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Statement following
consultation on Guidance under
the Communications
(Access to Infrastructure)
Regulations 2016

Statement
Publication date: 6 December 2016

About this document

This document sets out Ofcom's statement concerning 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.

We consulted on draft guidance over the course of the summer. We received nine responses to our consultation and in this document set out a summary of the issues raised by respondents and our conclusions. Separately, we have published our final guidance.

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Section 1

Ofcom's role under the Communications (Access to Infrastructure) Regulations 2016

Background

- 1.1 The Communications (Access to Infrastructure) Regulations 2016¹ (the ATI Regulations) came into force on 31 July 2016. The ATI Regulations set out measures intended to reduce the cost of deploying high-speed electronic communications networks (capable of delivering broadband access services at speeds of at least 30 megabits per second (30Mbit/s)). These measures include sharing the physical infrastructure of telecoms network providers as well as infrastructure operators in other sectors including gas, electricity, water and sewage and drainage systems, heating and transport services. The ATI Regulations transpose into UK law the Broadband Cost Reduction Directive 2014² (the Directive).
- 1.2 The ATI Regulations provide for a number of rights for access seekers in relation to physical infrastructure and civil works. In summary these are:
 - a right to access information (location, route, type and current use, and contact point for further requests) concerning existing physical infrastructure on proportionate, non-discriminatory and transparent terms;
 - a right to conduct surveys on proportionate, non-discriminatory and transparent terms;
 - a right to access physical infrastructure under fair and reasonable terms, including price;
 - a right to access in-building physical infrastructure under fair and non-discriminatory terms, including price;
 - a right to information concerning civil works (location and type of works, network elements involved, estimated date for the starting of the works and their duration and contact point) under proportionate, non-discriminatory and transparent terms; and
 - a right to co-ordinate civil works where these are financed by public means under proportionate, transparent and non-discriminatory terms.

¹ 2016 No. 700 Electronic Communications, The Communications (Access to Infrastructure) Regulations 2016: <http://www.legislation.gov.uk/uksi/2016/700/made>.

² Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2014.155.01.0001.01.ENG

1.3 The ATI Regulations also provide that either party is entitled to refer issues to Ofcom where the rights or terms under which the rights are to be granted cannot be realised through commercial agreement.

Our Guidance

1.4 The ATI Regulations require Ofcom to issue guidance for the purposes of the ATI Regulations and to consult stakeholders on the guidance. On 26 July 2016 we published draft guidance for consultation. Nine stakeholders responded to our consultation.³ In finalising our guidance we have carefully considered these responses. We discuss the responses and our conclusions in Section 2 of this document and have separately published our final guidance.

1.5 Ofcom's objectives in relation to the guidance are twofold:

- First, to explain how a dispute may be referred to us under the ATI Regulations, how we will deal with any such dispute and the responsibilities of the parties in relation to the dispute; and
- Second, to explain some of the considerations we would be likely to take into account to determine disputes.

1.6 In relation to our second objective, the information we provide is at a relatively high level. We have taken this approach primarily because the ATI Regulations apply to what is potentially a very wide range of cases involving different types of physical infrastructure and different types of network provider.

1.7 Consultation respondents have not questioned the overall approach we adopted in our draft guidance but requested clarification in a number of areas. In finalising our guidance, we have not changed our overall approach but in response to these requests we have made some changes to our guidance. In Section 2 we set out a summary of the detailed issues raised and our conclusions.

1.8 A number of consultation respondents raised points which fell outside the scope of our consultation, for example some consultation respondents expressed the view that the ATI Regulations would not be an effective substitute for Significant Market Power (SMP) regulation under the EU Regulatory Framework For Electronic Communications (the European Framework)⁴ and asked Ofcom to implement additional measures to facilitate access to BT's physical infrastructure through its SMP regulation. Those issues will be the subject of our forthcoming Wholesale Local Access (WLA) market review. In addition, some respondents expressed concern about the effectiveness of *ex post* dispute resolution processes established by the ATI Regulations, particularly in comparison with *ex ante* regulation under the European Framework. Again this issue is outside the scope of our consultation.

1.9 Our 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. It might for example be helpful to update the guidance

³ CityFibre, EE, Ofgem, Ofwat, Openreach, the Passive Access Group (PAG) (comprising Colt, Sky, Three, Vodafone and TalkTalk), TalkTalk, Virgin Media (VM) and Vodafone. Non-confidential versions of the comments received are available on Ofcom's website: https://www.ofcom.org.uk/consultations-and-statements/category-1/ati-dispute-guidance/_recache

⁴ As set out in Directives 2002/21/EC, 2002/19/EC, 2002/20/EC, 2002/22/EC, 2002/58/EC and 2002/77/EC.

with more specific information relating to particular circumstances if it becomes clear that there is demand for access to a particular type of infrastructure.

Section 2

Summary of consultation responses and our conclusions

Introduction

- 2.1 In this section, we summarise the key points made by consultation respondents and broadly follow the structure of our guidance in doing so.⁵ Where relevant, we indicate how and where our final guidance has been amended.
- 2.2 The issues covered in this section include; scope, Ofcom's dispute resolution function, additional measures to verify requests under the regulations, information about physical infrastructure, surveys about physical infrastructure, access to physical infrastructure, access to in-building physical infrastructure, information about civil works and coordination with civil works funded from public funds.

Scope

Definitions

- 2.3 CityFibre considered that there is some uncertainty about the definition of 'network operator' in the Directive and the corresponding definition in the ATI Regulations. It considered this might lead infrastructure operators to reject requests on the basis that they are not covered by the regulations or to dispute the status of network providers making requests. It asked Ofcom to clarify the definitions to avoid unnecessary disputes.⁶
- 2.4 CityFibre did not explain why the definition of network operator is uncertain. It is not immediately apparent to us that there is any uncertainty in the definition of network operator or infrastructure operator definition in Part 1 of the ATI Regulations.

