

Response to the
Consultation on dark fibre remedy and
Ofcom's Statement of Temporary Conditions
in the business connectivity market

by the
Infrastructure Investors Group



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1 Introduction and Summary

- 1.1.1 The IIG is pleased to set out in this document its comments on Ofcom's consultation on the proposed dark fibre access (DFA) remedy for the business connectivity market. In the DFA consultation, Ofcom has also invited comments on its recently imposed Temporary Conditions (TCs) and the IIG accordingly includes its comments on that Statement in this response document as well.
- 1.1.2 The IIG was surprised and concerned to see the documents published by Ofcom on 23rd November 2017 in response to the Judgment by the Competition Appeals Tribunal (CAT) in relation to Ofcom's Business Connectivity Market Review (BCMR) Statement published in April 2016 (the 2016 BCMR). Whilst it was expected that Ofcom would issue a revocation of the 2016 BCMR in as far as CISBO¹ services are concerned, the publication by Ofcom (alongside the revocation notice) of a set of Temporary Conditions (TCs) issued under emergency powers and a consultation to impose the DFA, despite the CAT's findings that Ofcom had been wrong to find a single CISBO market², is not what the IIG would have expected from a regulator.
- 1.1.3 Ofcom's use of emergency powers cannot be justified. Ofcom has demonstrated no urgency and has ignored a number of reasonable alternatives to cover any period between the CAT's Order and Ofcom completing its reconsideration of the 2016 BCMR. The remedies imposed via the TCs are near identical to the 2016 BCMR remedies and again Ofcom offers no compelling evidence as to the need for those remedies. Ofcom has in the past relied successfully on voluntary undertakings by BT, and offers no explanation for why such undertakings would not address any concerns of a deterioration of competitive conditions whilst the 2016 BCMR reconsideration is being completed.
- 1.1.4 It seems to the IIG that Ofcom has no intention of reconsidering the 2016 BCMR and is using the TCs to effectively circumvent the CAT's findings and extend the 2016 BCMR findings, regardless of it having been quashed and remitted in its entirety to Ofcom for reconsideration.
- 1.1.5 Ofcom does not present a justification for its proposal to introduce a DFA remedy at this time, and apply that remedy to markets for which it has not undertaken the statutory analysis, imposed under emergency powers. It seems to the IIG that the DFA remedy proposed by Ofcom risks being: 1) ineffective (but still hugely disruptive) as Ofcom has underestimated the costs CPs would incur in using the remedy, 2) used primarily by CPs who intend to breach the restriction forbidding the use of the DFA remedy to provide active circuits of bandwidth in excess of 1Gbps; and/or 3) used and remaining in place even to the extent that it is subsequently found not to be required in certain markets or at all.
- 1.1.6 Ofcom's proposes to pass the entire burden of implementing the usage restriction, as well as the monitoring and policing of compliance with the restriction, onto BT. It is unclear how

¹ Please note that this response uses the term CISBO for convenience as that is the term coined by Ofcom in the 2016 BCMR, but the IIG does not agree that there is a single market for CISBO services in the UK.

² The CAT found that Ofcom was wrong to find that there was no break in the chain of substitution between 1Gbps services and services of 10Gbps and above.

this could be done and the IIG considers it entirely inappropriate that Ofcom proposes to impose a remedy that is highly likely to be abused, due to a fundamental flaw in its specification.

2 The Infrastructure Investors Group

2.1.1 The Infrastructure Investors Group (IIG) is a collective of alternative infrastructure providers who have built, own and operate high-speed electronic communications networks within the UK, independently of BT. Whilst the members of the IIG normally compete intensely with each other, they believe that it is important to present a strong voice to protect a pro-investment environment for electronic communications networks in the UK and have come together for this sole purpose.

