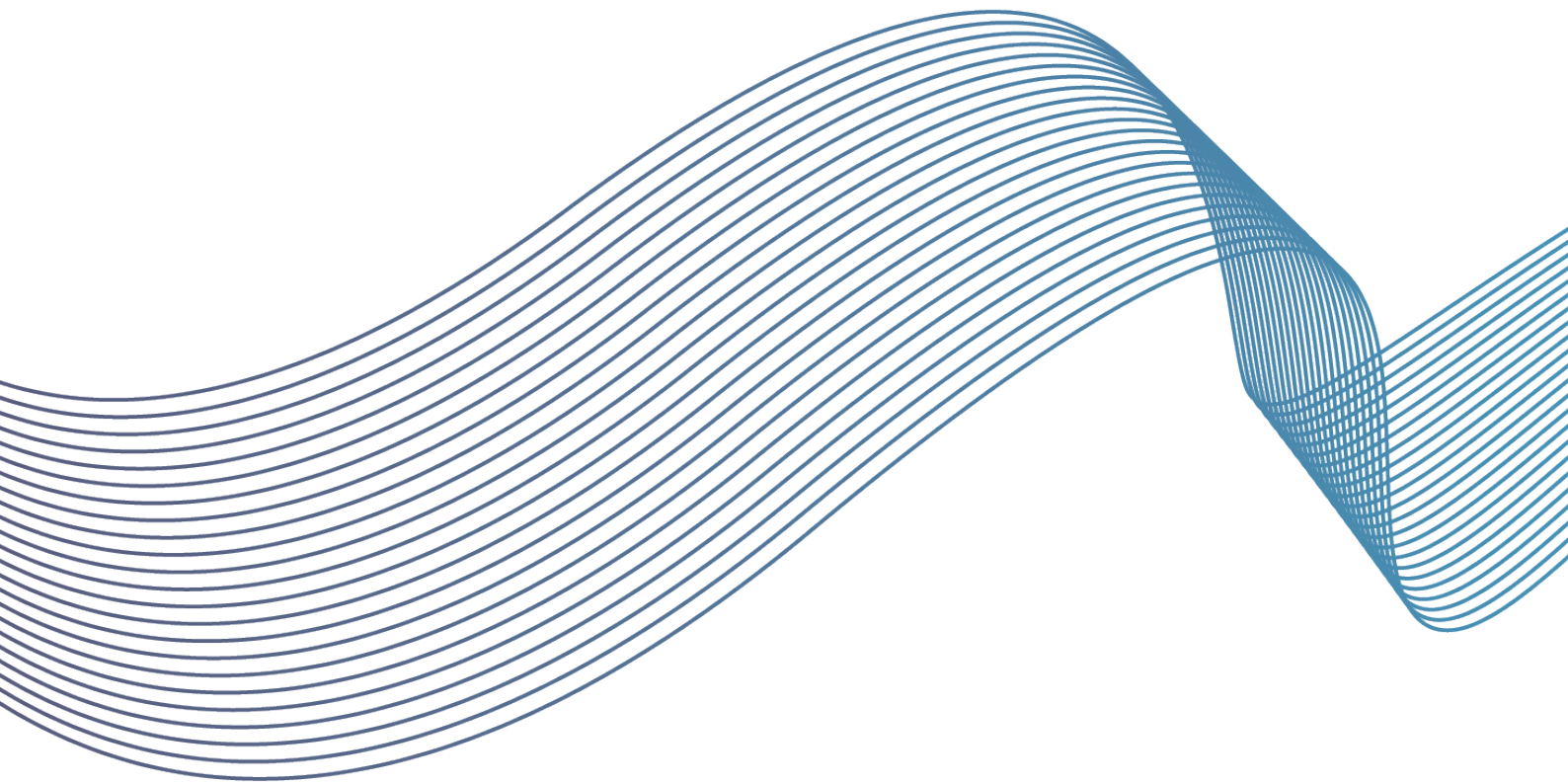


# Response to Ofcom PIMR Consultation

Version 1.0



12 April 2019

# Hyperoptic Introduction

Hyperoptic is a Code Power operator founded in 2011 by Dana Tobak and Boris Ivanovic. Hyperoptic is the largest provider of 1 Gb residential broadband in the UK and currently use a Fibre to the Building infrastructure operating across 28 cities with ambition to service significantly more. We have installed or are in the process of installing to over 400k residential homes and over 10k business units.

