Trends following the Communications (Access to Infrastructure) Regulations 2016

01/12/2017

TMT analysis: Graham Read QC and Rory Cochrane of Devereux Chambers consider the trends following the implementation of the Communications (Access to Infrastructure) Regulations 2016.

What are the Communications (Access to Infrastructure) Regulations 2016

The Communications (Access to Infrastructure) Regulations 2016, SI 2016/700 (the Access to Infrastructure Regulations) implemented EU Directive 2014/61/EU on 'measures to reduce the cost of deploying high-speed electronic communications networks.' Communications 'network providers' are given various rights to obtain information and surveys concerning physical infrastructure owned by third party 'infrastructure operators' and, where the network provider considers the physical infrastructure can be used for 'deploying elements of a high-speed electronic communications network using that infrastructure', the network provider can 'request an infrastructure operator for access to the operator's physical infrastructure to give the network provider access' in order to install communications network apparatus.

The definition of infrastructure operator includes not only other communications providers (falling within the definition of 'network provider') but also undertakings providing infrastructure for transport services (such as railways ports and roads) and the supply of gas, electricity, heating and, in certain instances, the supply of water and sewage facilities.

How are any disputes about these rights resolved?

Under the Access to Infrastructure Regulations, Pt 3, Ofcom is given the role of resolving disputes between network providers and the providers of physical infrastructure in respect of such requests for the provision of information, surveys and/or access to the physical infrastructure. On 26 July 2016, Ofcom issued a consultation on its likely approach and issued a final statement setting out its guidance for handling access to infrastructure (ATI) issues which was published by Ofcom on 6 December 2016 (Ofcom's ATI Statement and Guidance).

Were the Access to Infrastructure Regulations intended to be self-contained or is it part of a wider package?

As the Access to Infrastructure Regulations implemented Directive 2014/61/EU (which was designed to facilitate 'the ambitious broadband targets' set out in the EU Commission's Digital Agenda for Europe), these regulations were designed to be a specific self-contained code. The government consulted on them as a discrete area prior to implementation (see the Department for Culture, Media and Sport (DCMS) consultation response dated 4 July 2016). However, they cannot be entirely divorced from the rest of the government's digital broadband strategy which included putting 'in place modern regulation which fully supports the rollout of digital communications infrastructure'. Thus, broadly over the same period as the Access to Infrastructure Regulations was being introduced, the government also sought to reform the Electronic Communications Code (the Code). That gives communications providers, who are designated by Ofcom as 'code operators', the right (in the specified circumstances) to place electronic communications apparatus over land occupied by third parties (so called 'wayleaves').

After much discussion (including reports from the Law Commission) the government finally introduced a new Code in the Digital Economy Act 2017 (DEA 2017). The last press release from the government (19 October 2017) suggests that the new Code will be implemented in December 2017, although this is yet to be confirmed.

Are Network Providers using the Access to Infrastructure Regulations?

Certainly, the Access to Infrastructure Regulations have been used by network providers in their negotiations with third party infrastructure providers (though for obvious reasons such negotiations are rarely in the public domain). However, as far as we are aware, no network provider has engaged in a full-scale dispute in order to obtain access to physical infrastructure. For example, as far as can be seen from Ofcom's website, there is no reference to any specific dispute referrals to Ofcom. On the assumption that Ofcom adopts the same procedure as disputes between communications providers under sections 185 to 191 of the Communications Act 2003, any such disputes which are accepted by Ofcom for resolution would be listed in Ofcom's Competition Bulletin and, to date, there are none currently listed. (Ofcom's ATI Guidance explicitly requires any ATI disputes be sent to its competition complaints section).

Why has the dispute resolution procedure before Ofcom not been employed?

From our experience, one of the key reasons for this is ongoing uncertainty around when the government will introduce the new Code. In particular, the Access to Infrastructure Regulations, reg 3(2), provides that the regulations 'are without prejudice to the rights and obligations arising under the electronic communications code'. At present this means the existing code, originally established under the Telecommunications Act 1984, sets out the relevant rights and obligations.

However, the rights and procedures will significantly change when the new code is implemented. By way of just one example the test for any consideration payable will change and, according to the government's own consultation papers, considerably reduce. Further, although the Access to Infrastructure Regulations are designed to be a self-contained code, Ofcom's ATI Statement and Guidance seems to suggest there is a need for a wayleave if actual equipment is to be installed (see para 5.8 of the Guidance). In any event, ancillary rights might be best resolved by a wayleave (for example the new Code gives code operators the right to connect to a power supply). It is likely, therefore, that only with the implementation of the new code will network providers seek to will make greater use of the Access to Infrastructure Regulations in tandem with it.

Graham Read QC has been listed in the legal directories for over a decade as a leading Silk in telecommunications and has been involved in many wayleave cases, including advising on the new EC Code.

Rory Cochrane has also extensive experience in wayleave cases and has advised the government on the ATI Regulations. They have both previously written on the ATI Regulations.

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