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Editorial

In Brief

Articles

- Access to infrastructure – new rights for the digital economy
  Graham Read QC and Rory Cochrane
- EU opinion of the Advocate General in Tele 2/Watson – data retention and human rights
  Lorna Woods
- The *Schrems* decision, the EU-US Privacy Shield and the necessity to rethink how to approach cross border personal data transfers at global level
  Stefano Varotto

Case Notes and Comments

Recent Developments

Bloomsbury Professional

Access to infrastructure – new rights for the digital economy

Graham Read QC and Rory Cochrane

Introduction

Those who voted to leave the EU on 23 June, particularly because of concerns over the UK having to implement rafts of EU regulation into UK law, might be a little taken aback to know that, just some 11 days later, the UK dutifully published the Communications (Access to Infrastructure) Regulations 2016 (the ATI Regulations). These implemented EU Directive 2014/61/EU on 'measures to reduce the cost of deploying high-speed electronic communications networks' (2014 Directive) and became law on 30 July 2016. The 2014 Directive, and now the ATI Regulations, create completely new rights of infrastructure access in order to encourage telecommunications investment in high-speed broadband communications networks. They extend to infrastructure which is provided, not only by other telecommunications companies, but also by operators in the gas, electricity, water, railways, roads, ports and airports industries.

Of course, until Article 50 of the Lisbon Treaty is implemented, the UK has a legal obligation to comply with EU obligations. Even after it ceases formally to be bound by EU law, given the euro-centric nature of the UK electronic communications sector, it seems unlikely that the UK Government would be keen to depart too much from the EU approach to communications. But in any event, the ATI Regulations form just one element of a larger strategy by the government to improve internet connectivity, to ensure broadband availability and improve communications generally (including network coverage). As the Queen said in her speech to Parliament on 18 May 2016 'Measures will be brought forward to create the right for every household to access high speed broadband'. Thus, the day after the publication of the ATI Regulations, the Digital Economy Bill received its first reading in the House of Commons on 5 July 2016. The Bill contains a number of disparate measures, including some significant changes to the Communications Act 2003 (the 2003 Act): for example the basis of an appeal to the Competition Appeal Tribunal from Ofcom's decisions is to be narrowed from an 'on the merits' appeal to a judicial review test.

This article focuses on the ATI Regulations which are law at the time of writing. It looks primarily at those rights that have been created over 'infrastructure operators' whereby 'network operators' can obtain information about, conduct a survey on, or gain access to the 'physical infrastructure' of such infrastructure operators. Regulations 3-6, on which this article concentrates, open up a new means of network operators accessing a vast infrastructure, previously unavailable. We look at (i) their background; (ii) the general concepts which lie at the heart of the ATI Regulations; (iii) the rights and obligations created; and (iv) the dispute resolution role which Ofcom undertakes. At the end, we also very briefly discuss other aspects of the ATI Regulations which are more tied to property rights including access to 'in-building physical infrastructure' or 'access points' and to the coordination of civil works (regs 7-9).

The new Digital Economy Bill, which is still to be implemented into law at the date of writing, must await a further article. However, in the context of the government's agenda it is worth just highlighting two points. First, Part 1 of the Bill extends Ofcom's powers to impose a universal service order under section 69 of the 2003 Act to cover 'broadband connections and services' including 'guidance about matters relating to the speed or other characteristics of broadband connections or services'.

Second, Part 2 of the Bill introduces the much trailed new electronic communications code, consisting of some 104 paragraphs. This will replace the old code originally contained in Schedule 2 of the Telecommunications Act 1984 (which contained a mere 29 paragraphs**!**). A key feature is the desire to roll out better and faster communications networks which expressly dovetails with the ATI Regulations. As the Department for Culture Media and Sport made clear in its May 2016 statement on the new code (in connection with the consideration payable for code rights):

> *the nature of digital communications has changed significantly since the Code was established… [in] 1984. Given the priority that this government attaches to digital communications and long-term investment in UK infrastructure, and the ever more vital role that digital communications play in economic growth, productivity gains, and social interaction, we consider that reform must now go further.* [1]

The new code, therefore, will be a further element in rolling out broadband connectivity. Indeed it is worth noting from the outset that regulation 3(2) of the ATI Regulations makes clear that the ATI Regulations are 'without prejudice to rights and obligations arising under the electronic communications code'.