Hyperoptic was founded to bring the UK's broadband infrastructure to the next level creating a new full fibre infrastructure, offering 1 Gb services and raising the level of expectations on the role of connectivity in British households and businesses. Customers get the wired speeds they expect, and we have over 95 percent customer satisfaction rating consistently on our quarterly surveys.

To date, we have been expanding our network 100 percent year on year, and having recently secured 100m in debt funding. Our plans are to reach 2m homes passed by 2022 and 5m homes passed by 2025.

Currently, 50 percent of our footprint would, without Hyperoptic, be fibre-free with its residents only able to use ADSL often below 10Mbps – we are a key deliverer to whitespace areas and often target these areas having been neglected by other operators and network builders.

## Response summary

Hyperoptic welcome the opportunity to respond to the Ofcom Physical Infrastructure Market Review consultation.

As is set out in detail of this response, whilst we welcome the removal of usage restrictions from PIA to facilitate third party network build using BT's infrastructure, it is our view that if this consultation is to have the desired outcome, in furtherance of the government's policy objective, the remedy also needs to address the key operational issues that are undermining the effectiveness of PIA in achieving this aim. We request that Ofcom include the resolution of these issues as part of the specific remedy and prolong the implementation period timeframe accordingly by six months to facilitate this.

We are also highly concerned by the signalling that the future direction for the regulation of ducts and poles will be towards deregulation in competitive areas. We believe that Ofcom's construct of four markets to be unfounded as there is no physical access product available in any of the markets.

Hyperoptic is embarking on a significant investment programme to roll out its own fibre network to five million homes by 2024 and is deploying substantial capital to the achievement of that goal. A signal from the regulator that the basis for that investment may be subject to different treatment within a number of years is a disincentive to using PIA. The cumulative impact of this signalling as well as the absence of a product that is fit for scale build would be a reduction in additionality of FTTP deployment overall, putting at risk Government's fibre coverage targets of 15 million premises connected by 2025 and ubiquitous coverage by 2033.

## Remedies

### Specific remedies

We welcome Ofcom's specific remedy in so far as it goes, i.e. removing usage or geographic scope restrictions from PIA in each of the Physical Infrastructure markets. However, we see this as a missed opportunity and do not believe that the remedy goes far enough in order to achieve its policy objective.

As Ofcom will be aware, there are a number of key items that remain as yet unresolved in respect of the current RO for PIA under the WLA Statement. These will have a material impact on the usability of the product and whether or not it is fit for purpose to facilitate scale network build. The ability to build at scale is central to the overarching policy objective set out in the FTIR and the strategic policy position respectively: to maximise FTTP availability by using infrastructure competition as a stimulus.

Ofcom's aim in this consultation is to facilitate third party network build using BT's infrastructure which in turn will promote competition in downstream services. We believe that the current issues will have a disproportionately negative impact this aim, and therefore need to be addressed for the desired regulatory outcome to materialise.

At paras 5.21-5.31 Ofcom set out in great detail how usage or geographic scope restrictions will impact on the effectiveness of PIA and by extension the overarching policy objective set out in FTIR. Ofcom state in para 5.22, "*Usage restrictions would undermine the effectiveness of PIA. Limiting technology*

*flexibility and limiting the scope of the PIA remedy is likely to materially increase the risk that a telecoms provider may take the view that it is not viable to invest in the first place.”. The same para also states that “Therefore, in order to be effective, we consider the PIA remedy needs to allow telecoms providers to be able to take full advantage of the technologies available, the density of potential customers, and to achieve sufficient scale and scope”.*

