

DPA & the downstream WFTMR response: BT follow up paper

December 2020

Overview

We believe Ofcom's *de facto* application of SMP regulation to Enterprise activities, where it is simply seeking to make effective use of Ofcom's PIA remedies, is not justified. We are concerned about the lack of justification from Ofcom on these issues and meaningful consultation on those justifications.

Ofcom has failed to consider in its consultation document whether SMP regulation on Enterprise's activities is necessary and proportionate in light of proposed regulatory constraints on Openreach and the extent of competition at the downstream level.

The consultation refers to the 'general remedies [Ofcom] ... proposes to impose on *Openreach*, designed to address the competition concerns that we have provisionally identified in our market assessment'.¹ There is no explicit consideration, in accordance with Ofcom's statutory duties, of whether it is necessary or proportionate to impose SMP on downstream BT in circumstances where BT will have equivalent access to upstream regulated inputs and there will be no impact in the competitive downstream market

We are concerned about the lack of meaningful discussion of this issue in the consultation document and the potentially wide regulatory precedent this sets.

Further, since the publication of the WFTMR statement, Ofcom has not been transparent about its reasoning for the SMP designation applying to Enterprise and has not provided any analysis in writing to explain or justify its approach.

A level playing field in downstream markets is very important to Enterprise, particularly given the upcoming 5G mobile backhaul rollout and LFFN bids

Enterprise's MNO business is significantly underpinned by its backhaul business, amounting to [X]. Over the coming years, Enterprise's ability to bid in these markets will be unfairly weakened if DPA can't be used on a level playing field in the same manner as other CPs.

[X]

DPA is an enabler for Enterprise in a market where winning the access portion of a bid can facilitate success in the obtaining the contracts for connectivity and services as well. It is important that Enterprise can make independent bids for access as specifications do not always match Openreach products (e.g. the provision of Dark Fibre).

Without a level playing field, other CPs can free ride on Enterprise's investments without having to share in the infrastructure cost and risk of achieving payback. This is particularly acute in multi-customer site locations.

¹ Paragraphs 3.1-3.2 of the WFTMR (Volume 3: Non-pricing remedies) make clear that remedies in the PI, WLA, LL Access and IEC markets designed to address competition problems are imposed on *Openreach* – there is no reference to SMP applying to downstream BT. This is mirrored in the sections explaining Ofcom's reasoning in respect of the non-pricing remedies, each of which refers only to obligations being imposed on Openreach.

A level playing field increases competitive pressures and delivers benefits to customers from lower prices, more resilience, innovation and choice

A level playing field would allow Enterprise customers to benefit from: lower prices e.g. through lower input costs and commercial flexibility to blend across solutions; greater resilience e.g. back-up links through multiple connections; more choice i.e. customers not limited to OR access products; more innovative products and solutions, as DPA provides Enterprise with the flexibility to actively manage the service.²

A level playing field will increase competitive tensions between other providers – they won't be able to use Enterprise as a reference point and price below it. It will also deliver dynamic competition benefits in the longer term through increased competitive pressures. We also set out in our consultation response why a level playing field downstream is important.³

There is a risk to Ofcom's credibility and trust with BT and its investors if Ofcom doesn't follow through with its stated policy objective to enable a level playing field in markets downstream

This SMP assessment is the first real test of whether Ofcom will follow through with its stated WFTMR policy objective to regulate furthest upstream in the network (i.e. focused at OR level) and enable a level playing field in markets downstream of its PIA and LLA remedies.

[X]

Enterprise building duct at edges of the network to make effective use of DPA

Enterprise requests a published side letter clarifying that an SMP exemption applies when Enterprise builds duct to make effective use of DPA

Enterprise is requesting that Ofcom makes clear that the SMP Conditions for the PI market do not apply to BT Enterprise for duct built to make use of the DPA remedy. This exemption request is only for the narrow case where Enterprise needs to build ancillary duct to make effective use of DPA. This would be necessary where Openreach duct either does not exist or is not suitable for the required product.

For the avoidance of doubt, Enterprise is only seeking the SMP exemption in relation to duct created in response to customer requests or bids - it will not build infrastructure on a speculative basis nor seek to build duct to create a 'regional' connectivity solution.

We request that Ofcom publish a side letter alongside the WFTMR statement granting the SMP exemption above. A side letter will avoid the challenges of drafting the exemption into the legal instrument. It will also provide greater certainty and avoid unnecessary disputes compared to a solution where Ofcom's guidance made clear that SMP would only apply in situations where it was not possible for CPs to replicate Enterprise building duct.

Enterprise is in the same situation as other downstream CPs when it is making a decision to build duct at edges of the network to support its

Like other CPs using DPA, Enterprise will need to build 'adjunct duct' to make effective use of DPA – but only Enterprise faces the prospect of rival CPs accessing it on regulated terms. We created network diagrams showing that to

² See same slide above.

³ See paragraphs A8.28-31 & A8.47-49 of 'Annex to the BT response to Ofcom's consultation on promoting competition and investment in fibre networks – Wholesale Fixed Telecoms Market Review 2021-26'.

DPA roll out - imposing SMP would result in a distortion of competition and enable other CPs to free ride on Enterprise's investments

make effective use of DPA all CPs are likely to have to build their own duct and that this is replicable.⁴

We set out in our consultation response why BT Enterprise possesses no inherent, un-replicable advantages when building duct in connection with DPA (also see wayleaves section below).⁵

Without a level playing field, other CPs can free ride on Enterprise's investments without having to share in the infrastructure cost and risk of achieving payback. This is particularly acute in multi-customer site locations - analysis of a subset of data for two MNOs show [X].