Access to infrastructure – new rights for the digital economy

Background to the 2014 Directive and the ATI Regulations

The 2014 Directive was implemented on 15 May 2014 following extensive negotiations amongst Member States. The 2014 Directive is one part of the initiatives being implemented by the Commission as a result of the Digital Agenda for Europe[2], intended to assist to achieve the Commission's target that by 2020 all households will have broadband speeds of at least 30 megabits per second (Mbps), and at least 50 per cent of these households will be subscribed to broadband services providing speeds that exceed 100Mbps.

However, a barrier to achieving those goals is the cost of rolling out high-speed broadband networks. As noted in the Ministerial Forward to Department for Culture Media and Sport's Consultation Document of 30 November 2015 (the DCMS Consultation), civil engineering works account for some 80 per cent of the cost of deploying a broadband network[3]. The government's impact assessment[4] (the impact assessment) for the ATI Regulations identified a number of studies which modelled the potential cost savings of infrastructure sharing (compared to a base case of no sharing). These indicate that savings could be between 16 per cent to as much as 75 per cent of the costs of deployment[5]. (The government also published a consultation response with the ATI Regulations on 4 July 2016 (the DCMS statement)).

Further, the government has identified benefits of rolling out high-speed broadband not only to the economy, but also to society more broadly, and to the environment. These are outlined in the UK Broadband Impact Study, SQW Group, November 2013 (the Broadband Impact Study Report).These benefits include, by 2024, the addition of £17 billion to the UK's annual gross value, and the creation of some 56,000 new jobs[6]. In addition, the Broadband Impact Study Report identifies that the increase in tele-working facilitated by faster broadband will save about 60 million hours of leisure time per annum, with attendant social benefits[7]. Also, that reduced commuting time will benefit households by £270 million per annum[8] and it is estimated that 1.6 million tons of CO_2 equivalent per annum might be saved, attributable to a reduction in commuting and business travel by car. There will also be a reduction in electricity use caused by firms replacing inefficient servers with more efficient public cloud platforms[9].

The 2014 Directive aims, therefore, to reduce the costs of the deployment of new broadband networks by a range of measures directed towards lowering the cost of civil engineering works[10]. It is designed to lay down 'minimum rights and obligations applicable across the Union in order to facilitate the roll-out of high speed electronic communications networks and cross-sector coordination'[11].

One final point by way of background. Article 10 of the 2014 Directive requires the appointment of a 'national dispute settlement body'. The ATI Regulations prescribe Ofcom as that body in the UK and require Ofcom to issue guidance on the Regulations[12]. Ofcom published its proposed guidance on dispute resolution (Ofcom's Draft Guidance) on 26 July 2016. That casts some light on how Ofcom will approach the ATI Regulations, though, at present, it is only a consultation document which may subsequently be changed.

General concepts

In order to appreciate fully the scope of the ATI Regulations it is necessary from the outset to consider four key definitions contained within regulation 2, which are fundamental to the rights created. First, the new rights under the ATI Regulations are conferred upon 'network providers'. These are defined as the undertakings 'providing or authorised to provide a public electronic communications network' within the meaning of section 151(1) of the 2003 Act[13]. This is subtly different to a 'public communications provider' under section 151(1)[14] and imports the need for the operator to have a network 'provided wholly or mainly for the purpose of making electronic communications services available to members of the public'[15]. It imposes a significant limitation on those who can exercise rights under the ATI Regulations, given that not all parties providing electronic communications services have a network making such services available to members of the public.

Second, those rights granted to network providers are in general[16] available vis a vis 'infrastructure operators'. This group is defined broadly and far wider than those engaged within the electronic communications sector. An 'infrastructure operator' is defined in regulation 2 as meaning:

> *(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;*

Sub-paragraph (a) means that network providers may utilise the ATI Regulations to assert rights against other network providers, including direct competitors. However, the limitations contained within the definition of network provider are likely to limit the scope of sub-paragraph (a). For example, operators, who provide infrastructure for use by others to provide their own electronic communications network and services, but who do not themselves provide 'a transmission system …' and linked apparatus[17] are unlikely to be considered 'network providers'. In this respect, the government actually considered the position of so called wholesale infrastructure providers (WIPs), such as the providers of network masts for mobile network operators to attach their transmission equipment (the Arqiva Group being one example[18]). It considered that they would not necessarily be providing a public electronic communications network and so would not necessarily constitute a network operator[19]. However, once an operator provides anything capable of constituting a public electronic communications network, then potentially *all* their infrastructure (including that infrastructure not associated with the public electronic communications network) falls within the scope of the ATI Regulation[20]. (As an aside, it is worth noting that the role of WIPs has caused some considerable debate when

Access to infrastructure – new rights for the digital economy

the definition of 'land' was being formulated in the new draft electronic communications code[21]).