As currently set out, the proposal is effectively to remove the usage restrictions that are currently in place in the PIA product. But there are no proposals to address the issues that impact on the ability to achieve “sufficient scale and scope” when using the product. In justification for removing the usage restrictions currently in place, Ofcom cite at para 5.27b that “...*an access seeker may want to use duct and pole access to provide leased lines for businesses, mobile backhaul for mobile operators (for example, for small cells) and, only later, fixed broadband services for residential consumers.*” These service categories are the types of service that require a far more robust underlying product than would necessarily be the case in a purely residential focused service. In choosing how to extend a network to serve a leased line customer, or business park with multiple customers, a CP would have the option to extend their own network using PIA or take an ethernet product or leased-line equivalent. Ethernet processes are more mature and provide more certainty to a CP than is the case in PIA, making it less likely that a CP will want to risk a key commercial relationship by using a product that is not fit for purpose. But given that ethernet will be a more expensive solution, there will have to be a necessary trade-off between using available funding to grow the footprint in keeping with Government’s targets or using available capital to provide service in a more certain manner to a reduced footprint.

If this consultation is to have the desired outcome, of facilitating third party network build using BT’s infrastructure in furtherance of the government’s policy objective, the remedy also needs to address the key operational issues that are undermining the effectiveness of PIA in achieving this aim.

We briefly set out below what we see as the key operational issues with PIA as it currently stands:

#### **Network adjustments**

- For efficient and effective use of PIA, CPs need to be permitted to carry out NAs as we come across them and submit evidence and the NA request retrospectively. Any other process creates a bottle neck and needlessly slows build programmes.
- For those categories of NA that can only be performed by BT / or where a CP elects to have BT perform the NA, there are currently no effective SLAs. (As long as BT respond within the required timeframe, they can set any date for completion of works that they see fit and will remain fully compliant if they meet that date.) The application of SLAs to the current EAD fault resolution process demonstrates that it is perfectly achievable to set flexible SLAs for OR executed works.

#### **SLAs**

- The SLAs for the current RO mean that there is uncertainty in the end-to-end provision of the service.
- In order to facilitate the efficient and effective use of PIA, CPs need a much more comprehensive set of SLAs governing all aspects of the service.

### **Connecting Customers during project build**

- For efficient and effective use of PIA, and to maximise the return on network build, CPs need to be able to connect customers as relevant network build proceeds rather than having to wait until the end of the build project to submit a build completion pack prior to connecting customers.
  - Under the current RO this is a contract breach. It places an admin overhead on CPs that with the result that a CP cannot set up its operational processes to work in the most efficient manner.

These issues have not been resolved throughout the negotiation of the current RO. Therefore, just removing the usage restrictions in a short RO timeframe and expecting these operational issues to be resolved by Industry in a BAU setting is unrealistic. In order to ensure the effectiveness of PIA, we request that Ofcom include the resolution of these issues as part of the specific remedy and prolong the implementation timeframe set out at para 5.92 to six months to facilitate this. This timeframe should be able to benefit from the learnings of the PIA bedding in period currently proposed to commence on 1<sup>st</sup> April and should therefore be able to address these issues in a relatively short timescale.

### **Dark fibre**

Ofcom have not provided any compelling evidence or analysis that explains the rationale for rejecting a limited dark fibre remedy. A process that results in a CP having to build its own duct in any situation where network adjustments are not feasible and/or do not promote economic efficiency creates a level of uncertainty that undermines the usefulness of PIA as a remedy. The remaining available capacity within the BT network is unknown, as is the amount of unlit fibre. The inevitable result of this is that there will quickly be areas where PIA is not available, despite the fact that there is capacity available via unlit fibre. Ofcom cite the examples of Portugal, Spain and Ireland but the network estate in those countries is not directly comparable to that of the UK and therefore the comparison is of limited value. Given that much of the work to develop a dark fibre offering has already taken place, it is not clear why Ofcom feel that it is disproportionate to include this requirement at this time. Such a requirement would also serve to remove the risk of BT using up capacity with unlit fibre. Given the ultimate aim of this policy is to maximise FTTP availability, we believe it is both proportionate and appropriate to include this requirement.

