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**Non-confidential version
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Three's response to Ofcom's Wholesale Local Access (WLA) Market Review: Duct and Pole Access (DPA)

1. Three welcomes Ofcom's consultation on WLA Market Review: Duct and Pole Access published on 20 April 2017.
2. As noted in our recent response to Ofcom's companion consultation "WLA Market Review: consultation on the proposed market, market power determinations and remedies", [3]. This can be expected to bring significant benefits to UK consumers.
3. In the consultation, Ofcom proposes to allow telecoms providers to access BT's duct and poles in order to deploy their own fibre networks direct to homes and businesses, but only if the purpose is primarily the delivery of broadband services to consumers. This restriction would prevent Three from using BT's infrastructure to [3].
4. This proposal could deny the availability of [3]. This does not seem consistent with Ofcom's strategic objectives or the public interest at large.
5. In Three's view, Ofcom would be more likely to secure its strategic objectives as follows:
 - a. By ensuring unrestricted access to BT's duct and poles in its Duct and Poles consultation; or alternatively
 - b. By allowing use of BT's duct and poles for FWA, even if Ofcom were to maintain its proposed usage restrictions. Use of DPA for FWA should be permissible because it is a remedy "based on the nature of the problem identified" (i.e. the scope for BT's Significant Market Power in WLA to lead to unfavourable broadband terms for consumers). Moreover, Ofcom's current approach favours certain technologies over others. FWA and fixed-line

broadband are competing products meeting the same consumer need, so there is an obvious risk of distorting competition if reductions in the cost of deploying fixed-line broadband are available to some technologies (e.g. cable) but not others (FWA).

Background

6. In its recent Strategic Review of Digital Telecommunications Ofcom has signalled a strategic shift from active to passive remedies in order to reduce the country's reliance on Openreach. Ofcom's aim is to promote the large-scale roll-out of ultrafast broadband networks as an alternative to BT's planned deployment of (mostly) copper based technologies.
7. Ofcom has set out its ambition of achieving "full competition between three or more networks for around 40% of premises".¹ Ofcom believes that network-based competition is the most effective spur for investment in high quality fibre networks. Ofcom is implementing its new policy via this consultation.
8. Three fully supports Ofcom's ambition in this area. The emergence of competing fibre networks is critical for the future of the UK's telecoms infrastructure and [redacted] to the benefit of UK consumers.

Three plans to deploy a nationwide fibre backhaul network

9. Three and EE source their mobile backhaul via Mobile Broadband Network Limited (MBNL), a 50/50 joint venture that manages the operation of Three and EE's Site Share and 3G technology share.
10. Following the CMA's approval of BTEE [redacted]
11. **Figure 1:** [redacted]
12. Three has [redacted].
13. [redacted]. As shown below, MBNL's choice of backhaul provider has traditionally been limited to BT Wholesale (BTW), Virgin Media (only in areas where it has a cable network) and self-supplied microwave circuits (typically lower range, lower capacity circuits at the edge of the network).

Table 1: Backhaul providers to MBNL

Supplier	Approx # of sites
MBNL self-supplied microwave	[redacted]
BTW-only	[redacted]
BTW and Virgin	[redacted]

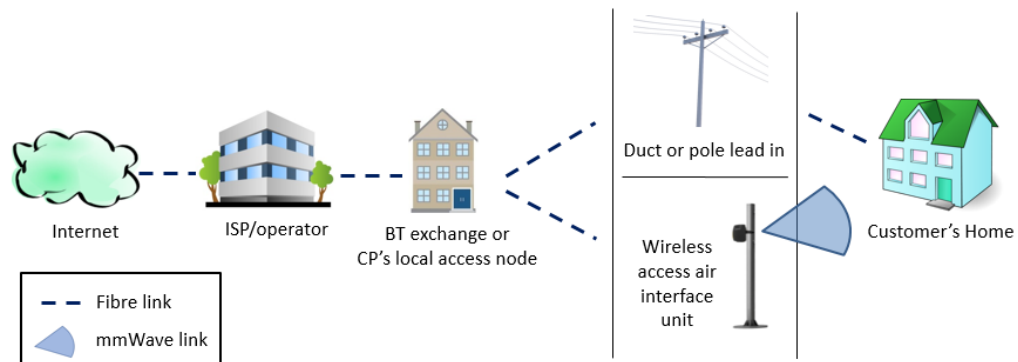
¹ Paragraph 1.4, DCR: Strengthening BT's strategic and operational independence, Ofcom, July 2016.