Perhaps of much greater significance is the extension of 'infrastructure operators' beyond electronic communications undertakings to infrastructure providers in other industries. The consultation document stated that the affected companies will include the seven main electricity distribution network operators, as well as the four gas distribution network operators and six independent gas transporters. Moreover, entities providing physical infrastructure for transport services are also potentially subject to the rights. This includes Network Rail, Channel Tunnel, Heathrow Express, London Underground, and all commercial airports (including Heathrow, Gatwick, Luton and Stansted) and ports in the UK[22].

The width of this can be seen from the government's analysis of the private businesses that could fall within the scope of infrastructure operators. The breakdown by sector as follows[23]:

Sector	Number of firms identified
Telecoms operators	123
Electricity distribution	11
Gas distribution	10
Water and sewerage companies	32
Rail	4
Ports	18
Airports	58
Roads	1

The third point of importance in the definitions is that the various rights can only be exercised 'for deploying elements of a *high-speed electronic communications network*'[24]. However, this is not likely to be a particularly limiting factor since the expression 'high-speed' means 'capable of delivering access to broadband services at speeds of at least 30 megabits per second'[25]. Given that all fast broadband deals on the uSwitch site currently relate to speeds between 38 Mbps and 100 Mbps (though of course always quoted as 'up to'), already the 30 Mbps definition of the speed looks rather ordinary.

Fourth, the rights relate to 'physical infrastructure' which is defined as[26]:

> …..*any network element which is intended to host other network elements and which is not itself active, such as pipes, masts, ducts, inspection chambers, manholes, cabinets, buildings or entries to buildings, antenna installations, towers and poles. The term does not include cables (including strands of optical fibre) and elements of networks used for the provision of water intended for human consumption...*

The definition is extremely broad, but clearly intended to be limited to 'passive' infrastructure, ie not the active apparatus itself. (This can be contrasted with Ofcom's decision, in its Business Connectivity Market Review statement dated 28 April 2016, to require BT to allow access to its so called dark fibre, namely unused optical fibre[27]). Otherwise, only very limited exclusions are made to the definition of physical infrastructure (which include the provision of water for human consumption and the specific exemptions set out in Sched 1 to the ATI Regulations).

Rights and obligations

As already noted, this paper focuses on the three sets of rights and obligations contained respectively in regulations 4 to 6. While some of the issues overlap, each category of right is considered in turn below.

Regulation 4: Information about physical infrastructure

A network provider may make a request to an infrastructure operator for 'disclosable information'[28]. The nature of the 'disclosable information' is defined in regulation 4(2) and consists of '(a) the location, route, type and current use of the infrastructure; and (b) a point of contact for any further requests about the infrastructure'[29]. Subject to certain rights of refusal, including a 'national security' duty (considered below), an infrastructure operator must within two months 'beginning with the date of receipt of the request' make available on 'proportionate, non-discriminatory and transparent terms', the 'disclosable information' that it holds.

There are a number of questions that arise out of this regime. First, how is an infrastructure operator to know whether a valid request has been made? Given that the time limit for responding in two months commences with the making of the request, it is vitally important for infrastructure operators to be able to know whether a valid request has been made to start the clock. Ofcom's Draft Guidance has set out what Ofcom currently considers would be 'likely to be sufficient'[30] but in many ways it emphasises the possible problems:

(a) Ofcom's Draft Guidance suggests that the requestor should provide 'a clear description of the geographic area for which infrastructure information is requested', and that this should be as 'specific as possible so as to minimise the burden on infrastructure operators' including 'street names, postcodes and/or geographic coordinates' [31]. However, in highly developed streets where there are numerous utility services in the ground, a street name or post code may still lack sufficient specificity. No doubt Ofcom could refuse to consider any such dispute (discussed further below) on the basis that there would be a 'realistic prospect of the dispute being resolved' by the supply of more information, but it still leaves uncertainty. On the other hand, the very reason why the network operator wants the information is because he does not know what is there (otherwise he would probably be using regs 5 or 6 instead). Imposing a requirement for too detailed information, could, therefore, limit the effectiveness of the government's vision for broadband roll-out.

(b) Likewise, Ofcom's Draft Guidance suggests that 'a clear description of the infrastructure information sought' should be provided by the network operator seeking information[32]. However, again, the reason why the network provider wants to have the information is that he does not know precisely 'the location, route, type and current use of the infrastructure'[33], the very information he is entitled to seek under the ATI Regulations. This still all begs the question of how 'clear' a 'description' is actually needed.