Interaction with significant market power regulation

- 2.5 Several consultation respondents (CityFibre, Openreach, The PAG and TalkTalk) discussed the interaction between the ATI Regulations and existing passive infrastructure access regulation, namely the Passive Infrastructure Access (PIA) remedy imposed on BT in the WLA market:
- CityFibre acknowledged the potential for the ATI Regulations to deliver access to a wider range of infrastructure, but expressed concern that the ATI Regulations are seen by Ofcom as effectively replacing the need for SMP-based duct access provisions in the business connectivity market to which purpose they find the ATI Regulations entirely unsuitable.⁷

⁵ CityFibre also note three typographical errors it believes Ofcom made in its draft guidance. We agree with CityFibre on two of the points it raised and we have updated paragraphs 4.6 and 5.32 (paragraph 5.31 of the draft guidance is paragraph 5.32 of our final guidance) of our guidance accordingly.

⁶ CityFibre response, page 6.

⁷ CityFibre response, pages 4-5.

- CityFibre considered that in geographic locations where access to physical infrastructure could be sought from an operator with SMP as well as an operator who does not have SMP, the non-SMP infrastructure operator may reject requests under the ATI Regulations on the basis they are unreasonable.⁸
 - Openreach asked that we be more clear about how the ATI Regulations interact with infrastructure access obligations imposed under SMP regulation. Openreach was of the view that to the extent that the ATI Regulations establish a broader range of access than those required under SMP regulation, Openreach would be able to set access prices in compliance with the ATI Regulations and would not be constrained by SMP regulation.⁹
 - The PAG was concerned that Openreach might discourage access by refusing access or by tying Ofcom up in lengthy disputes and litigation. It urged Ofcom to impose unrestricted duct access in the upcoming WLA market review.¹⁰
 - TalkTalk doubted that the ATI Regulations would lead to material use of BT's infrastructure by other telecoms providers. It said that, in view of BT's strong incentive to prevent other telecoms providers from using its passive infrastructure to compete with it, a strongly specified *ex ante* regime is required to ensure that other telecoms providers can compete with BT effectively.¹¹
- 2.6 The rights and obligations created by the ATI Regulations are not dependent on any finding of SMP and are not intended to address competition problems in markets where there is SMP. Matters relating to competition problems due to SMP or the effectiveness of the SMP remedies, including the passive infrastructure remedies, fall outside the scope of this consultation and can be considered in the appropriate Ofcom market review such as the forthcoming WLA market review.
- 2.7 We consider that paragraph 1.8 of the guidance provides a clear explanation of the relationship between the ATI Regulations and SMP regulations. This reflects recital 12 to the Directive which makes clear that the rights under the Directive (which the ATI Regulations transpose) are without prejudice to the European Framework. Paragraph 1.8 also explains that to the extent that the ATI Regulations establish a broader right to access physical infrastructure than exists under an SMP condition, this right is not limited by the scope of the SMP condition.
- 2.8 Openreach also requested that Ofcom amend the guidance to include the first sentence of Recital 12 of the Directive which reads "*In the light of the lex specialis principle, when more specific regulatory measures in conformity with Union law apply, those should prevail over the minimum rights and obligations provided for in this Directive.*"¹² We consider this is a useful addition to our guidance concerning the relationship between the ATI Regulations and the European Framework and have amended paragraph 1.8 of the guidance accordingly.

⁸ CityFibre response, page 7.

⁹ Openreach response, page 2.

¹⁰ The PAG response, pages 2-3.

¹¹ TalkTalk response, section 2.

¹² Openreach response, pages 1-2.

Ofcom's dispute resolution function

General

- 2.9 Several consultation respondents commented on and broadly welcomed our proposed approach to resolving disputes. VM considered our approach provides a reasonable balance between providing greater detail on the process without being overly prescriptive.¹³ Vodafone said our proposed framework broadly fits the existing dispute framework but urged us to commit to a review after two or three years, once the scope and volume of disputes is better understood.¹⁴ In light of the responses, we have decided not to change our approach in our guidance. We agree with Vodafone that it is good practice to keep guidance under review; we note this at paragraph 1.6 of our guidance. We are not setting a specific timetable for review as we consider there is too much uncertainty as to how frequently Ofcom will be called on to resolve disputes.
- 2.10 VM expressed concern in its response that including timeframes in the dispute resolution process at this stage is unhelpful due to uncertainties.¹⁵ Whilst we agree there are uncertainties, we consider it useful to provide clarity to stakeholders on how we expect the dispute process to work so stakeholders broadly know what to expect and when. Therefore, we have not removed illustrative timescales in finalising our guidance.

Dispute reference and resolution

- 2.11 Three consultation respondents Openreach, Vodafone and Ofgem commented on this topic.
- 2.12 Openreach requested that we clarify the obligation on us to consider all disputes which fall under the ATI Regulations, which is in contrast to the dispute resolution regime under the European Framework where Ofcom can decide not to investigate and/or make a determination in relation to certain types of dispute.¹⁶ We agree with Openreach that there are some important differences in the dispute frameworks including the requirements on us. Paragraph 2.4 of our guidance is clear that ATI Regulation 13 requires Ofcom to consider any dispute referred to it under ATI Regulation 12 and make a determination for resolving it. We have not updated our guidance on this point.
- 2.13 Vodafone asked that the guidance be clearer on whether disputes that fall within Ofcom's dispute resolution function under the ATI Regulations include those relating to existing as well as new agreements. Vodafone encouraged us to state that we will resolve disputes relating to new access requests and where an amendment to an existing agreement cannot be agreed.¹⁷ While we note Vodafone's point that the definition of disputes, as set out in ATI Regulation 12, does not make reference to whether the dispute must be in relation to a request related to a new or existing agreement, we would need to be satisfied that a request for an amendment to an existing agreement amounted to a request under the ATI Regulations in the circumstances of the particular case; that is, whether it concerns a request made

¹³ VM response, page 2. (References to page VM numbers are against the non-confidential version of VM's response).