Virgin Media only	[3<]
Total Shared MBNL sites	[3<]

Three [3<]

14. On 31 May 2017 Three completed its acquisition of UK Broadband Limited, a provider of broadband services to homes and businesses via FWA technology. UK Broadband (UKB) currently operates under the Relish Brand and provides FWA broadband services to 17,000 customers from approximately 150 sites in Central London and Swindon.
15. Three's acquisition of UKB will [3<].
16. [3<] Like a traditional fixed network, a FWA network uses fibre from the local BT exchange (or CP's local access node) to the "last drop", where the network connects to individual homes and businesses. [3<]. In a FWA network the last drop is then provided wirelessly, as opposed to a wired connection in traditional fixed networks (i.e. a drop-wire from a pole, buried fibre or an underground cable).

Figure 2: Fixed vs FWA network



17. Historically, FWA was not competitive in terms of speed and was typically deployed in rural areas only, where other technologies were uneconomic. FWA can now be deployed as the last mile connection everywhere, in urban and rural areas. This creates a much bigger market, increases competition and drives down network and customer premises equipment costs.
18. As set out in our response to Ofcom's WLA Market Review consultation, FWA is increasingly competitive with other fixed technologies in terms of cost and performance. FWA speeds were previously limited by licensed spectrum owned by MNO but can now provide comparable speeds to FTTP. FWA can be cheaper to deploy than FTTP, as there is no need for new fibre drop-wires or digging up roads.

Unrestricted Duct and Pole Access is needed to increase competition in the Wholesale Local Access (WLA) and leased lines markets

19. Improved access to BT's duct and poles is critical to increase competition in the WLA and leased lines markets and [3<].
20. The current DPA remedy allows access to BT's ducts and poles only for the purposes of deploying broadband access networks for business and residential customers, but not leased lines or FWA services. This usage restriction has undermined the success of the DPA remedy and has resulted in limited deployment of rival fibre networks. Fibre deployment by Cityfibre, Colt, Level 3, Zayo, etc. has been largely limited to small towns and cities, business districts with high user densities (such as central London and other large cities) and aggregated trunk routes between major population centres.
21. Usage restrictions are fundamentally inconsistent with Ofcom's policy of encouraging the emergence of fibre networks. Investment in fibre is very costly and risky due to demand uncertainty, large sunk costs and long payback periods. The business case typically depends on being able to generate as many different revenue streams as possible. Economies of scale and scope and BT's incumbency advantages have so far proven hard for new entrants to overcome and have inhibited large scale entry by new players.
22. In the consultation Ofcom proposes to relax the current DPA usage restriction. Ofcom intends to allow telecoms providers to access to BT's duct and poles provided the purpose of the network deployment is primarily the delivery of broadband services to consumers.² Ofcom is reluctant to allow DPA to be used for deployment of FWA or leased lines, other than strictly as a by-product of fixed-broadband deployment.
23. Ofcom believes that this restriction is needed to ensure that i) the remedy is sufficiently limited to addressing BT's market power in the WLA market; and ii) prevent BT's rivals from using DPA only to build a limited number of high value point-to-point leased lines connections.³
24. However, Ofcom's approach would not allow [3<]. This does not seem consistent with Ofcom's strategic objectives or the public interest.

Alternatively, Ofcom should allow access to BT's duct and poles for FWA services

25. There is no specific legal requirement for Ofcom to limit DPA use primarily to broadband. In Three's view:

² https://www.ofcom.org.uk/_data/assets/pdf_file/0008/101051/duct-pole-access-remedies-consultation.pdf

³ Paragraph 4.72

- a. Use of DPA for FWA should be permissible because it is still a remedy “based on the nature of the problem identified” – where the problem is the scope for BT’s SMP in WLA to lead to unfavourable broadband terms for consumers;
 - b. It is proportionate for DPA to extend to FWA as it carries a much greater prospect of benefits for broadband consumers and much lower risk of adverse effects than the use of DPA for leased lines.
26. In particular, Article 8(4) of the Access Directive requires that any access conditions imposed on an SMP operator must be:⁴
- a. “based on the nature of the problem identified”;
 - b. “proportionate”; and
 - c. “justified in the light of the objectives laid down in Article 8 of [the Framework Directive].”
27. Ofcom appears to believe that its DPA condition can only be “*based on the nature of the problem identified*” if it specifically promotes the roll-out of competing local access networks used for the provision of fixed-line broadband to end-users. This seems an unduly narrow interpretation. We elaborate on these arguments further below and also suggest an alternative wording for the new condition.

