infrastructure operator.
- The name and contact details of the person responsible for the notice.
- Details of the request including the name of the undertaking that made the request, the date of the request and any identifying reference provided by the requester as appropriate.
- A statement specifying that a request for information about planned or current civil works is being refused under ATI Regulation 8(6).
- Subject to ATI Regulation 8(6) and 8(8) a statement specifying reasons for refusing the request.

## Section 8

# Coordination with civil works funded from public funds

## Introduction

8.1 ATI Regulation 9 concerns the right to coordinate civil works funded from public funds. In this section we provide guidance on: requests to coordinate civil works, responses to requests to coordinate civil works and refusals to requests to coordinate civil works.

## Requests to coordinate civil works

8.2 ATI Regulation 9(1) provides that a network provider may make a request to an infrastructure operator to coordinate civil works which are funded wholly or partly by public funds, provided the request is in writing and is made with a view to deploying elements of high-speed electronic communications networks. A dispute relating to a request under ATI Regulation 9(1) may be referred to Ofcom under ATI Regulation 12.

## Form of requests

8.3 In considering any disputes concerning whether a request from a network provider is sufficient to give rise to an obligation on an infrastructure operator under ATI Regulation 9(1), Ofcom considers that a written request containing the following information would be likely to be sufficient:

- A statement specifying that a request for coordination of any civil works is being made under ATI Regulation 9.
- The name of the undertaking making the request. Requests should be made by an officer of the network provider.
- The name and contact details of the person responsible for the request.
- A clear description of the civil works (financed wholly or partly by public funds) for which it seeks coordination. Depending on the circumstances the information available to the network provider about the planned civil works may vary. Requests should be as specific as possible so as to minimise the burden on infrastructure operators and could for example include infrastructure identifiers if available and/or street names, post codes and/or geographic coordinates.

## Responses to requests to coordinate civil works

8.4 ATI Regulation 9(2) requires that an infrastructure operator must, not later than one month following the date of receipt of a request for coordination under ATI Regulation 9(1) agree to coordinate those works on proportionate, non-discriminatory and transparent terms.

## **Terms concerning coordination of civil works**

8.5 In assessing any disputes on the terms on which coordination is offered or provided we would likely take into account the factors discussed at paragraphs 3.13-3.17. In assessing whether any terms imposed as to confidentiality, Ofcom will take into account the considerations discussed at paragraphs 3.18-3.19.

## **Refusals to requests to coordinate civil works**

8.6 ATI Regulations 9(3) and 9(4) specify the grounds on which infrastructure operators may refuse requests for coordination of civil works under ATI Regulation 9(1). The grounds for refusal are limited to:

- where the works are of a description set out in Schedule 2 to the ATI Regulations;
- where the request has not been made promptly, and in any event at least one month before the date of the final submission of the infrastructure operator's project to the relevant permit granting authority for a permit to carry out the works;
- where coordination would give rise to any additional costs to the infrastructure operator (including costs occasioned by any delay that would be caused by coordination of the works); or
- where coordination would materially impede the infrastructure operator's control over the works.

8.7 As discussed further at Section 3, paragraphs 3.24-3.26, ATI Regulation 10 requires infrastructure operators or rights holders to refuse requests where complying with the request would be prejudicial to national security. ATI Regulation 10 sets out the steps that must be followed before any such refusal is made including an opinion must be sought from the appropriate Minister of the Crown which must be followed.

8.8 ATI Regulation 9(5) requires that refusals must be notified to requesters within one month of receipt of a request for information under ATI Regulation 9(1). ATI Regulation 9(5) further provides that the infrastructure operator must specify:

- that the request has been refused or the extent of the refusal; and
- the grounds for refusing and the reasons for the refusal except where disclosure is not permitted on grounds of national security under ATI Regulation 10(8).

## **Form of refusal notices**

8.9 We consider that a written notice containing the following information would be sufficient to satisfy the requirements of ATI Regulation 9(5):

- The name of the undertaking issuing the refusal notice. Notices should be made by an officer of the infrastructure operator.
- The name and contact details of the person responsible for the notice.



- Details of the request including the name of the undertaking that made the request, the date of the request and any identifying reference provided by the requester as appropriate.
- A statement specifying that a request to coordinate civil works financed by public funds is being refused under ATI Regulation 9(3).
- Subject to ATI Regulation 10(8) a statement specifying reasons for refusing the request.

## **Grounds for refusals**

### Timeliness of requests

8.10 ATI Regulation 9(4)(a) provides that infrastructure operators may refuse to coordinate works if the request has not been made promptly or at least one month before the date of the final submission of the infrastructure operator's project to the relevant permitting authority. In this context, requests to the relevant permitting authority are likely to include planning applications, street works notifications or applications for Development Consent Orders.

### Additional costs

8.11 ATI Regulation 9(4)(b) provides that infrastructure operators may refuse to coordinate works if, or to the extent, coordination would give rise to any additional costs to the infrastructure operator (including costs occasioned by any delay that would be caused by coordination of the works). In this context, additional costs are costs incurred by the infrastructure operator arising as a result of the coordination of civil works after any contribution made by the requesting network provider. Costs might for example include: costs relating to the construction of additional infrastructure requested by the network provider; costs occasioned by any delay caused by the coordination of works; and costs arising as a result of the coordination of works.

### Control of works

8.12 ATI Regulation 9(4)(c) provides that infrastructure operators may refuse to coordinate works if, or to the extent, coordination would materially impede its control over the works. We would expect this to arise where the successful completion of the work within a satisfactory timetable can no longer be guaranteed, for example, because completion would be dependent on the requesting network provider undertaking other works.