¹⁴ Vodafone response, page 1.

¹⁵ VM response, page 5.

¹⁶ Openreach response, page 2.

¹⁷ Vodafone response, pages 1-2.

under ATI Regulation 4, 5, 6, 7, 8 or 9 which is in dispute. For example, if a network provider were to seek an amendment to an agreement shortly after it had entered into an agreement, and if unsuccessful refer a dispute to us, we would need to consider carefully if there was a genuine dispute as to that amendment. We have clarified that amendments to agreements may be included in our guidance at paragraph 2.4.

- 2.14 Ofgem suggested we encourage any Parties¹⁸ bringing a dispute against an electricity and gas company to resolve their dispute with the company concerned in light of the CEAR Act 2007 and the Gas and Electricity Regulations 2008 which states that electricity and gas network companies are required to establish arrangements to handle complaints and disputes.¹⁹ We understand that the requirements on such companies include situations where disputes arise between companies (as well as consumers). We note that the right to bring a dispute under the ATI Regulations is independent of the CEAR Act 2007 and the Gas and Electricity Regulations 2008 and that there is no requirement on Parties to have exhausted all other rights before relying on the ATI Regulations. In the context of disputes under the ATI Regulations, we note that where such frameworks have been used in trying to resolve the dispute, this could form part of an explanation of the grounds for dispute (see Appendix 1 of our guidance, paragraph A1.10).

Consultation process

- 2.15 Three consultation respondents (Openreach, VM and Vodafone) requested that we always seek Parties' representations through a provisional conclusions document (and not just in relation to disputes regarding access to physical infrastructure). The reasons cited by respondents include in summary: views that omitting this step would slow down the resolution process and increase the risk of appeals; consulting Parties is in the interest of transparency, thoroughness, good governance and well-reasoned decision making. VM went on to note that if we maintain the position set out in the draft guidance, we should consider more tightly defining the circumstances where we would seek Parties' representations.²⁰
- 2.16 We agree with respondents about the importance of transparency and thoroughness in a dispute resolution process. We believe our proposed process will achieve these objectives. We are ensuring that the process is transparent - we plan to go beyond the requirement imposed by the ATI Regulations and publish a summary of any disputes we open in our competition bulletin, and publish dispute references and representations after closing the dispute. With regard to thoroughness, in what we expect to be the most complex disputes we will normally issue Parties with our provisional conclusions for disputes concerning access to physical infrastructure. In other types of disputes we do not expect this will be required typically but we may follow the same process in exceptional circumstances. It is not possible to be definitive about such exceptions but they could potentially arise in cases where for example there are complex technical questions in the dispute (e.g. questions arising out of the conduct of an infrastructure survey). We have added this clarification to Figure 1.1 of our guidance.

¹⁸ We explain at paragraph 2.1 of our guidance that under ATI Regulation 12, a dispute may be referred to Ofcom either by the person making the request under the ATI Regulations or the person to whom the request was made under the ATI Regulations. Such persons are referred to as 'Parties'.

¹⁹ Ofgem response, page 1.

²⁰ VM response, page 5.

2.17 VM raised an additional comment regarding our proposed consultation process. VM was concerned about the “*appropriateness of Ofcom considering...publishing a Provisional Conclusions document and opening this to other stakeholders to comment*” and stated that publishing such a document would be unwelcomed by both Parties involved in the dispute which appears to be because of confidentiality and concerns that competitors would influence the terms.²¹ In our guidance, we set out that we envisage publishing a provisional conclusions document for wider stakeholders seeking representations when it is clear that the matters in dispute could have implications for other infrastructure operators and network providers. Parties can be assured that the information published will be both relevant and appropriately sensitive to confidentiality concerns (and as is required by ATI Regulation 17). We have not considered it necessary to update our guidance on this issue.

Consulting with persons who have functions of a public nature

2.18 Ofgem and Ofwat made representations regarding how Ofcom consult persons who have functions of a public nature. Ofgem requested early notification of relevant disputes. Ofgem and Ofwat expressed some concerns about our proposed timeframe for responding to information requests, three to 10 days, on particularly complex or technical questions, and asked that we engage informally with other regulators in advance of sending formal requests for information and advice. In addition, Ofwat suggested that the guidance distinguish between requests for information and requests for advice, and that more time be allowed for responses to the latter.

2.19 We agree that early engagement with persons who have functions of a public nature is important in a successful dispute resolution process. As we set out in our draft guidance at Figure 1.1, we will informally engage with such bodies in advance of sending them requests for information under ATI Regulation 17. As regards the timeframe for responding to information requests, we proposed that we normally expect to allow respondents between three and 10 days to respond. In exceptional cases we can consider whether to extend the timeframe for response. We have not considered necessary to update our guidance on this point, however, we have clarified at paragraph 2.14 of our guidance that we will engage with such bodies throughout the dispute resolution process as appropriate.

2.20 In addition, we agree with Ofwat that it is useful to distinguish between different types of input we may require. We may request input from relevant bodies, in addition to consulting relevant bodies, but we do not envisage asking other bodies to carry out analysis for us, for example, technical reports.

