

## **Telefónica UK Limited's ("O2") response to Wholesale Local Access Market Review: Consultation on Duct and Pole Access remedies**

O2 welcomes Ofcom's intention to relax the current rules for PIA so as to ensure that the PIA remedy is effective and results in the development of local access networks to compete with BT.

Notwithstanding this, O2 has serious concerns that Ofcom's proposals for a mixed usage restriction will not create the commercial environment which will promote network investment, in accordance with Ofcom's strategic objectives.

O2 therefore makes the following submissions:

1. Ofcom should impose a general PIA obligation, one that does not include any usage restrictions. In the alternative, if Ofcom is to maintain its current position, Ofcom must explain its reasoning beyond simply citing that there is a "risk of regulatory failure"; and
2. If it is in fact the case that Ofcom is unable to impose a general PIA obligation, and a mixed usage restriction is appropriate, Ofcom must ensure that there is sufficient clarity as to what will and will not be compliant with the obligation.

### **Ofcom should impose a general PIA obligation**

Ofcom has acknowledged that the ability to offer services beyond broadband may be crucial for the viability of investment.<sup>1</sup> Ofcom is also of the view that *"...the current use restriction prevents the PIA remedy from being effective as a basis for large scale roll-out of competing local access networks."*<sup>2</sup> Ofcom has therefore concluded that its aims will not be met unless it either relaxes or removes the usage restriction.

However, despite Ofcom's own preference to impose a remedy without any usage restriction, it considers that to do so presents too great a risk of regulatory failure. Ofcom repeatedly cites the risk of "regulatory failure" as being the reason why it considers it inappropriate to put in place an unconstrained PIA obligation. However, Ofcom has not provided any detail as to why it considers this to be the case. Clearly, the preferred option is no restriction and we consider that Ofcom needs to be transparent and explain precisely why it considers this option is not available to it.<sup>3</sup>

We also note Ofcom's decision not to respond to stakeholders' views on a usage rule.<sup>4</sup> We consider that Ofcom should respond to those views, particularly to the extent that they raise concerns over both the existence and workability of a mixed usage restriction. To the extent those stakeholders are potential network providers, they are the best placed to assist Ofcom in determining whether or not a mixed usage restriction goes far enough to enable them to invest and deploy the network in the way that Ofcom is trying to achieve.

### **Ofcom's proposals for mixed usage are ambiguous.**

As Ofcom considers it is unable to impose a general obligation, it is therefore planning to impose a mixed usage restriction on PIA whereby telecoms providers can deploy local access networks

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<sup>1</sup> Consultation, paragraph 4.70

<sup>2</sup> Consultation, paragraph 4.71

<sup>3</sup> We refer Ofcom to Section 3(3)(a) Communications Act which requires Ofcom to have regard to the principles of regulatory activity which includes transparency.

<sup>4</sup> Consultation, footnote 98

offering both broadband and non-broadband services, provided the purpose of the network deployment is primarily the delivery of broadband services to consumers.

O2 agrees with Ofcom that the current usage restriction has rendered the PIA redundant. However, Ofcom's proposals are unlikely to provide the requisite level of certainty needed to ensure investment. This is because the restriction is ambiguous and Ofcom has not issued, neither is it proposing to issue, sufficient guidance on how network providers and Openreach can determine whether or not access requests are compliant with the restriction. By Ofcom's own analysis, the effectiveness of its remedy depends on the efficacy of the mixed usage restriction, it is therefore imperative that Ofcom ensures its proposals can work.

### The Restriction Itself

Ofcom's proposed restriction is ambiguous and gives rise to unnecessary uncertainty which will affect investment decisions and ultimately the viability of network deployment.

O2 notes that there are two iterations of the restriction, one which simply requires the primary purpose of deployment to be the delivery of broadband services and one which appears to have a second criterion:

*...purpose of network deployment is primarily the delivery of broadband to homes and businesses<sup>5</sup>;*

**and**

*...purpose of network deployment is primarily the delivery of broadband to homes and businesses, where the inclusion of non-broadband services enables the investment.<sup>6</sup>*

In order for a network operator to deploy network, there may be instances in which access is simply preferable or more efficient but is not strictly *necessary* for the investment to be made. O2's concern is that, to the extent, this "second limb" has to be met, the threshold for meeting it is potentially very high and or difficult to prove. The risk of failing to meet this criterion could result in network providers deciding not to invest in the first place.

There are potentially countless factors and variables that will be assessed when determining whether or not to make an investment and to identify a single one as being the keystone to an investment decision is unrealistic.

It is O2's strong view that, to the extent intended, any reference or secondary criterion beyond the "primary purpose" must not be included. Its inclusion will only serve to undermine the rationale for allowing mixed usage in the first place.

### *"Primarily"*

Ofcom's proposed generic usage restriction requires the purpose of network deployment to be "primarily" for the delivery of broadband. As such, it is entirely ambiguous. Ofcom provides no real guidance as to what this means or how it should be interpreted. Instead Ofcom has provided an "indication of factors" that it considers would likely be relevant to assessing whether a request for access is compliant.

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<sup>5</sup> Consultation, paragraph 1.1

<sup>6</sup> Consultation, paragraph 1.16, see also paragraph 4.80.

O2 agrees that it is preferable for network operators to have flexibility but the wording Ofcom has chosen does not provide for flexibility in network deployment so much as for flexibility of interpretation. It is simply not clear what would and what would not comply with the usage restriction. The greater the flexibility for differing interpretation, the more likely that Openreach and the network operators will find themselves in a dispute, especially as it is Openreach who will be assessing all access requests in the first instance. The potential for dispute and delay is significant and may be enough in itself to deter the very investment Ofcom is looking to encourage.<sup>7</sup>

O2 does not disagree with Ofcom that, “...there is potentially a very wide range of cases involving different network designs and different types of network provider...” and that it is likely that “...each referral would be assessed on the specifics of the case.”<sup>8</sup> However, Ofcom’s approach to addressing this issue does not provide any real parameters for either a network operator or Openreach to understand what is or is not compliant.

Network providers will need to take a view on whether their deployment plans will comply with the usage restriction up front and, those plans and investment decisions will likely be contingent on access being given. Were it to subsequently be determined that the proposed network deployment is not compliant, this could frustrate a provider’s entire plan and be the difference between an investment being viable or not. Given the potential importance of a network provider being deemed to be compliant, it is unrealistic for Ofcom to expect network providers to invest, absent the certainty that their proposals will not be frustrated by failing to clear regulatory hurdles which they were unable to properly assess themselves.

Without Ofcom setting out further principles or supplementary guidance, O2 is concerned that the wording of the usage restriction will fail to move Ofcom beyond the limitations of the existing PIA remedy as the proposed restriction will not create the conditions in which network providers will consider previously unviable investments as viable.

#### Scope of the proposed PIA in practice

Ofcom should provide a clear explanation as to what the scope of the PIA actually is. It seems to us that an overarching difficulty with Ofcom’s proposed approach is that there is a tension between requests being made on an individual segment by segment basis and Ofcom’s view that deployment be assessed “holistically”. Added to this, is that an assessment of compliance will necessarily need to be made on a theoretical basis. As we understand it, Ofcom will be asking Openreach to assess compliance based on operators’ business plans and intentions. Openreach would, we believe, effectively then have to undertake a qualitative assessment on the likelihood of those business proposals succeeding.

Consequently, whether or not a proposed network deployment complies with the usage restriction is *inherently uncertain*. The below sets out just some of the questions that will need to be answered by both network operators and Openreach and which O2 considers Ofcom should be able to provide further guidance on.

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<sup>7</sup> O2 notes that both Openreach and network operators have expressed a preference to have a specific restriction. This is presumably because both partners can foresee and are concerned about the potential for disputes.

<sup>8</sup> Consultation, paragraph 4.90

*Is purpose the same as use?*

Ofcom's proposed usage restriction refers to the *purpose* of deployment rather than to the actual *use* of a network. As such, should network providers and Openreach only concern themselves with what they intend to use the network for or what it will actually end up being used for?

If it is in fact intended that a network provider has to prove that its network will primarily be *used* for broadband services, we are not sure this will be possible as it would require the network providers, Openreach and, ultimately any subsequent decision maker, to know the unknown. This is not practical and creates a huge scope for dispute.

We consider this issue to be a fundamental point and one which Ofcom should be able to clarify in this consultation.

*How will an operator be deemed to be compliant?*

The mix of services offered will likely be a significant factor in determining compliance. However, the theory and the practice of network deployment may be very different. Ofcom has rightly rejected Openreach's argument that that a network provider should be able to demonstrate actual connections rather than, for example, number of premises passed.<sup>9</sup> As Ofcom points out, "*...the number of premises connected with an active service is dependent on other factors partially outside a telecoms provider's control, such as competitive responses.*"<sup>10</sup> However, this does not make clear what else will be deemed as compliant.

A potential solution to this might be that a network operator reserves a certain amount of capacity on its network for broadband services. If this is permissible, then Ofcom should be able to clarify this at the consultation stage.

*By when would a network operator have to be compliant?*

Ofcom acknowledges that networks may need to be deployed in phases and that leased line services may need to be deployed in advance of broadband services.<sup>11</sup> O2 agrees with this but notes that this simply raises the question of what is the timeframe on compliance? Does the purpose need to be met within a particular time frame to be compliant?