Second, there may clearly be issues of confidentiality. This could be relevant both to concerns about business secrets and where the infrastructure in question is vulnerable to security issues, whether data security, or in many cases, physical security. Regulation 4(5) provides some safeguards against disclosure including where such information would, or would be likely to, prejudice '(a) the security or integrity of any network; (b) a duty of confidentiality owed by the infrastructure operator to another person; (c) operating or business secrets of any person; or (d) safety or public health'. Likewise, regulation 10(1) makes clear that any request under the ATI Regulations must be refused 'if or the extent complying with the request would be prejudicial to national security'.

However, it should be noted that, whilst the confidentiality of the information vis a vis a third person is protected under regulation 4(5)(b), unless the information falls within the other provisions of regulation 4(5) or 10(1), then confidentiality of the information vis a vis the infrastructure operator *itself* is not a ground for refusal. This concern is partly addressed by regulation 11, which places a duty on network providers, who acquire information in confidence from an infrastructure operator, (i) to use that information solely for the purpose it was provided for, (ii) to restrict access to the information, and (iii) to 'respect at all times' the confidentiality of such information[34]. Moreover, they have a duty to 'not pass such information to, or allow it to be used by, any other person *within* the network provider or otherwise'[35]. This raises issues over who within the network provider is entitled to receive the information in the first place. Ofcom's Draft Guidance further suggests that it may be possible 'for infrastructure operators to impose terms of confidentiality on network *over and above this duty*'[36]. Any such terms, Ofcom indicates, would need to be proportionate, non-discriminatory and transparent. However, there are clearly a number of potential issues surrounding how any duty of confidentiality will work in practice.

During the consultation, the government posed the question whether it would be appropriate explicitly to allow network operators to limit 'information which may harm competition'[37]. However, it did not make express provision for this in the ATI Regulations. Instead, the government appeared to be persuaded that sufficient protections existed in 'other community rules and regulations including competition law' and that it intended network operators 'to apply sensitive and appropriate requirements regarding confidentiality, and to limit information only where strictly necessary' [38]. It also appeared influenced by the existence of confidentiality rings in the Competition Appeal Tribunal[39]. The issue of whether information would, or would be likely to, prejudice the infrastructure operator's 'operating or business secrets' (and thus be a proper ground for refusing the information under reg 4(5) (c)) is likely to be a contentious issue, particularly between direct competitors. For example, between networks operators, it might well be argued that network configuration itself, including, for example, the optimisation of the location of network elements, is a business secret. An overly wide interpretation of this right of refusal, though, could frustrate the purpose of 2014 Directive and ATI Regulations.

Ofcom's Draft Guidance does not completely deal with this point (probably because Ofcom would only want to consider it in the context of actual disputes), but it does infer that it would look to confidentiality measures to alleviate concerns over operating or business secrets, 'expecting the infrastructure providers to be able to demonstrate that there are genuine concerns that are not addressed by ATI regulation 11 which cannot be mitigated by additional contractual terms such as nondisclosure agreements'[40].

Finally, whilst on the issue of secrecy, it should be noted that, under regulation 10, a request made under regulations 4 to 9 *must* be refused if complying with the request would be 'prejudicial to national security'. While that may sound like a surprisingly broad discretion for the infrastructure operator to have, it is mitigated by the requirement that the infrastructure operator cannot take a decision 'until it has received the opinion of the appropriate Minister of the Crown'[41].

Third, regulation 4 does not provide for any request to be on 'fair and reasonable terms' (contrast reg 6(2) discussed further below). However, the obligation to make the information available is 'on proportionate, non-discriminatory and transparent terms'[42]. Although these phrases are well known to competition and regulatory lawyers, they are highly fact specific. One area likely to be contentious is in relation to the costs the infrastructure operator can charge for the provision of the information. Some submissions during the government's consultation asserted that infrastructure operators should be able to charge above cost to prevent frivolous requests, and should be able to charge for the costs involved in setting up an online system to provide the information[43]. Regulation 14(2)(d) gives Ofcom the power, when determining any dispute, 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'. In Ofcom's Draft Guidance, it is suggested that infrastructure operators should be able to recover any 'efficiently incurred' costs in providing the information to network providers[44]. However, Ofcom does not consider it 'appropriate to prescribe how such cost should be recovered', but states that it may be appropriate, for example, to spread the cost over multiple requests rather than recovering them from the access seeker making the first request.