Statutory time limits and exceptional circumstances

2.21 Openreach requested clarification on what might be considered exceptional circumstances including whether exceptional circumstances under the dispute regime in the European Framework would be the same as those in the context of the ATI Regulations.²² In our draft guidance we confirmed that we will on a case by case basis consider whether there are exceptional circumstances, including in light of any representations which have been made. We also noted that exceptional circumstances should be construed narrowly on the facts of a particular case. This is

²¹ VM response, page 5.

²² Openreach response, pages 2-3.

consistent with the approach we have taken in our dispute resolution guidelines for disputes under the European Framework.²³

- 2.22 As regards providing greater clarification as to when exceptional circumstances might apply, since we will not know in advance what circumstances would need to apply to be regarded as exceptional, we are unable to clarify this further in our guidance. To give stakeholders examples of when exceptional circumstances have been cited in disputes under the European Framework, we recently considered it to be inappropriate to determine one dispute until we had the opportunity to consider the implications of another dispute which we were considering at the same time (albeit on a slightly different timescale) which involved overlapping issues. We have previously cited exceptional circumstances where we were considering a dispute that raised similar issues to a previous dispute decision which was on appeal. We have waited until relevant court decisions have been decided before resolving such disputes.
- 2.23 CityFibre enquired into the extent to which Ofcom's decisions in dispute resolution should be considered as establishing a 'case law' that can be referred to by other Parties.²⁴ As set out in our draft guidance, disputes will be determined on the facts of each and every case. However, where a dispute raises similar issues to an earlier dispute, while any outcome in the later dispute will depend on the facts of the specific case, that earlier dispute is likely to provide broader context.

Providing versions of documents to share with Parties/for publication

- 2.24 VM and Vodafone commented on this topic. VM stated that the requirement that representations made by the subject of a dispute must include versions which can be shared with the disputing Party and a non-confidential version that can be made public (after the closure of any dispute) may limit Ofcom's ability to resolve disputes swiftly and/or to receive relevant information from Parties.²⁵ We do not agree with this point of view. Our experience of resolving disputes under other frameworks is that sharing details of the matters in dispute with the subject of the dispute and requiring an appropriate document to be submitted to us for this purpose is an important part of an efficient dispute resolution process. Accordingly, we have not updated our guidance on this point.
- 2.25 Vodafone suggested that in relation to disputes concerning matters of national security, in the interests of transparency, Ofcom should consider sharing redacted versions of correspondence between the infrastructure operator and the Minister of the Crown and/or a redacted version of the Minister's opinion with network providers.²⁶ In this context, Vodafone noted that there is nothing in the ATI Regulations to prevent this. Whilst the ATI Regulations prevent us from disclosing information that would be prejudicial to national security, we agree that the ATI Regulations do not expressly prevent sharing redacted versions of the Minister of the Crown's opinion. However, it is not clear to us that this would bring benefits. The issues will be of a highly sensitive nature so it is likely redacted versions will contain very little if any, insight. We have therefore concluded it is not appropriate to add this step into our process.

²³ Discussed at paragraphs 5.46-5.47 of the Dispute Resolution Guidelines: https://www.ofcom.org.uk/_data/assets/pdf_file/0020/71624/guidelines.pdf

²⁴ CityFibre response, page 6.

²⁵ VM response, pages 5-6.

²⁶ Vodafone response, page 2.

Ofcom's powers to award costs

- 2.26 TalkTalk expressed concern that there could be 'gaming' of the ATI Regulations and have suggested that Ofcom include measures that encourage compliance with the intent of the Directive. TalkTalk suggested we include measures to encourage compliance, for example, fines for persistent misbehaviour or paying the costs of access seekers/Ofcom in its guidance.²⁷
- 2.27 We discuss our cost guidelines at paragraph 2.27 of our guidance. The guidelines provide the framework under which we will consider whether to award costs including the factors we may take into account, the methodology and process that will be used. Under these guidelines, we can consider the types of behaviour that TalkTalk have drawn attention to.

Risk of perverse incentives

- 2.28 VM expressed concern that access seekers will have an incentive to dispute the reasonableness of terms regardless of the infrastructure operator's proposal given they will be required to commit only limited resource and information to raise a dispute. VM proposed that the disputing Party should be required to provide evidence and justification for the reasons it considers terms to be unreasonable.²⁸ Appendix 1, paragraph A1.14 of our guidance already requires this.
- 2.29 VM also considered that were an access seeker able to successfully dispute the basis of an infrastructure operator's prices, it could establish an on-going precedence in the reduction in charges which would be referenced in any future access seeking arrangements with that infrastructure operator.²⁹ Similarly, CityFibre commented that access disputes can become a tactical mechanism to harm the economic prospects of new infrastructure being built.³⁰ As discussed at paragraph 1.4 of our guidance, Ofcom will consider each dispute referral on its facts, case by case. However, to the extent that previous disputes are relevant, we do not consider this to be problematic.

Additional measures to verify requests under the regulations

- 2.30 Several consultation respondents (CityFibre, EE, Openreach and VM) suggested that we should amend our guidance to require network providers to provide additional information to allow infrastructure operators to establish whether requests are in accordance with the ATI Regulations or to reduce the potential for abuse and misuse:
- CityFibre proposed that network providers should be required to make a statement confirming that any information requests are in accordance with the ATI Regulations i.e. with a view to deploying elements of a high speed electronic communications network. This would avoid both network provider and infrastructure operator incurring costs in requesting and providing information which could not subsequently be used.³¹

²⁷ TalkTalk response, pages 4-5.