Also in relation to timing is the issue of whether compliance with the usage restriction has to be ongoing. If so, how would this be assessed and enforced? We note that BT has raised this issue<sup>12</sup> but Ofcom has made no reference to monitoring compliance with the usage restriction. Would network providers be expected to refuse the provision of non-broadband services where the provision of those services would change the network such that it would no longer be deemed to be compliant?

*Holistic assessment*

Ofcom considers it would "*not be practicable to assess what each individual segment is being used for*" and anticipates that a network should be looked at holistically in order to determine whether or not a network provider is compliant with a usage restriction. Whilst we agree with Ofcom's intention, we consider Ofcom's proposal will have inadvertent and negative effects.

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<sup>9</sup> Consultation, footnote 104

<sup>10</sup> Consultation, footnote 104

<sup>11</sup> Consultation, paragraph 4.91.4

<sup>12</sup> Consultation, footnote 104

Ofcom's regulatory intervention relates to duct and pole access and therefore seeks to regulate how network providers use that access. However, a holistic approach will mean that Ofcom's regulation will look beyond duct and pole access and to the broader network, even where PIA is only being used in some segments of the network.<sup>13</sup>

Therefore, whether or not a network provider can use PIA may be dependent on factors not subject to regulation. Ofcom's proposal inadvertently creates a condition in which, to be given PIA access, the primary purpose of your network needs to be the provision of broadband services.

If this is correct, this could serve as a constraint on the development and deployment of other services and products that are not part of the WLA market. This seems wrong and could serve to hamper competition in the markets for these other products. Notably, BT, the very party whose SMP this consultation seeks to address, would be given a significant advantage for other products and services, as it will not be subject to the same restrictions on its network.

#### Ofcom must provide clearer guidance

It is clear from the above that, for Ofcom's proposals to achieve the desired effect, it is imperative uncertainty as to the meaning and application of the usage restriction is minimised. Under the present proposals, disputes seem inevitable and the risk of dispute may, in and of itself, affect the viability of investment. We consider this is possible in at least two ways:

1. **No investment at all.** As Ofcom itself believes, mixed usage will be the difference between a network deployment being viable or not. It is therefore reasonable to assume that a network provider's entire strategy could rest on PIA. Despite this, and absent clearer guidance, it is not possible for a provider to determine with any certainty whether or not a PIA request will be deemed as compliant with the restriction.

Further, it is not possible to determine the outcome of the dispute in the planning or beginning stages of the network deployment. As figure 6.1 shows, a network provider will not know whether its proposals are compliant until its PIA and any infrastructure request are ordered and assessed. This does not happen until *after* its services have been established and accredited and it has undertaken its planning and surveying and forecasting. Ofcom is therefore requiring the network provider to undertake a significant amount of work and no doubt incur cost at the risk of its plan being challenged if found to be non-compliant. Ofcom has not shown, nor have the potential network providers made clear, that they would be willing to take such a risk. If they are not, then Ofcom's proposal is practically no different from the existing remedy.

Failing to minimise the uncertainty surrounding the mixed usage restriction could mean that otherwise viable investments may be deemed unviable.

2. **Delayed Investment.** Given the likelihood of disputes over compliance with the mixed usage restriction arising, deployment may be delayed as networks, sensibly, wait for another player to go first.

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<sup>13</sup> Consultation, paragraph 4.92

As stated above, Ofcom has failed to provide any real parameters as to what will or will not be compliant and its reasoning for not doing so is not satisfactory. Ofcom is perfectly capable of issuing clear guidance without fettering its discretion at a later stage.

The fact that each case is likely to be different may mean that it is not possible to prescribe what does not comply with the restriction. However, this does not prevent Ofcom from clarifying what does comply with a restriction. Put another way, Ofcom may not be able to rule anything out but that does not prevent it from “ruling things in”. Guidance that provides for safe harbours would dramatically increase certainty.

Further, there is precedent for such guidelines and principles in other areas and for them working effectively. For example, the EU competition rules on verticals restraints.<sup>14</sup> These rules and accompanying restrictions provide clear parameters whilst maintaining a huge degree of flexibility to cater for differing circumstances.

We are not suggesting that such guidance would result in disputes never arising. Clearly, there will always be scope for a dispute but disputes should be for cases at the edges, not every case. Clearer guidance will enable both network providers and Openreach to understand and identify which requests are likely to be contentious. This would be a vast improvement on Ofcom’s current proposals in which, as we see it, every request could be contentious.

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<sup>14</sup> <http://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32010R0330>