Access to BT’s ducts and poles for FWA would be based on the nature of the problem

28. Ofcom’s concern about BT’s SMP in the WLA market is ultimately the risk of “*poor outcomes for retail customers, such as high prices for retail services that rely on WLA, reduced levels of innovation and suboptimal quality of service*”.⁵ Whilst this risk may be diminished by having competing local access networks used for fixed-line broadband, it is not the only way in which a local access remedy may reduce the risk.
29. Ofcom’s market definition exercise in its WLA Market Review has identified that FWA could be a potential substitute to fixed-line broadband, even if FWA is not yet a close substitute “for most customers” due to lack of wide availability in Ofcom’s view.⁶ In its response to Ofcom’s WLA Market Review, Three has explained that FWA is expected to become a close substitute, particularly as [3<].
30. In any event, Ofcom can reasonably conclude that a condition encouraging competition from retail alternatives to fixed-line broadband would also be “*based on the nature of the problem identified*”, even if those alternatives were not universally available within the market review period.
31. More competition from FWA can be expected to constrain pricing and poor quality of service, especially given that fixed-line broadband prices are typically uniform across

⁴ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ 2002 L 108, p. 7), as amended by Directive 2009/140 (“the Access Directive”).

⁵ Paragraph 4.2, the WLA MR Consultation.

⁶ Paragraph 3.76, the WLA MR Consultation.

the country. Any FWA deployment will provide competition to fixed-line broadband in the relevant location, as both services will target the same end users and these are unlikely to take both products.

32. In short, there is no good reason for concluding that a remedy must focus on products that are currently part of a market under review, or directly downstream of it, rather than also extending it to products that could form part of the market if more widely available.

It is proportionate for DPA to extend to FWA

33. Ofcom is concerned that some providers may only use DPA to build high value point-to-point leased lines absent usage restrictions, in circumstances where such services are not in the WLA market or downstream from the WLA market.⁷ Further, Ofcom believes that there are specific adverse effects from allowing use of DPA for leased lines, namely:

- a. a reduction in BT's leased line volumes, which in Ofcom's view could affect BT's ability to recover costs from regulated products (not least since BT has historically recovered a greater proportion of common costs from leased lines than from broadband products);⁸ and
- b. a risk of an adverse impact on other providers of leased lines.⁹

34. However, the benefits of allowing DPA for FWA are likely to be substantial and the potential adverse consequences are likely much less than in relation to leased lines. The risk of BT failing to recover common costs as a result of FWA deployment using DPA is much lower for several reasons, namely:

- a. It is unlikely BT's plans have factored in any significant contribution from FWA deployment, given the limited availability of the service to date;
- b. Revenue from DPA is likely to be additive for BT (rather than substituting for revenue on other products with a higher common cost recovery).

35. Moreover, it would be contrary to the principle of technology neutrality to disallow use of DPA for FWA deployment (other than where secondary to a fixed-line deployment). Ofcom's duty is "*to take account of the desirability of Ofcom's carrying out their functions in a manner which, so far as practicable, does not favour (a) one form of electronic communications network, electronic communications service or associated facility; or (b) one means of providing or making available such a network, service or facility, over another.*"¹⁰

⁷ Paragraph 4.72, the DPA Consultation.

⁸ Paragraph 4.115, the DPA Consultation.

⁹ Paragraph 4.120, the DPA Consultation.

¹⁰ Section 4(6), Communications Act 2003.

36. In circumstances where FWA and traditional, wired fixed-line broadband are competing products meeting the same consumer need, there is an obvious risk of distorting competition if the cost of deploying fixed broadband is reduced but the same cost reductions are not available to FWA providers. The unfairness, and risk of competitive distortion, will be particularly exacerbated if DPA is made available to some broadband technologies (e.g. cable) but not others (e.g. FWA).
37. It is arguable, in fact, that if the reference in the new condition to “broadband access services” is broad enough to encompass cable deployments then it is also broad enough already to encompass FWA deployments as well, at least when construed in light of the duty of the technological neutrality. To our knowledge, “broadband access services” are not specifically defined in the condition, other conditions or the legislation.

Alternative formulation of the new condition

38. The alternative text Three would propose is as follows:

(d) Physical Infrastructure Access, including such DPA Ancillary Services as may be reasonably necessary for such use of Physical Infrastructure Access, for use by the requesting Third Party for the purposes of the deployment of **broadband** access networks serving multiple premises primarily for the provision of broadband access services to end users **at fixed locations**, provided that the provision of non-broadband access services on any such **broadband** access network facilitate that overall **broadband** access network deployment. **For the avoidance of doubt, broadband access services provided using Physical Infrastructure Access may use any appropriate technology, including copper, fibre, cable or fixed wireless access.**