²⁸ VM response, pages 3 to 4.

²⁹ VM response, page 3.

³⁰ CityFibre response, page 6.

³¹ CityFibre response, page 7.

- EE proposed that network providers should be required to demonstrate that they have Code Powers³² and additionally to provide reasonable justification for and explanation of the request including high-level plans, time-frames, confirmation and evidence that necessary consents or approvals have been applied for or are in the process of being applied for and details of any other requests which have been or will be made.³³
- Openreach considered that it would be reasonable for infrastructure operators to require network providers to provide information about their network plans, so that they could establish that requests for information are in accordance with the purpose of the regulations (i.e. with a view to deploying elements of a high speed electronic communications network), before releasing information about their infrastructure.³⁴
- VM considered that the rights established in the ATI Regulations should come with an obligation to use them reasonably and responsibly. It considered that the draft guidance did not do enough to address the potential for the regulations to be 'gamed' and exploited by network providers seeking to gain a commercial advantage or otherwise raise vexatious requests. VM proposed that Ofcom should rebalance the guidance to: ensure that infrastructure operators have access to additional information to determine that requests are bona-fide; take greater account of the commercially sensitive nature of information requested; ensure that infrastructure operators have a mechanism to refuse requests where requests appear to be on ulterior motives or to favourably resolve disputes; and provide additional safeguards to protect against the incentives requestors have to dispute terms.³⁵

2.31 We consider that the ATI Regulations and our guidance are sufficient to address the concerns raised by consultation respondents.

2.32 Each of the rights under the ATI Regulations is subject to the requirement that the request must be with a view to deploying elements of a high-speed electronic communications network. In our guidance we have specified that each request should include a statement explaining that the request is in accordance with the relevant ATI Regulation.

2.33 Specifically in relation to requests for information about physical infrastructure, we note that the right to request infrastructure information under the ATI Regulations is not contingent on the supply of additional information (such as network or business plans) or on the possession of Code Powers. We therefore do not consider it appropriate to amend the guidance to include a requirement for such additional information to be provided. To the extent that infrastructure providers might seek to impose any such additional requirements, we would need to consider in the context of any dispute as to whether this is consistent with the ATI Regulations.

³² A telecoms provider that is subject to a direction by Ofcom under Section 106 of the Communications Act 2003 applying the Electronic Communications Code ('the Code'). The Code enables electronic communications network providers to construct electronic communications networks. The Code enables these providers to construct infrastructure on public land (streets), to take rights over private land, either with the agreement with the landowner or applying to the County Court or the Sheriff in Scotland.

³³ EE response.

³⁴ Openreach response, page 3.

³⁵ VM response, pages 2-3.

- 2.34 We also note that ATI Regulation 11 imposes a duty on network providers in relation to confidential information acquired from infrastructure operators or rights holders under the ATI Regulations. This duty requires network providers 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.
- 2.35 This duty is enforceable, by a person who is or might be prejudiced by a failure to comply with it, in civil proceedings.³⁶
- 2.36 Subject to the requirements under the ATI Regulations that any disclosable information must be provided on proportionate, non-discriminatory and transparent terms, infrastructure operators may impose additional terms which could include terms in relation to confidentiality. We have explained in our guidance that in the event of a dispute concerning terms as to confidentiality, we would consider the extent to which such additional terms are necessary to address confidentiality concerns over and above the duty in ATI Regulation 11. In view of this, we do not consider it appropriate to amend our guidance to specify additional safeguards for confidential information.

Information about physical infrastructure

Requests for information

- 2.37 CityFibre noted that the terms of confidentiality could cause a dispute and it is important that such terms are agreed before the two month period for the provision of information starts.³⁷ We consider that the ATI Regulations are clear that the timing for responding to a request commences from the date of the receipt of the request and not, as CityFibre suggests, the date any confidentiality undertakings are agreed.

Charges for information

- 2.38 VM and CityFibre commented on charges for information. VM agreed with our proposal that efficiently incurred costs should be recoverable and that specifying a methodology or quantum of charges would be inappropriate given that the nature, scale and complexity of requests may vary significantly from operator-to-operator and from request-to-request.³⁸
- 2.39 CityFibre agreed that only efficiently incurred costs should be recoverable and considered that charges for information should reflect the opportunity costs of not deploying the relevant resources for their standard duties. It considered this is particularly important for smaller network providers where requests under the ATI Regulations will be handled by staff members who have full-time roles whose efforts will have to be diverted to process such requests. CityFibre also noted that for infrastructure operators with relatively small network footprints, it may be necessary

³⁶ Specifically, civil proceedings for an injunction; for specific performance of a statutory duty under Section 45 of the Court of Sessions Act 1988; or any other appropriate remedy or relief.

³⁷ CityFibre response, page 7.

³⁸ VM response, page 8.

to recover costs of making changes to systems from a single network provider as there is no certainty that more requests will be received.³⁹

- 2.40 In the draft guidance, we explained that in most cases we would expect charges for information to reflect only the costs caused by retrieving and providing information. Where labour is required to retrieve and provide information, we would expect the cost to reflect the labour rates of the staff involved.⁴⁰ With regard to the recovery of costs associated with changes to systems and processes, we said in our draft guidance that we did not consider it appropriate to prescribe how such costs should be recovered. We recognise that it may be appropriate to recover costs from a single network provider if there is no certainty of future demand. However, in a dispute, we would look at whether the changes to systems and processes are really necessary to respond to that network provider's request efficiently. We do not consider it necessary to change our guidance on this topic.