Regulation 5: surveys of physical infrastructure

Regulation 5 confers on a network provider the right to request an infrastructure operator for an on-site survey 'of elements of the [infrastructure] operator's physical infrastructure'. A number of the issues in respect of regulation 4 arise in like fashion in relation to regulation 5 (for example, the issues surrounding confidentiality, secrecy and security and the requirement that the infrastructure operator must comply 'on proportionate, non-discriminatory and transparent terms'[45]). The first issue discussed above is slightly different in that the request is not delineated by 'a specified geographic area'[46] but to 'elements of the operator's infrastructure'[47]. However, Ofcom's proposed approach seems similar in that it requires any such request for a survey to set out 'a clear description of the specific elements of the physical infrastructure for which the on-site survey is requested' and that they should be 'as specific as possible to minimise the burden on infrastructure operators'[48].

There are, however, some specific additional issues in connection with the exercise of the right to a survey. First, there is an additional hurdle to such a survey in that an infrastructure operator can also refuse to grant a survey 'if, or to the extent, the request cannot reasonably be met'[49].

Second, neither the Directive nor the ATI Regulations clearly identify who is to carry out the on-site survey. One might assume, given that it is the network operator who has the right to request the survey, that the network operator would either itself be conducting the survey or would appoint the surveyor. However, Ofcom's Draft Guidance explicitly provides that the survey may be undertaken by the network provider, the infrastructure operator, jointly by both parties or by an agreed third-party[50].

Indeed, the Draft Guidance gives examples of specific

‘proportionate, non-discriminatory and transparent’ terms that infrastructure operators might be entitled to impose when dealing with such requests (which are not directly mentioned in either the 2014 Directive or the ATI Regulations). These include terms as to[51]:

- qualifications, certification or training requirements for suppliers;
- a requirement for named individuals to undertake surveys;
- operational processes for survey activities; and
- work notification requirements or work permit processes.

Third, in relation to the costs of surveys, like requests for information under regulation 4, Ofcom has suggested that, in assessing proportionality, an infrastructure operator may recover ‘efficiently incurred costs associated with granting and undertaking surveys’[52]. However, it is easy to anticipate with large-scale infrastructure survey requests that this will give rise to involved disputes about what are ‘efficiently incurred’ costs. For instance: should a competitive infrastructure operator’s actual costs be treated as the starting point for a consideration of efficient costs? how should efficient costs should be modelled and using what assumptions? how, if at all, are fixed overheads to be apportioned in this?[53] indeed, should ‘efficiently incurred’ (rather than actual incurred) costs even be the correct test?

Regulation 6: access to physical infrastructure

Arguably, the most far-reaching and significant aspect of the ATI Regulations is the right granted to access an infrastructure operator’s physical infrastructure. As discussed above, these access requests apply to a large number of infrastructure operators including gas, electricity, heating, water and transport undertakings, as well as other network providers. It opens a vast new infrastructure sector for network providers to seek to utilise for their networks.

The right for a network provider to make such a request is provided for by ATI regulation 6. It would appear that the request for access should be more specific than requests for information or a survey under regulations 4 or 5. In addition to the standard requirement that the request must be in writing and made with a view to deploying elements of a high-speed electronic communications network using that infrastructure, there are explicit requirements[54] that the request:

> *…(b) specifies the infrastructure to which the request relates; … (d) specifies the network elements it proposes to deploy; and (e) specifies the time frame required for deploying those elements.*

The main battleground is likely to be the terms on which the access is sought. The infrastructure operator must agree to provide access on ‘fair and reasonable terms’ within two months of a request being made[55]. Such terms specifically include the ‘price’ that the infrastructure operator can charge[56]. Even assuming there have been prior surveys, two months seems a very tight time period to agree such terms[57]. (Arguments and negotiations over wayleave terms under the electronic communications code, particularly over what is a ‘fair and reasonable’ consideration, are well known for stretching into months if not years. In this regard it is slightly ironic that, in the new draft electronic communications code, Parliament is specifically moving away from a ‘fair and reasonable’ test for consideration in order to improve the code).

As identified in Ofcom’s Draft Guidance, there will be a raft of potential terms relating to matters other than price which infrastructure operators may seek to impose on network providers seeking access to physical infrastructure. Ofcom identifies[58]:

- *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;*
- *technical specifications and operational processes concerning the types of network elements that may be deployed and their installation and repair.*

Resolving arguments about issues like these will be difficult in itself.