2.1.2 The members of the IIG are (in alphabetical order):

- CityFibre Infrastructure Holdings plc
- euNetworks Group Limited
- Virgin Media plc
- Zayo Group UK Limited

2.2 CityFibre Holdings

2.2.1 CityFibre is the UK's largest alternative provider of wholesale fibre network infrastructure. It has major metro footprints in 42 cities across the UK and a national long distance network that connects these cities to major data-centres across the UK and to key peering points in London. The company has an extensive customer base spanning service integrators, enterprise and consumer service providers and mobile operators. CityFibre provides a portfolio of active and dark fibre services. CityFibre currently operates in excess of 2,250 kilometres of metro local access duct, as well as a 1,139 kilometres national long distance network connecting 22 towns and cities to data centres in London and the UK regions. In July 2016, CityFibre raised a further £200m in order to commence construction of FTTP across our towns and cities and to expand our networks into further towns and cities, regulatory conditions permitting. In November, CityFibre announced a Strategic Partnership with Vodafone to commence construction of FTTP to 1 million premises, potentially expanding to 5 million premises if regulatory conditions permit. The consequence of these investment will be increased network reach in the BCM.

2.3 euNetworks

2.3.1 euNetworks is a European provider of bandwidth infrastructure services. It owns and operates 14 fibre based metropolitan city networks in 5 countries, connected with a high capacity intercity backbone covering 49 cities in 15 countries. euNetworks leads the market in data centre and cloud connectivity provider in Europe, directly connecting over 300 data centres in Europe, with further data centres indirectly connected. euNetworks was founded in 2002 and has its headquarters in London.

2.4 Virgin Media

2.4.1 Virgin Media is the second largest provider of broadband infrastructure within the UK. Its network – the result of multi-billion pound private investment – delivers ultrafast broadband with speeds of up to 350Mbps, as well as market leading connectivity to thousands of public

and private sector organisations. Virgin Media is a part of Liberty Global plc, the world's largest international cable company, together serving 24 million customers across 14 countries.

2.5 Zayo Group

- 2.5.1 Zayo Group is a global provider of communications infrastructure services, including dark fibre, wavelength, Ethernet and IP services. Zayo operates in the United States, Canada, France, Germany, Netherlands, Belgium, Switzerland, Italy, Ireland, and the United Kingdom. Its UK fibre optic network spans more than 450,000km and connects over 130 data centres via unique routes alongside the national gas pipeline and within London's sewer system. Zayo was founded in 2007 and is headquartered in Boulder, Colorado, with European headquarters in London and Paris.

3 Ofcom's process and consultation timeframe

- 3.1.1 The CAT issued its ruling on July 26th 2017 that it had quashed Ofcom's product and geographic market definitions as set out in the 2016 BCMR Statement (the 2016 BCMR). The fully reasoned Judgement was issued by the CAT on November 10th and Ofcom issued the revocation of the 2016 BCMR, its Temporary Conditions Statement (the TC Statement) and its consultation on the introduction of a dark fibre access remedy on November 23rd 2017.
- 3.1.2 It would seem that Ofcom has spent the time since July 26th 2017 to produce the analysis presented in the TC Statement. The TC Statement clearly takes its starting point in the 2016 BCMR (despite the 2016 BCMR having been quashed in its entirety and remitted to Ofcom for reconsideration by the CAT) and makes incremental adjustments to the market definitions and SMP findings from the 2016 BCMR.
- 3.1.3 More specifically:
- a) Ofcom excluded circuits >1Gbps from the CISBO product market and separated five central business districts (CBDs) of Birmingham, Glasgow, Manchester, Bristol and Leeds into separate markets (the CBDs were included in the rest of the UK (RoUK) market in the 2016 BCMR).
 - b) Ofcom then performs a perfunctory and flawed SMP analysis, which results in BT being found to not have SMP in three of the five CBDs, namely Birmingham, Glasgow and Leeds.
 - c) Having identified the SMP markets, Ofcom applies a near-full set of 2016 BCMR remedies (with minor adjustments) to all the those SMP markets and states that the conclusions in the TC Statement will apply in the business connectivity market (BCM) for a period of 16 months, until the end of March 2019 when in any case the 2016 BCMR was due to expire.
- 3.1.4 Additionally, Ofcom has used the time since July 2017 to develop a proposal for the introduction of the same DFA remedy as imposed in the 2016 BCMR to the new SMP markets.
- 3.1.5 The two documents to which this document responds were issued by Ofcom on November 23rd 2017. Ofcom is not consulting on its Temporary Conditions Statement (as they are already in force), but has invited comments on the TC Statement as part of its consultation on the DFA remedy and responses are to be submitted to Ofcom no later than December 29th 2017.
- 3.1.6 That, in reality allows for less than four weeks for stakeholders to respond, given the time of year. Additionally, this deadline falls within companies' quarter and year-end financial reporting cycles, making the short response time even more challenging. The short response time, and the timing of the consultation, risks Ofcom not receiving responses at the level of quality or detailed analysis warranted by the significance of the documents.
- 3.1.7 Individual IIG members have analysed Ofcom's documents and some have submitted separate responses. The IIG agrees with the analyses presented by its individual members and does not propose to repeat them here. Instead, we highlight the key issues identified in

Ofcom's approach with respect to investment incentives for building new competitive infrastructure to serve the BCM.