Surveys about physical infrastructure

Responses to requests for on-site surveys

- 2.41 Three consultation respondents commented about responses to on-site surveys:
- Openreach noted that it had existing processes and procedures for responding to requests for surveys, and that it hoped to apply these to survey requests under the ATI Regulations. These procedures require telecoms providers to be *“established for the product they intend to buy and accredited to the minimum standard required to operate in or on the network.”*⁴¹
 - EE noted that some sites are subject to site agreements which impose conditions on on-site access including requirements for third parties including the landowner to consent to access and on-site supervision by the landlord. Surveys under the ATI Regulations would also have to be subject to these conditions and any charges set out in site agreements should be also passed on to requesters on a pass through basis. Additionally, the infrastructure operator may wish to supervise the survey which will create additional cost which should be paid by the requester on a pass through basis.⁴²
 - VM anticipated that it would use approved third party providers to undertake surveys and asked Ofcom to recognise this approach in the guidance.⁴³
- 2.42 The draft guidance made clear that subject to the requirement under ATI Regulation 5(2) to offer proportionate, non-discriminatory and transparent terms, that infrastructure owners may impose terms concerning the conduct of on-site surveys. Consultation respondents have cited various terms that they might wish to impose including: reusing suitable existing processes; reflecting terms of site agreements in on-site survey terms, supervising on-site surveys and using sub-contractors for on-site surveys. Whilst the ATI Regulations allow for surveys to be granted subject to terms, we would, however, consider whether the terms imposed by an infrastructure

³⁹ CityFibre response, pages 7-8.

⁴⁰ The staff may be internal, or, where there is no internal availability to deal with requests, external.

⁴¹ Openreach response, page 3.

⁴² EE response.

⁴³ VM response, pages 9-10.

operator are consistent with ATI Regulation 5(2) on a case by case basis in the context of disputes.

Refusals to requests for on-site surveys

- 2.43 VM suggested that we should amend the guidance to make clear that site surveys should always be preceded by a request for information, and that infrastructure operators have grounds to refuse survey requests where conclusive information about the extent/condition of physical infrastructure has already been provided in response to an information request. This would minimise the potential for vexatious requests and for requestors to seek information for the primary purpose of business intelligence.⁴⁴
- 2.44 The ATI Regulations do not require network providers to obtain information prior to making a survey request. We therefore do not consider it appropriate to amend the guidance. We do, however, observe that in practice it is likely to be more efficient and cost effective for network providers to obtain infrastructure information before requesting on-site surveys. It is unclear how or why the sequence of requests would minimise the potential for vexatious requests. We discuss consultation respondents' concerns about vexatious requests and use of the ATI Regulations to gather business intelligence at paragraph 2.30 above.

Access to physical infrastructure

Scope of usage in ATI Regulation 6

- 2.45 Two consultation respondents made comments regarding the scope of usage of ATI Regulation 6. VM commented that *“the requirement that the network is “capable of delivering access to broadband services at speeds of at least 30 megabits per second (30Mbit/s)” essentially provides no practical limitation on use. Given the intent of the underlying Directive, it is reasonable that the request should relate to investment that has as its principal objective the actual delivery of broadband services, even if other services are also provided.”*⁴⁵ As we noted in our draft guidance, for a request to be valid it must be made with a view to deploying elements of a high speed electronic communications network using that infrastructure, and high speed means capable of delivering access to broadband services at speeds of at least 30 Mbit/s.
- 2.46 CityFibre asked for clarification on the scope of the ATI Regulations, specifically that Ofcom provide guidance on whether the rights under the ATI Regulations allow for point-to-point business connectivity products.⁴⁶ To address CityFibre's point on the scope of requests that fall within the ATI Regulations, we have provided additional clarification in paragraph 5.4 of the final guidance. Specifically, we note that although the ATI Regulations are restricted to networks capable of delivering access to broadband services at speeds of at least 30 Mbit/s the ATI Regulations are silent as to specific customers (e.g. residential versus business customers), technical interfaces, network architectures (e.g. point-to-point versus point-to-multipoint) or network segment.

⁴⁴ VM response, page 9.

⁴⁵ VM response, page 10.

⁴⁶ CityFibre response, pages 5, 8 and 9.

Requests for access to physical infrastructure

- 2.47 VM said that the guidance concerning the information which network providers should provide as part of an access request is insufficient to: verify the request; to determine whether the request is genuine; or to determine the terms on which access should be provided. VM considered that network providers should also provide detailed and verified business plans (including forecasts of the services to be sold as well as pricing and acquisition strategies) and evidence of funding for the project and overall financial solvency.⁴⁷
- 2.48 The ATI Regulations do not require access seekers to provide business plans as part of a request for access. Infrastructure operators are free to ask an access seeker for details of their business plans for the purposes of determining the terms on which to offer access, but the access seeker does not have to provide the requested information for the ATI Regulations to be engaged.⁴⁸ Nevertheless, we do not consider that this information is necessary to be able to offer terms which are fair and reasonable. For example, in the absence of business plans, infrastructure operators can offer access terms based on their own expectations, or offer terms which are contingent on particular outcomes. In a dispute, our assessment of whether the terms offered are fair and reasonable will take into account the information made available to the infrastructure operator.

Wayleaves

- 2.49 TalkTalk responded to our consultation on this topic and suggested that infrastructure operators should be subject to additional obligations with respect to additional permissions such as wayleaves that are required for a network provider to use physical infrastructure. In particular:
- where the infrastructure owner has to obtain the permissions it should be required to obtain them in a reasonable timescale and to ensure that any charges passed on to access seekers are reasonable; and
 - where the network provider has to obtain the permissions, the infrastructure owner should be required to provide reasonable support such as providing details of the relevant rights holder and other necessary information in a timely manner.⁴⁹
- 2.50 ATI Regulation 3(1) specifies that the requirement on an infrastructure operator or rights holder to provide access to infrastructure or access to in-building infrastructure are without prejudice to the property rights of any other person.
- 2.51 The ATI Regulations do not impose any specific obligations on infrastructure operators or infrastructure owners in relation to wayleaves. The regulations do not, however, preclude commercial agreements to provide information or assistance concerning wayleaves. In the absence of such agreements network providers will have to obtain any necessary wayleaves in order to use an infrastructure operator's passive infrastructure.