However, there is likely to be even more arguments over what is a ‘fair and reasonable’ ‘price’. The DCMS consultation on this point was relatively brief, and confined to three questions. [59] There were a variety of responses, for example, some telecoms operators took the view that infrastructure operators ought to be allowed to make a ‘return to investors consistent with the risks taken in infrastructure competition’[60]. The government has taken no fixed view on these issues, preferring to leave it to Ofcom to consider all relevant factors when assessing prices.

Regulation 16(2) does however set out factors which Ofcom ‘must’ take into account when fixing any price under regulation 6. Ofcom must:

> *(a) ensure that the infrastructure operator has a fair opportunity to recover its costs; and (b) 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 physical infrastructure used for the provision of high-speed electronic communications services.*

These appear to suggest that there may be less weight placed on any ‘market value’ for such access and more on compensation for disruption to the infrastructure operators business and assets.

Moreover, regulation 16(3) specifically indicates that where the infrastructure operator is a network operator (ie falling within the telecoms regulatory remit of the 2003 Act) then ‘Ofcom must take into account the objectives set out in Article 8 of the Framework Directive[61]’, with its clear focus on ensuring competition, efficiency, and end-user and citizen benefit. Normally, this requires economic evidence of one course of action and the counter-factual. How Ofcom approaches the requirement of taking into account Article 8 will be very difficult to predict.

Ofcom’s Draft Guidance provides some additional information concerning how it will approach pricing[62]. Noteworthy points include the following.

First, Ofcom draws a distinction between disputes where the infrastructure operator has offered a price for access but that price is alleged not to be fair and reasonable, and disputes where the infrastructure operator refuses to offer a price at all. In the former, Ofcom will consider whether that price falls within ‘a range of prices and pricing approaches’ that might satisfy the ‘fair and reasonable’ criteria. However, where no price for access has been offered, Ofcom will assess and set a specific price which it considers to be fair and reasonable. This may well create an incentive for infrastructure operators to attempt to offer a price at the high end of the ‘fair and reasonable’ range rather than risk Ofcom setting a specific ‘mid range’ price.

Second, with respect to cost recovery, Ofcom considers that the infrastructure operator should at least be able to recover any ‘efficiently incurred’ incremental costs in providing access, including ‘a reasonable return on the activity of facilitating and providing access.’[63] Ofcom does not however specify the methodology that should be used in determining those efficient costs. It is not clear to what extent approaches taken in other telecommunications contexts[64] will be transposed to this context, though the language it uses (‘incremental costs’, ‘greater downstream competition ... which could reduce the profitability of the investment’ ‘ability to recover … investments’) suggests the approach may be similar.

Third, although Ofcom expands a little on how it will apply the provisions of ATI regulation 16 in Ofcom’s Draft Guidance[65], it still adopts something of a ‘wait and see’ approach to this issue (stating that it will consider ‘the relevance of other impacts in the context of specific disputes’[66]). For example, Ofcom’s Draft Guidance recognises that ‘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’[67]. Ofcom also suggests that it will have regard to the matters set out in Recital 19 of the 2014 Directive[68], which includes specific factors where network operators are providing the access.

The dispute resolution provisions

In light of the above issues, Ofcom’s dispute resolution functions are likely to be crucial. In keeping with the principle of subsidiarity, it was left to Member States to determine which body was to perform this function and the procedures they would adopt: see eg Recital 34 and Article 10 of the 2014 Directive. However, like Article 20 of the Framework Directive, (in respect of network access disputes between communications providers etc) strict time limits for resolving disputes were envisaged[69]. Indeed, when drafting the ATI Regulations, it is clear that the Government had firmly in mind the provisions in sections 185-191 of the 2003 Act (which implemented Art 20 into UK law).

The ATI Regulations provides for disputes to be referred to Ofcom[70], but only where ‘there is no realistic prospect of the dispute being resolved without that reference’[71]. ATI regulations 13-18 set out the procedures and powers relating to these disputes. Ofcom has broad powers to make a determination subject to a time limit of four months in respect of regulation 6 access disputes,[72] and in all other cases two months,[73] unless there are ‘exceptional circumstances’. Ofcom has express powers to make declarations, fix the terms of transactions, or give directions[74]. It may also require parties to pay the costs of another party, Ofcom, or persons consulted[75]. Indeed, Ofcom may consult any person ‘who has functions of a public nature that Ofcom consider relevant’[76] and require the provision of information (though not in the case of where a request has been refused on the grounds of national security)[77]. With the latter, the constraints on information requests contained in sections 138-139(A) of the 2003 Act are expressly incorporated.