Enterprise has no advantage from existing BT Group wayleaves when it comes to duct build related to DPA so there can be no competition problem due to wayleaves

When Enterprise builds duct at the edge of the network where none currently exists, there will be no existing BT Group wayleaves that it can use.

BT plc wayleaves therefore confer no advantage on Enterprise when it builds ancillary duct to make use of DPA. Enterprise will be in the same position as any CP building adjunct duct to extend the DPA footprint.

An asset register is simple to implement and would give Ofcom assurance around duct build

We propose that duct-related assets are retained within Enterprise and that we create an 'open book' asset register to give Ofcom transparency around the amount, purpose and location of duct BTE builds for DPA.

We believe that monitoring Enterprise specific assets will be relatively simple. BT's regulated accounts report assets against the entity within BT the costs are allocated to - the accounts already work in this fashion. Ofcom already has access to these regulated accounts and underlying data.

By contrast, the proposal that Enterprise duct moves into BT's wider asset base after an initial contract period is complex and does not achieve desired outcome of a level playing field

In discussion, Ofcom briefly suggested that Enterprise could have exclusive access to the duct it creates for the lifetime of the initial contract with the customer. The duct and its costs would then be placed in the general BT plc asset base for Openreach to manage and operate on a regulated basis i.e. falling under the standard PIA terms.

However, this approach would not achieve the objective of creating a level playing field downstream. Infrastructure costs are long term investments with pay back beyond the life of the initial contract. Further, it is standard practice for infrastructure costs to be shared across multiple customers.⁶ Without the ability to do these things Enterprise would be at an unfair disadvantage relative to other CPs and this would inhibit investment in DPA.

From a practical perspective it is also complicated to implement such a solution. The Commitments mean that Enterprise doesn't have visibility of, or access to, Openreach's contracts and specifications for building duct. Enterprise will therefore not be able to create specifications that allow the duct to be easily transferred and used by to Openreach for multi-operator capability.

⁴ See 'WFTMR downstream response and slidepack on Enterprise DPA use – 29 June'. Slide 9 shows that the way BT Enterprise plans to use DPA is replicable by other CPs. Slide 10 shows that to make effective use of DPA, Enterprise, as all CPs, must build its own new duct.

⁵ See paragraphs A8.43-46 of the BT consultation response.

⁶ As set out above [X]

Enterprise using PIA remedies to provide services in the LLA market

Enterprise requests a published side letter clarifying that an SMP exemption applies when Enterprise uses PIA remedies to provide LLA services

As we set out in our original response to the WFTMR consultation, Enterprise is requesting that the relevant SMP obligations for the LLA market do not apply where BT Enterprise creates business-grade products or services that would fall into this market on the basis of its use of DPA and Dark Fibre.

We request that Ofcom publish a side letter alongside the WFTMR statement granting the exemption above. A side letter will avoid the challenges of drafting the exemption into the legal instrument. It will also provide regulatory certainty and avoid unnecessary disputes compared to a solution where Ofcom's guidance made clear that SMP would only apply in situations where it was not possible for CPs to replicate Enterprise services using existing PI and LLA remedies provided by Openreach.

Because Openreach has an obligation to provide PIA and active services, CPs can replicate the services that Enterprise provides.

Other CPs are able to replicate what BT Enterprise wishes to do with DPA.⁷

Without a level playing field, other CPs can free ride on Enterprise's investments without having to share in the infrastructure cost (e.g. deployment of fibre) and risk of achieving payback.

Wayleaves are only required in a subset of DPA cases where access is needed to third party sites to pull fibre through OR ducts. Ofcom has not provided any evidence that Enterprise access to BT Group wayleaves will inhibit competition for services in the LLA market. We note that regulatory protections are already in place given Openreach is required to provide regulated PIA and active LLA services - so CPs will not be prevented from competing in downstream markets.

We have considered whether Enterprise could seek wayleaves via a third party but this is proving to be legally complex, will be confusing for landowners with whom we have legal agreements and will be costly and complicated to set up a duplicative process for wayleaves.

Granting an SMP exemption is consistent with Ofcom's previous approach on Dark Fibre where it issued a side letter providing an SMP exemption for services downstream of the PIA remedy.

Downstream BT using altnet inputs

BT requests that Ofcom clarifies in its WFTMR statement and legal instrument that downstream BT is exempt from SMP conditions where it uses altnet inputs.

BT is requesting an SMP exemption when downstream BT (Enterprise and Consumer) is using altnet inputs (instead of Openreach inputs).

We request that this exemption should be set out in the WFTMR Statement and accompanying legal instrument to provide clarity and certainty on the rationale for SMP and resulting remedies.

⁷ See 'WFTMR downstream response and Enterprise DPA use – 29 June' – slides 8-10; and WFTMR response, paragraphs A8.16-27.

We believe that the current drafting of the SMP conditions inadvertently applies to BT downstream when it uses altnet inputs.

When BT downstream (Enterprise and Consumer) provides fibre products using altnet inputs they are subject to SMP conditions – we believe this was not intended by the regulation.

BT Enterprise is considering using altnets to compete in LFFN bids, where OR actives are uncommercial: it would buy upstream network inputs from a third-party provider. Enterprise has no inherent advantage in this scenario and is simply replicating what other CPs do.

Therefore, SMP conditions should not apply to BT's downstream fibre products created using upstream altnet inputs.