### **General remedies**

We believe that the general remedy headings as set out by Ofcom in table 4.1 include the relevant categories that would be required of BT in order to provide network access to services in the physical infrastructure markets. We are however concerned about the practicality of imposing a non-discrimination condition in the absence of proper transparency. We believe that Ofcom should set a basic level of metrics that would serve as evidence that any differences between the processes or systems used by CPs from those used by OR are broadly equivalent. We note that Ofcom set out at para 4.44 that it is inappropriate to impose any specific transparency obligations on OR at this time without any detailed reasoning. Although Ofcom say that will they be better placed once the RO for WLA duct access is put in place to identify which processes are the most relevant to indicating the performance of network access products, we believe that this reasoning is flawed. Firstly, by waiting for the RO, there will be less time during which Ofcom can assess the WLA product, and also because

there are currently a number of areas within the current RO discussions where CPs have highlighted concerns about undue discrimination.

Additionally, during the negotiations of the current RO, CPs submitted a comprehensive set of KPIs to BT in order to facilitate understanding performance of the product and potential undue discrimination. Despite confirming that they currently capture most if not all of these data points, BT has declined to share most of them. Ofcom have opted for the lesser form of obligation i.e. undue discrimination, stating at para 4.36 *“Where Openreach can justify any processes or systems used by network users as being different from those used by Openreach, the condition would still require these to be broadly equivalent. This means that any difference must not put network users at a disadvantage, particularly in terms of extra cost, time or uncertainty, compared to the processes Openreach follows internally.”*, but are not proposing an upfront obligation on Openreach to justify all instances of non-equivalence. The result of this application of non-discrimination means that CPs would have no way to determine whether or not they are at a disadvantage. As key stakeholders, CPs will be unable to contribute in a meaningful way to the monitoring programme Ofcom refer to at para 4.41.

Given that the metrics are already in place, we request that that in addition to the basic metrics referred to above in respect of the general remedy, Ofcom include these KPIs as part of the specific remedy. Lack of KPIs will result in uncertainty for Ofcom as to how the product is performing. It will also decrease the confidence of potential new CPs in PIA and will act as a disincentive to using it, thus further undermining and frustrating the policy objective of the consultation.

## Market Assessment and SMP

### **Product market definition**

We agree with Ofcom’s finding that there is a single product market for the supply of wholesale access to telecoms physical infrastructure for deploying a telecoms network.

### **Geographic market definition**

We note that Ofcom have used the same assessment methodology and reached similar provisional conclusions as those set out in the BCMR. Namely that there are four distinct geographic areas; BT only areas, BT and Virgin areas, High Network Reach areas excluding the Central London Area and the Central London Area.

We agree with Ofcom’s conclusions in respect of SMP, but we strongly disagree with the principle of Ofcom’s analysis as well as the focus on the mere presence of rival infrastructure as the main factor determining the prevailing conditions of competition in a given location.

Unlike the BCMR consultation, where Ofcom was able to present evidence demonstrating the presence of different conditions within the different geographic areas, we do not believe that the case has been made in context of the supply of wholesale access to telecoms physical infrastructure for deploying a telecoms network. In setting out the characteristics that differentiate geographic areas, Ofcom need to distinguish between the use-case underpinning the analysis. In the context of the BCMR, the presence of alternative networks gives way to the potential for a credible threat to switch supplier. This is the case because the BCMR is focused on leased-line type market, where presence of

alternative supply together with the option of real substitutability to that competing supply would be able to exert competitive pressure on an incumbent. Therefore, groupings based on the volume of competing infrastructure is highly relevant as purchasing decisions can be made on a geographic basis (absent other barriers to real substitutability).