## Appendix 1: Form of dispute reference

# Form of dispute reference

A1.1 Dispute references including draft references should be made to:

Investigations Programme Manager, Competition Group  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA  
e-mail: [competition.complaints@ofcom.org.uk](mailto:competition.complaints@ofcom.org.uk)  
Telephone: 020 7783 4100

A1.2 If you need any further guidance on how to make a dispute reference, please contact the Competition Group's Investigations Programme Manager.

A1.3 In line with ATI Regulation 12(6) a dispute reference is to be made in such manner as Ofcom require. In this Appendix we set out the manner which Ofcom requires dispute references to be made and this guidance constitutes publication of a notice for the purpose of ATI Regulation 12(7). If Parties do not refer disputes in the manner set out in this guidance, a dispute will not have been referred to Ofcom for the purposes of ATI Regulation 12 and Ofcom will not be required to resolve the dispute under ATI Regulation 13.

A1.4 A dispute reference should contain information set out in Sections 1 to 4 below. The referring Party should also provide a version of its dispute reference which can be shared with the Party which is the subject of the reference, and a version which can be published after the dispute case has been closed. We will require Parties to justify any claims of commercial confidentiality, and will not entertain blanket claims.

A1.5 In all cases, Ofcom expects the referring Party to provide information and evidence that is focused and appropriately tailored to the relevant issues in dispute.

## Section 1: Background information

A1.6 Please provide:

- business name, address, telephone number, and email address and, the contact details of an individual who can discuss the detail of the dispute;
- a brief explanation of the nature of the Party's business (e.g. network provider, infrastructure operator, rights holder etc) and its scale (local, national, international - approximate turnover is helpful);
- details of the other Party in dispute (nature of the Party's business; contact details);
- a summary of the dispute including the legal basis according to which the dispute is being referred (i.e. relevant part(s) of the ATI Regulations);
- a concise explanation of the commercial context to the dispute including a summary of the planned network deployment; and

- a brief description of the proposed remedy or remedies for resolution of the dispute.

## **Section 2: More detailed information**

### **Statement under the relevant ATI Regulations**

A1.7 The referring Party should provide a clear statement setting out:

- i) what ATI Regulation(s) the dispute is made under. This statement must refer to ATI Regulations 4, 5, 6, 7, 8 or 9.
- ii) the grounds for referring the dispute. This statement must refer to ATI Regulation 12(4)(a), (b) or (c).

### **Explanation of the grounds for dispute**

A1.8 The referring Party should provide an explanation of the grounds for dispute including providing supporting evidence as described further below.

#### No realistic prospect of the dispute being resolved without a reference to Ofcom

A1.9 The referring Party should provide a clear and detailed statement setting out why it believes there is no realistic prospect of the dispute being resolved without the reference.

A1.10 This should include a detailed description of any negotiations (or the reasonable endeavours to enter into good faith negotiations) which have taken place between the Parties. This description should be supported by the following information and evidence:

- a timeline of events covering the interactions with the Party which is the subject of the dispute;
- relevant documentary evidence of commercial negotiations covering the whole period of negotiation, including copies of requests sent to the other Party, responses received from the other Party, other correspondence, notes of meetings and telephone calls; and
- details of any options or proposed solutions put forward by any Party during negotiations, including what, if anything, was accepted, what was rejected and why.

A1.11 In the event that a Party has refused to enter into negotiations, the dispute reference should provide any evidence available which demonstrates that the referring Party has taken reasonable endeavours to enter into good faith negotiations.

#### Disputes concerning refusals

A1.12 Where a dispute concerns a refusal under ATI Regulation 12(4(a)) the referring Party should ensure that the information provided in relation to paragraph A1.9 – A1.11 demonstrates that the request has been refused.

- A1.13 In addition, the referring Party should provide an explanation of why the grounds for refusal are not justified under the relevant ATI Regulation(s). This should include supporting evidence including where appropriate technical, operational and financial information.

#### Disputes concerning terms

- A1.14 Where a dispute concerns the terms under which the request is to be granted, the referring Party should explain why the proposed terms are not acceptable under the relevant ATI Regulation(s). This should include supporting evidence including where appropriate technical, operational and financial information.

#### Disputes where there has been no response to a request

- A1.15 Where a dispute has arisen because there has been no response to a request within the time limit given in the regulation for responding, the referring Party should provide a copy of the request, proof of when it was sent, and a statement confirming that a response under the ATI Regulations has not been received.

### **Section 3: Relevant public bodies and Minister of the Crown**

- A1.16 The referring Party should provide details of any person it considers has functions of a public nature that Ofcom should consult in accordance with ATI Regulation 15(4(b)). It should also briefly explain its reasons for identifying these persons.
- A1.17 In cases where the referring Party considers that ATI Regulation 10 (national security) applies, it should provide details of the appropriate Minister of the Crown.

### **Section 4: Proposed Remedy**

- A1.18 The referring Party should provide details, with reasons, of the appropriate remedy for the dispute. Any remedies must fall within the powers of resolution set out in ATI Regulation 14. If relevant, this should include details of the specific terms (including charges) which it proposes should be imposed by Ofcom.

### **Declaration by an officer of the company:**

- A1.19 The dispute reference must include the following declaration signed by an officer of the company.

Before making this reference to Ofcom, to the best of my knowledge and belief, [company name] has sought to resolve this dispute through commercial negotiation and I am satisfied that in accordance with ATI Regulation 12(3) there is no realistic prospect of the dispute being resolved without that reference.

All information and evidence provided in referring this dispute to Ofcom is, to the best of my knowledge and belief, true and accurate.

Signed:

Position in the company:

Date: