

INCA Response to Ofcom's Consultation on Duct and Pole Access Remedies

Introduction

INCA represents builders and operators of high speed fibre and wireless digital networks. INCA's members include Vodafone, CityFibre, Hyperoptic and WarwickNet. INCA members operate in urban and rural areas, have a range of business models and use private investment to build their networks.

INCA believes that the proposed "mixed usage" rule is anti-competitive and unworkable. INCA urges Ofcom to consider the application of the PIA remedy to the Business Connectivity market simultaneously with its review of the Wholesale Local Access market.

Ofcom should review the Wholesale Local Access and Business Connectivity markets together

In its various market reviews, Ofcom is failing adequately to address the need to facilitate and encourage investment in competing fibre infrastructure. Attempting to regulate individual markets in silos plays into the hands of the incumbent and fails to provide incentives to invest in networks. Ofcom should be reviewing the WLA market and the leased lines markets together and regulating access to the underlying networks in a service-neutral way.

Networks are converging – not only residential and business networks and services, but fixed and mobile networks. Fibre is the underlying component of residential, business and mobile service delivery. Ofcom's regulatory framework has not kept pace with this evolution.

This was highlighted by the Institution of Engineering and Technology recently:

Ofcom has progressed regulation of Passive Infrastructure Access and Dark Fibre access with BT. However, the impact of 5G calls into question the siloed market review approach taken to regulation and whether this should just apply to BT and just to network operators but to all public utilities. ***The "access seeker" is prohibited from using Passive Infrastructure Access for mobile backhaul (or business access connectivity) for example. This may no longer make sense from an engineering or business case perspective in a 5G era when seeking to construct a common fibre network to serve consumers, businesses and 5G backhaul. Constructing independent parallel networks to serve different market segments is obviously inefficient and impractical. There is a case to be made for exploring a new more holistic approach with no usage restrictions on operators seeking to use Passive Infrastructure Access for 5G backhaul.***¹

We urge Ofcom to consider the application of the PIA remedy to the business connectivity market in this current review of the WLA market.

The French National Regulatory Authority, ARCEP, reviews the markets for Wholesale Local Access (Market 3a) and "High Quality" access (Market 4, which Ofcom refers to as the Business Connectivity

¹ IET, "5G Networks for Policy Makers", Sections 12.1 and 12.2

market) together². ARCEP's view has been that the underlying wholesale products cannot be separated between business and residential markets and that the evolution of the market requires a holistic approach to regulation.

Ofcom's proposal to allow "mixed usage" is anti-competitive

Any restrictions on the use of Openreach's ducts and poles which it does not apply to itself are anti-competitive:

- Firstly, restrictions on use discriminate between Openreach's competitors and its downstream business units which can use Openreach's ducts for all services with no restrictions at all.
- Secondly, by denying operators necessary economies of scope, it is failing to encourage competition in the provision of alternative networks.
- Thirdly, the need for fibre connections to facilitate backhaul from 4G and 5G small cells in the coming years is considerable and is likely to be one of the primary drivers of fibre roll-out into areas where BT currently does not have fibre (whether the new connections are provided by BT or Altnets). Ofcom's mixed use rule would prevent Altnets from benefiting from the small cell backhaul market, to complement the market for broadband connections to businesses and private consumers, potentially leaving BT as the only viable provider of that infrastructure (even if the downstream service is provided by an Altnet, the actual fibre connections would be provided by BT). The mixed use rule therefore constitutes a major barrier to competition, as the inability to serve the small cell backhaul market may make it unviable for some Altnets to roll out FTTP networks at all.

In February 2017 the National Infrastructure Commission expressed the view that:

"Ensuring that best use is made of the existing infrastructure, such as masts, poles, ducts power supplies and the fibre network alongside our motorways [and railways], so that it can be used to support the backhaul of mobile data will be essential."³

The Government responded that "Where telecoms regulation is identified as a potential barrier, it will involve Ofcom in discussions as appropriate to determine how best to deliver the Government's coverage objectives."⁴

The "mixed usage" rule acts as a barrier to investment and we urge Ofcom to rethink its approach.