Like section 192 of the 2003 Act, appeals from Ofcom’s determinations are to the Competition Appeals Tribunal[78]. As clause 74 of the Digital Economy Bill is proposing to do for section 192 appeals, the Competition Appeals Tribunal, when determining an appeal from an Ofcom determination under the ATI Regulations, must apply ‘the same principles as would be applied by a court on an application for judicial review’[79]. This will make appeals from Ofcom’s determinations under the ATI Regulations significantly less easy (and therefore presumably less frequent) than they would have been under an ‘on the merits’ appeal. A further appeal lies from a decision of the Competition Appeals Tribunal to the Court of Appeal or Court of Session, but only on a point of law[80].

Other features of the ATI Regulations

First, the ATI Regulations contain two express reservations concerning other property rights. We have already mentioned regulation 3(2) above, which makes the ATI code rights expressly without prejudice to the electronic communications code. In addition, regulation 3(1) states that a requirement on an infrastructure operator to provide access to physical infrastructure is not to be taken ‘to prejudice the property rights of any other person’. As noted by Ofcom in the Draft Guidance[81], the effect of these provisions appears to be that, where network providers seek access to physical infrastructure, the ATI Regulations do not override the property rights of persons upon whose property the relevant physical infrastructure is located and network providers still need to get any relevant wayleaves. Ofcom has stated that it does not expect disputes between network providers and holders of code rights to be resolved under the ATI Regulations.

Second, there are three further rights under the ATI Regulations which a network operator may seek to exercise. Under regulation 8 providers can seek to obtain from an infrastructure operator ‘disclosable information’ (defined differently to reg 3) ‘concerning civil works relating to the operator’s physical infrastructure’. Under regulation 9 the network provider can request an infrastructure operator carrying out civil works ‘to coordinate with those works civil works that the [network] provider proposes to carry out’. In short, the ATI Regulations set up a system whereby infrastructure operators carrying out civil works can be required to allow a network provider to assess those works and see if its own work can be co-ordinated with those works.

Finally, regulation 7 allows a network operator to make a request to ‘a rights holder’ for ‘access to the rights holder’s access point or in-building physical infrastructure’. Regulation 2 defines a rights holder as the person having ‘the right to use (a) an access point or (b) in-building physical infrastructure’ (‘access point’ and ‘in-building physical infrastructure’ are also defined in reg 2). As is stated in Ofcom’s Draft Guidance, this ‘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’ but not elements of communications networks[82].

Conclusion

The ATI Regulations form part of the government’s stated attempt radically to improve digital communications, and in particular to

drive forward broadband connectivity. The wide effect of these provisions is probably not fully understood, certainly by those outside the electronic communications sector, in areas such as the gas, electricity, sewage, and transport. They have the potential to change broadband capabilities radically. However, there is a long way to go before their precise application and utility can be understood. Much will turn upon how Ofcom approaches its dispute resolution function. Still, implementation of the ATI Regulations seems a lot clearer than what the implementation of Brexit entails!

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(Graham has, for over a decade, been listed as one of the leading telecoms Silks in the legal directories and has been involved in some of the most important telecoms case to come to Court. Rory was a solicitor advocate in Australia heavily involved in the telecoms sector. He came to the UK in 2007 and practised with Herbert Smith Freehills for six years before coming to the Bar in 2013. Rory has advised the government on issues relating to the implementation of the 2014 Directive).