⁴⁷ VM response, page 10.

⁴⁸ These arrangements could include a commercial agreement to address concerns around how details of confidential business plans are used by the infrastructure operator.

⁴⁹ TalkTalk response, page 4.

Responses to requests for access to physical infrastructure

Charges for access to physical infrastructure

2.52 A number of respondents made comments about the proposed guidance on charges for access to physical infrastructure, particularly about how we will apply the criteria in ATI Regulation 16.

- TalkTalk agreed with some of the principles underlying the guidance, but requested that we provide clearer guidance on how charges should be set in practice. For example: how will subjective assumptions be set; how will we take into account the impact of access on the infrastructure operator's business plan; and how will we determine what costs are efficiently incurred. TalkTalk stated the lack of clarity in the draft guidance leads to uncertainty, appeals and risk for access seekers.⁵⁰
- VM was concerned that the guidance risks creating a free-rider problem as it makes no mention of any contribution to the underlying costs of installing and maintaining the relevant assets. VM considered that requiring infrastructure operators to provide access without reimbursement for the assets utilised and the associated option value of those assets would not be conducive to continued investment. Moreover, VM considered that the requirement in ATI Regulation 16 to take into account the impact of access on the infrastructure operator's business plan does not provide infrastructure operators with enough certainty that their investments will not be undermined by the ATI Regulations. As an example, VM said that Ofcom could inappropriately consider that a specific access request is reasonable on a simple test of whether that individual request does not undermine a broader business case. VM stated this would fail to take into account the combined effect of multiple individual requests. VM requested that we provide further clarity about how it anticipates operators analysing business plan impacts.⁵¹
- VM noted that it should be reasonable for access charges to reflect the rate of return that the infrastructure operator achieves on comparable products that make use of the physical infrastructure.⁵²
- EE noted that operators of telecoms infrastructure should be compensated fairly for the investment made and for any services provided e.g. maintenance, upkeep etc. Any "*fair and reasonable*" price for access should reflect that investment and those additional services.⁵³

2.53 As the ATI Regulations apply potentially to a very wide range of cases involving different types of physical infrastructure and different types of network provider, we consider that we can only provide guidance on how we expect to apply the criteria in ATI Regulation 16 at a relatively high level. The precise approach followed in a particular dispute will depend on the specific circumstances of that dispute. However, we have amended paragraph 5.24 of our guidance to clarify that the requirement to take into account the impact of access on the infrastructure operator's business plan requires that the price for access should ensure the viability of investments in physical infrastructure is not undermined. Specifically, in relation to EE's comments,

⁵⁰ TalkTalk response, paragraphs 1.3, 2.6, 3.1-3.3.

⁵¹ VM response, pages 11-12.

⁵² VM response, page 11.

⁵³ EE response.

our assessment of the impact on the viability of investments would be expected to take into account the ability to recover ongoing costs such as maintenance.

- 2.54 In paragraph 5.27 of the guidance, we already indicate that in evaluating any impact on the infrastructure operator's business plan, we will have regard to the factors set out in recital 19 of the Directive. This makes clear that the requirement to take into account the impact of access on the infrastructure operator's business plan includes the investments made in the physical infrastructure to which access is requested.⁵⁴ Recital 19 also refers specifically to the problem of free riding, and hence the need to fully take into account the impact of access on the economic viability of investments made in physical infrastructure.

Article 8 of the Framework Directive

2.55 Three consultation respondents commented on this topic:

- Openreach agreed with Ofcom that the application of Article 8 of the Framework Directive will depend on the specific circumstances of each dispute. Openreach also requested that Ofcom confirm it will take the Supreme Court judgment in the ladder charges case as context to the ATI Regulations.⁵⁵ Openreach noted that this judgment sets out views on how Article 8 applies to dispute resolution and in situations where the parties do not have SMP. Openreach considered that there is no reason why the judgment should not apply to dispute resolution in the ATI Regulations.⁵⁶
- CityFibre asked for clarity on how Article 8 will be applied to the dispute resolution process.⁵⁷
- The PAG considered there appears to be a direct conflict between Ofcom's duties under Article 8 of the Framework Directive and under the Communications Act 2003 and the ATI Regulations.⁵⁸

2.56 Taking the points raised in turn, we acknowledge the Supreme Court judgment referred to by Openreach which concerns dispute resolution regime under the European Framework and we will consider the relevance of this to a dispute under the ATI Regulations on a case by case basis. Turning to the point made by The PAG, it is not clear to us that a contradiction exists between the ATI Regulations and Ofcom's duties to promote competition including in line with Article 8. Consideration of Article 8 is specifically required under the ATI Regulations. We have amended paragraph 5.29 of our guidance to clarify that the regulations require us to take into account of Article 8 of the Framework Directive in resolving such disputes.

Refusals to requests for access

2.57 Two consultation respondents commented on this topic. CityFibre said that it understood that the purpose of the ATI Regulations is to make use of old, often

⁵⁴ In relation to the example given by VM, we would expect to not consider it appropriate to assess the impact of a specific access request by considering only its impact on the infrastructure operator's broader business case.