The NIC went on to say:

"Ofcom's proposals around duct and poles access are likely to be important to enabling the necessary fibre to be provided for small cell deployments. ... Suitable arrangements amongst operators in terms of fibre and duct access flexibility, maintenance, sharing of contractual obligations and future deployment will also be necessary. In the coming years, a new challenge will be the extension of fibre and connecting cells into non-typical locations, such as

² https://www.arcep.fr/uploads/tx_gspublication/bilan_et_perspectives-ADM-HD_THD-juil2016.pdf

³ The National Infrastructure Commission, "Connected Future", February 2017, Recommendation 2 and 3

⁴ "Next Generation Mobile Technologies: A 5G Strategy for the UK", Annex

street furniture, so that operators can roll out new sites in a cost effective and timely manner.”⁵

In its 5G Strategy Paper published in March 2017, the Government highlighted the need for dense fibre networks to provide backhaul for the thousands of small cells that will need to be deployed to provide 4G and 5G infrastructure.

“The Government recognises that having access to fibre is a critical limiting factor in the deployment of 5G and will continue to drive the deployment of new fibre networks. We will also work with Ofcom to ensure that operators can get fair access to fibre on reasonable terms and explore the scope for a duct and pole access remedy as part of the next Business Connectivity Market Review, for the purposes of supporting 5G deployment.

The Government will work with Ofcom to identify and tackle unnecessary barriers to infrastructure sharing and will explore the potential for a clearer and more robust framework for sharing, while preserving investment incentives.”⁶

The mixed usage rule will prevent the PIA remedy from achieving the aim of enabling competition in the provision of electronic communications networks

Ofcom’s principle justification for permitting restrictions on use is that “in the absence of usage restrictions, there is a risk that some telecoms providers might use PIA only to build a limited number of high value point-to-point leased lines connections. Since such services are not part of the WLA market, or downstream from the WLA market, this would not promote greater network competition in accordance with our aims, and would not be consistent with PIA as a remedy in the WLA market.”

We note that the Commission’s guidance is that different remedies are to be used to address different identified problems and that remedies should be tailored to specified problems. However, this does not preclude remedies being used across markets, especially where, in the case of the WLA market and the leased lines market, competitive problems and BT dominance have been identified in each.

Article 8 of the Framework Directive requires the NRA to put in place measures which are aimed at, and proportionate to, achieving the objectives set out in the Directive, which include promoting competition and investment in electronic communications networks and ensuring there is no distortion of competition.

The French Conseil de la Concurrence has expressed the view that the purpose of *ex ante* regulation is not simply to allow competition and choice in the provision of services, but also to encourage investment in competing infrastructures. This overriding objective, in the view of that competition authority, justifies the imposition of remedies which go further than simply addressing SMP to achieve those objectives.⁷

⁵ Connected Future, paragraph 2.44 and 2.45

⁶ “Next Generation Mobile Technologies: A 5G Strategy for the UK”. DCMS and HMT, March 2017

⁷ Conseil de la Concurrence, Avis n° 08-A-09, 5 June 2008, paragraph 32
<http://www.autoritedelaconcurrence.fr/pdf/avis/08a09.pdf>

These sentiments are echoed by BEREC, the Body of European Regulators, in the package of papers it published on June 7th, which criticise the European Commission’s proposals for a revised regulatory Framework.⁸ BEREC states:

“The Commission is proposing to qualify the principle of proportionality described in Article 3(3)(f) by prescribing that regulation should only be imposed to secure competition “on the retail market concerned”. It is already clear in Article 65(4) that NRAs should impose SMP obligations where they consider that one or more retail markets would not be effectively competitive in the absence of those obligations. In Article 66(4), it is clear that SMP obligations imposed must be based BoR (17) 85 4 on the nature of the problem identified, with the ultimate aim always being optimizing retail outcomes in the long term.

However, the newly proposed qualification goes significantly beyond this and would risk precluding NRAs from imposing SMP remedies to address competition problems in relevant wholesale markets which cannot necessarily be easily demonstrated to offer a proportionate contribution to competition in the relevant downstream retail markets. The design of wholesale remedies frequently involves a large number of detailed regulations to ensure interventions address the competition problem identified. Indeed, the simplistic drafting in Article 3(3) overlooks the complexity of the relationship between wholesale and retail markets – the use of the singular (“the market concerned”) does not take into account the fact that in many cases a wholesale market can provide upstream inputs for a variety of retail markets, as acknowledged by the Commission in Recital 157. This qualification is therefore ill-judged.

Geographic Reach

Ofcom proposes to limit usage of PIA to local access network deployments and to permit its use between network termination points (i.e. customers’ premises) and the local access node serving those network termination points.