Notes

1 Department for Culture, Media and Sport, *A New Electronic Communications Code*, May 2016, p 15.
2 See eg Recitals 1-4 of the 2014 Directive.
3 DCMS Consultation, p 4. See also Recital 7 to the 2014 Directive.
4 DCMS, *EU Broadband Cost Reduction (2014/61/EU) transposition Impact Assessment*, IA No: DCMS 16, 24 May 2016.
5 Impact assessment, page 18.
6 Broadband Impact Study Report, pp 2-3.
7 Broadband Impact Study Report, p 4.
8 Broadband Impact Study Report, p 4.
9 Broadband Impact Study Report, p 5.
10 See for example Recitals 7 and 8 of the 2014 Directive.
11 Recital 11 of the 2014 Directive.
12 ATI Regulations, regs 21-22.
13 ATI Regulations, reg 2.
14 Which can, for example, under s 151(1) of the 2003 Act include 'a person who makes available facilities that are associated facilities by reference to a public electronic communications network or a public electronic communications service'.
15 Section 151(1).
16 ATI Regulations, reg 7, as discussed later in the article, is an exception.
17 So that the infrastructure they provide does not fall within the definition of an 'electronic communications *network*' contained in s 32(1) of the 2003 Act.
18 As to the arrangements between mobile network operators and WIPs see by way of example *Arqiva Limited & others v Everything Everywhere & others* [2011] EWHC 1411 (TCC).
19 DCMS Statement document, p 8.
20 DCMS Statement document, p 8.
21 See for example the DCMS Communications Code Statement, particularly at pp 12-13.
22 DCMS Consultation, p 10.
23 Impact Assessment, p 11.
24 See eg ATI Regulations, regs 4(1)(c), 5(1)(c) 6(1)(c), 7(1)(c) and 8(1)(c).
25 ATI Regulations, reg 2.
26 ATI Regulations, reg 2.
27 See eg Vol 1, s 9 and Annex 22 of the 2016 BCMR statement dated 28 April 2016.
28 ATI Regulations, reg 4(1).
29 Note that 'disclosable information' has a different definition elsewhere in the ATI Regulations: see reg 8(2).
30 See Ofcom's Draft guidance, para 3.3, p 18.
31 See Ofcom's Draft guidance, para 3.3, fourth bullet, p 18.
32 See Ofcom's Draft guidance, para 3.3, fifth bullet, p 18.
33 ATI Regulations, reg 4(2)(a).
34 ATI Regulations, reg 11(1)(a).
35 ATI Regulations, reg 11(1)(b).
36 Ofcom Draft Guidance, para 3.19, p 20.
37 DCMS consultation, p 18.
38 DCMS Statement document, page 12.
39 DCMS Consultation, page 18.
40 Ofcom's Draft Guidance, paragraph 3.29, page 22.
41 ATI Regulations, reg. 10(2).
42 ATI Regulations, reg. 4(3).
43 DCMS Statement, p 13.
44 Ofcom's Draft Guidance, paras 3.20-3.22 at pp 20-21.
45 See ATI Regulations, reg 5(2).
46 See ATI Regulations, reg 4(1)(b).
47 See ATI Regulations, reg 5(1)(b).
48 Ofcom's Draft Guidance, para 4.3, p 23.
49 ATI Regulations, reg 5(5).
50 Ofcom's Draft Guidance, para 4.5 first bullet, p 24.
51 Ofcom's Draft Guidance, para 4.5 second bullet, p 24.
52 Ofcom's Draft Guidance, para 4.8, p 24.
53 The judgment in the tort claims case *BT v Geraghty & Miller International,* Queen's Bench Division, Leeds Mercantile Court, 29 July 2004, provides an illustration of the problems.
54 ATI Regulations, reg 6(1).
55 ATI Regulations, reg 6(2).
56 See ATI Regulations, reg 16 and Art 3(2) 2014 Directive.
57 It is the time period prescribed by Art 3(3) of the 2014 Directive.
58 Draft Guidance, para 5.10, p 27.
59 DCMS Statement, pp 16 to 19.
60 DCMS Statement, p 18.
61 Directive 2002/21/EC 'on a common regulatory framework for electronic communications networks and services' as amended by the 'Better Regulation' Directive 2009/140/EC.
62 Ofcom's Draft Guidance, at paras 5.18 to 5.28, pp 29-30.
63 Ofcom's Draft Guidance, para 5.18 *et seq*, p 29.
64 The issues of economic efficiency in cost recovery is currently being debated in a number of cases, including TalkTalk's appeal to the Court of Appeal from the Ethernet decision (see *BT v Ofcom* [2014] CAT 14, for example at paras 75 and 183).
65 Ofcom's Draft Guidance, para 5.23-5.27, p 30.
66 See Ofcom's Draft Guidance, paragraph 5.24, p 30.
67 See also Ofcom's Draft Guidance, para 5.24, p 30
68 See Ofcom's Draft Guidance, para 5.26, p 30.
69 See eg Arti 3(5) of the 2014 Directive.
70 ATI Regulations, reg 12.
71 ATI Regulations, reg 12(3). This is partially analogous to s 186(3) of the 2003 Act.
72 ATI Regulations, reg 13(2)(a).
73 ATI Regulations, reg 13(2)(b).
74 ATI Regulations, reg 14(2).These mirror s 190(2) of the 2003 Act.
75 ATI Regulations, reg 14.
76 ATI Regulations, reg 15(2).
77 ATI Regulations, reg 17(8).
78 ATI Regulations, reg 19.
79 ATI Regulations, reg 19(4).
80 ATI Regulations, regs 20(1) and 20(4).
81 See eg Ofcom's Draft Guidance, at paras 5.6-5.8, p 27.
82 See eg Ofcom's Draft Guidance, at paras 6.3 and 6.4, p 33.