Ofcom have previously assessed that BT's ownership of their duct and pole network provides them with an enduring advantage which absent regulation would prevent competition. There is no current equivalent alternative to PIA offered by a physical infrastructure provider, Ofcom also conclude that the ATI Regulations do not address competition concerns such that there is no likelihood of such a product being offered commercially in the foreseeable future. With no competing product, there is by definition no competition, so the basis for Ofcom's analysis in assessing different markets is flawed.

By creating four markets and mandating four ROs, Ofcom is signalling that the future direction for the regulation ducts and poles will be on a similar basis to that seen in BCMR, towards deregulation of PIA in competitive areas. Hyperoptic is embarking on a significant investment programme to roll out its own fibre network to five million homes by 2024 and is deploying substantial capital to the achievement of that goal. A signal from the regulator that the basis for that investment may be subject to different treatment within a number of years is a disincentive to using PIA. The consequence would be a reduction in additionality of FTTP deployment overall, putting at risk Government's fibre coverage targets of 15 million premises connected by 2025 and ubiquitous coverage by 2033.

Turning to the analysis itself, as Ofcom note at paras 3.105-3.108 a ubiquitous telecoms physical infrastructure (both in terms of the overall coverage it provides, and the contiguity of that coverage within a particular area) is highly important. It brings the ability to connect to as many residential premises or business sites within a deployment area as possible, and the flexibility and certainty to be able to provide any connection in the future quickly and without significant additional connection cost. Based on our own experience of building an infrastructure strategy to reach the highest levels of customers in the most efficient way, we believe that Ofcom must include factors that are basic to the product in question when grouping geographies into homogeneous areas.

At a minimum Ofcom should take into account the ubiquity of the network it is assessing. At para 3.111 Ofcom state that *'This partly reflects our choice of geographic unit and the way in which we have defined these areas (i.e. if Virgin Media can serve more than [X]% [30-80]% of premises in a postcode sector, then that postcode sector is considered covered and is included in its entirety)*'. There is clearly a highly material difference between 30-80% and we would argue that when considering which areas are sufficiently homogeneous, Ofcom need to take a view on the relevance of the infrastructure to the product.

If an alternative infrastructure does not have at least 60-70% ubiquitous coverage it should be discounted as an alternative infrastructure in the relevant geography, as it does not have the basic characteristics to offer access to physical infrastructure. This is consistent with Ofcom's definition of an existing network as set out in para 1.15 of the Promoting investment and competition in fibre networks - Approach to geographic markets Consultation, which states that 65% of premises in a postcode sector would need to be covered by an existing network before considering that the network is already present.

Even setting the above arguments aside, it is not clear even within the framework that Ofcom has set out why the CLA is considered as a distinct geographic market. Although within the context of the BCMR, the high presence of rival leased lines infrastructure is material, in the context of a physical infrastructure market this is not the case. Unless any single infrastructure provider has the requisite coverage to pose as a credible alternative to OR, the fact that all providers taken together have a high level of infrastructure should not be the basis to distinguish the CLA from any other.

Looking to the future, we believe that Ofcom must analyse the actual propensity of customers to switch between competing infrastructures rather than focusing on the presence of alternative networks. As we argued in our BCMR response, our experience shows that whilst there is a theoretical option to switch, there are a number of factors make effective switching unviable today, thus removing it as a constraining effect on the incumbent. These can occur from different scenarios: economic; operational; and customer impact, the cumulative effect of these factors is that that CPs would face a material disincentive to switching to another provider. We suggest that Ofcom builds these factors into the framework for future analysis.

## Conclusion

As set out above, we have significant concerns that this consultation has addressed only one of the major issues that undermine the effectiveness of PIA as well as the signalling that the future direction for the regulation ducts and poles will be towards deregulation in competitive areas. These factors will likely result in a reduction in additionality of FTTP deployment overall, putting at risk Government's fibre coverage targets of 15 million premises connected by 2025 and ubiquitous coverage by 2033. We therefore urge Ofcom to mandate a more comprehensive RO with a longer implementation period of six months. We also urge Ofcom to provide clarity about the current direction for regulation for access to infrastructure in a way that supports and encourages investment in fibre.