Modern fibre networks are not bound by “hub and spoke” or “trunk and branch” designs. Nor is fibre limited by distance in the way that copper is. The need to aggregate is diminished. Networks can be built in rings or ribbons. In terms of access and backhaul, most of the network will effectively constitute backhaul.

“Backhaul” can, however, be distinguished from “backbone” or core networks. Routes between major cities are clearly “backbone”, for which PIA is not necessary or appropriate. But PIA is essential for backhaul.

By definition, any network connecting wireless cells constitutes backhaul, since it’s backhauling wireless traffic aggregated at the cell or base station. It is not acceptable, given overall Government policy, that PIA would not be available for the deployment of dense fibre networks connecting 4G and 5G base stations.

Mixed Usage rule is unworkable in practice and creates an unacceptable level of regulatory uncertainty

⁸ http://www.berec.europa.eu/eng/document_register/subject_matter/berec/press_releases/7090-updated-press-release-on-berec-papers-on-the-review

Ofcom proposes to relax the current PIA usage restriction to allow ‘mixed usage’ so that PIA can be used to deploy local access networks offering both broadband and non-broadband services provided the purpose of the network deployment is primarily the delivery of broadband services to homes and businesses provided this mixed use enables the investment in the provision of broadband services more generally.

This presents an unacceptable level of regulatory uncertainty which will inevitably lead to a large volume of disputes being brought to Ofcom and a delay in the wide-scale deployment of fibre networks.

How will Openreach assess compliance with the mixed usage rule?

Under Ofcom’s proposals, Openreach has the right to refuse a request for access on the grounds of non-compliance with the mixed usage rule, if it provides reasons for its refusal. This is unworkable, as Openreach will not be in a position to judge whether or not the CP will comply with the rule, without access to the CP’s business plans.

What constitutes a “deployment”?

Ofcom considers that Openreach should take into account the services to be offered “within any deployment”. An operator may have network installed throughout a city, town or village, and may require duct or pole access to supplement their own infrastructure. How would Openreach apply the mixed usage rule in such a case?

How should CPs demonstrate a “commitment to broadband deployment”

Ofcom states: “The potential for phased service deployment may therefore require determining the commitment of the telecoms provider to deploy broadband services. For example, contracts in place with residential developers for broadband services, or committed funding and orders for equipment only suited for broadband services would evidence significant intention.”⁹ It is clearly not possible or desirable for commercial reasons for CPs to be sharing details of contracts with their suppliers and customers with Openreach.

Ofcom also suggests that Openreach should take into account “the type of customers being targeted and the type of services being sold”.¹⁰ How would Openreach know this for new deployments without advance knowledge of the CP’s marketing strategy or business plan?

Networks deployed initially for the benefit of a B2B customer such as to connect street furniture hosting small cells, could subsequently be used as a spine from which residential connections could spur. As Ofcom acknowledges, enterprise or public sector customers are likely to drive the initial investment, and residential customers can then follow. But they will be unable to follow if the initial investment is prevented by regulatory restrictions.

Ofcom suggests as follows:

“Ultimately PIA is ordered on an individual segment by segment basis and it would not be practicable to assess what each individual segment is being used for. Therefore, in the event of a dispute, we would expect to consider the above features applied across the local area,

⁹ Paragraph 4.91.4

¹⁰ Paragraph 4.91.5

looking holistically at the network deployment in the local access area. In the case of a hybrid network deployment, where PIA is only used for some segments of an overall network design while the rest of the network infrastructure is self-built, we would expect to take a similar holistic approach.”

How would Openreach ascertain the location and application of a CP’s self-built network? Such information is not normally in the public domain and can only be estimated from public advertising campaigns. Some ISPs mainly utilise direct marketing techniques.

Regarding the sharing of commercially sensitive information Ofcom states: “we do not propose that telecoms providers would be compelled to provide any information to Openreach beyond the details of the duct and poles they are seeking access to”. This would appear to be contradictory to the guidance which precedes this statement.

Equivalence of Input should apply to PIA

Operators who install fibre in Openreach ducts are competing with Openreach itself in the provision of electronic communications networks, as well as with BT’s downstream divisions. The application of non-discrimination principles over-simplifies the competitive environment and assumes a reseller model, rather than a model of competing infrastructures.

Equivalence of input must be applied to at least some of BT/ Openreach’s forward looking downstream products, including G.Fast, FTTP and Dark Fibre Access. If purchasers of PIA are subject to restrictions on use which do not apply to these downstream products, then Openreach will be at a competitive advantage to purchasers of PIA when selling products for which duct access is a component element.

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