⁵⁵ Openreach response, pages 3-4.

⁵⁶ Openreach response, pages 3-4.

⁵⁷ CityFibre response, page 10.

⁵⁸ The PAG response, page 2.

unused infrastructure to reduce the cost of deploying fibre networks rather than to mandate access to recently constructed infrastructure deployed for fibre networks. CityFibre asked Ofcom to clarify that the objective of the ATI Regulations is not to effectively expropriate newly built physical infrastructure for which there are business plans that require the duct space provided for in the infrastructure, even if that utilisation may be one or more years away.⁵⁹

- 2.58 The access rights under ATI Regulation 6 are not contingent on the age of the physical infrastructure or the purpose for which it was built. Regulation 6(3)(b) does however set out possible grounds for refusal which include due to availability of space in the physical infrastructure to host the network elements, taking into account the infrastructure operators' sufficiently demonstrated future needs. Also, we note the requirements on Ofcom under ATI Regulation 16 in fixing any terms as to the price for access (discussed at paragraph 5.16 of our final guidance). We consider that our guidance is clear on these points and have therefore not amended our final guidance.
- 2.59 VM noted it was not clear on the implications of Ofcom's statements in the draft guidance where existing, inactive, infrastructure is currently present.⁶⁰ In our draft guidance we set out that on availability of space issues relating to current services, 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 explained that we would consider whether the infrastructure operator has plans to activate the service on the existing infrastructure and the timescales for activation or whether it intends to free space in the foreseeable future. VM explained that if it has a fully utilised duct, but cables are not active due to customers purchasing services by competitors, it is not clear what considerations Ofcom would apply. In such circumstances, VM explained it has no intention to remove the assets, but equally it would not be able to specify that it would provide services on these lines within a given timeframe.⁶¹ The ATI Regulations do not explicitly require that space must be made available if the existing cables are not used. They require however that, when refusing access on the grounds of availability of space, infrastructure operators have sufficiently demonstrated their future needs for the available space. We have provided further clarification on this point at paragraph 5.38 in the final guidance.

Access to in-building physical infrastructure

Requests for access to in-building physical infrastructure

- 2.60 VM said that requests for access to in-building physical infrastructure should include information on the technologies and network elements to be deployed, the types of services to be provided and the network provider's business model. Without this information it would be difficult to: verify that a request is bona-fide; determine whether a request would lead to any technical issues that may require mitigations or refusal of the request; determine whether granting a request would impair the infrastructure operator's business case.⁶²
- 2.61 The access rights under ATI Regulation 7 are not contingent on the provision of information about the elements of an electronic communications network that the

⁵⁹ CityFibre response, page 11.

⁶⁰ VM response, page 13.

⁶¹ VM response, page 12.

⁶² VM response, pages 12-13.

network provider wishes to deploy. It may, however, be useful for network providers to provide such information to help infrastructure operators to assess requests.

- 2.62 We have discussed VM's comments about the need for access requests to include information about the services to be provided in paragraph 2.30.

Refusals to requests for access to in-building physical infrastructure

- 2.63 VM said that the draft guidance specifying that a refusal to a request should include "*detailed reasons*" is disproportionate and liable to be misused or exploited in the case of disputes by network providers.⁶³
- 2.64 ATI Regulation 7(4)(b) requires that rights holders who refuse requests for access to in-building physical infrastructure under ATI Regulation 7(1) must provide the grounds for refusing requests for access and the reasons those grounds apply.⁶⁴ To make our guidance more consistent with ATI Regulation 7(4)(b) we have amended paragraph 6.16 to specify that reasons for refusal should be supplied rather than detailed reasons. For the same reason we have also made the same amendment to paragraph 4.12 of our guidance concerning refusal of on-site survey requests.
- 2.65 With reference to ATI Regulation 7(3)(a) (which provides grounds for refusal if it would be technically possible and economically efficient for the network provider to install additional in-building physical infrastructure) VM asked Ofcom to provide guidance on its interpretation of how "*economically efficient*" will be asserted by an infrastructure operator and assessed by Ofcom where this is cited as a ground for refusal.⁶⁵ At this stage we do not think we can give general guidance on this point and believe the matter is best considered on a case by case basis.

Information about civil works

Requests for information

- 2.66 VM asked Ofcom to amend the guidance to reduce the burden on infrastructure owners by making clear that network providers must first determine what information about planned civil works is publically available before submitting requests for information to infrastructure operators under ATI Regulation 8.⁶⁶
- 2.67 We have explained in paragraph 7.6 of our guidance that network providers should in the first instance obtain information about planned civil works from streetworks registers and planning registers. Moreover, the two week lead time for responses under ATI Regulation 8 together with infrastructure operators right to refuse requests relating to information that is in the public domain should give network providers a strong incentive to check public registers before submitting information requests.

Coordination with civil works funded from public funds

- 2.68 VM asked whether Ofcom could provide further clarity in the guidance about the grounds for refusal (under ATI Regulation 9(4)(b)) of requests for coordination of civil works that give rise to additional costs. VM said that it was not clear what these costs

⁶³ VM response, page 13.

⁶⁴ Subject to ATI Regulation 10(8) concerning refusal on national security grounds.

⁶⁵ VM response, page 13.

⁶⁶ VM response, page 14.

may be or the extent to which they could be identified during the one-month response period specified in the ATI Regulations.⁶⁷

- 2.69 In paragraph 8.11 of the guidance we explain that ATI Regulation 9(4)(b) provides grounds for infrastructure operators to refuse to coordinate works that give rise to any additional costs after any contribution made by the requesting network provider. Such 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. We have clarified our guidance on this point.

⁶⁷ VM response, page 14.