4 Ofcom's use of emergency powers

- 4.1.1 The TC Statement has been issued by Ofcom using emergency powers, claiming that exceptional circumstances prevail and that Ofcom needs to act urgently to safeguard competition and the interests of consumers.
- 4.1.2 The IIG strongly disagrees that Ofcom is justified in deploying emergency powers to make these decisions. The IIG does not consider that Ofcom's has proven that exceptional circumstances exist as a result of the CAT's Order, nor that Ofcom has an urgent need to safeguard competition and protect the interests of consumers.
- 4.1.3 Ofcom would have had sufficient time to reconsider the 2016 BCMR properly, had it started in July 2017 and engaged with the market and stakeholders at that time.
- 4.1.4 Between the CAT's ruling in July 2017 and the CAT's order in late November, the 2016 BCMR was effectively not applicable. To the best of the knowledge of the IIG members, BT took no steps during that period to exploit its market power. There is no evidence of a risk of BT suddenly doing so, or that BT doing so would constitute exceptional circumstances in which Ofcom has an urgent need to act to protect competition and consumers.
- 4.1.5 Whilst Ofcom would not have been able to pre-judge the contents of the CAT's full reasoned judgement, it was clear that up-to-date market data in relation to market shares and updated plans of Communications Providers (CPs) to build new networks, including the plans of Virgin Media and CityFibre to roll out extensive fibre networks to service both the broadband market and the BCM, would be required. Ofcom did not issue any s.135 data requests to support its analysis for the TCs, nor to prepare for a proper reconsideration of the 2016 BCMR.
- 4.1.6 In fact, Ofcom has no plans of reconsidering the 2016 BCMR, but is simply moving on to the next BCMR (the 2019 BCMR) and the TC Statement is effectively re-imposing the 2016 BCMR for the remainder of the period the 2016 BCMR was supposed to run. To the objective observer, it would seem that Ofcom has simply re-imposed the 2016 BCMR notwithstanding the judgment of the CAT that it could not do so. This behaviour increases regulatory risk and causes investors in the sector to step back and reconsider whether the unpredictable actions by the regulator simply makes investment in the UK less attractive than other jurisdictions.
- 4.1.7 The UK is at a stage where investment in new fibre networks is critical to the continued development of the digital economy and the Government is devoting considerable efforts to encouraging investment in fibre networks. It is therefore striking that Ofcom should choose to act in a way that substantially increases perceived investment risk and acts as a direct investment deterrent through the re-imposition of the aggressive leased lines charge control and the DFA remedy.
- 4.1.8 Ofcom had a number of reasonable options it could have pursued to address any interim period between the CAT's Order and the completion of Ofcom's 2016 BCMR reconsideration.

Instead of pursuing any of those, Ofcom chose to perform a perfunctory analysis, using out-of-date data and not engaging with stakeholders at all.

- 4.1.9 Ofcom dismisses the use of voluntary undertakings by BT to address any period, without explicit ex-ante regulation in the BCM³, but provides no rationale for that position. Ofcom has in the past relied extensively (and successfully) on voluntary undertakings by, including for the creation of Openreach and the implementation of the functional separation remedy. The IIG sees no reason why Ofcom could not seek voluntary undertakings from BT to prevent any deterioration in competition conditions for the short period in question.
- 4.1.10 In summary, the IIG strongly disagrees with Ofcom's use of emergency powers and does not consider that Ofcom has justified having done so.
- 4.1.11 For further analysis of Ofcom's use of emergency powers, please see responses by IIG members:
- CityFibre response paragraphs 5.2.1 through 5.2.49.
 - Virgin Media response section 3 (up till 3.3) and section 3.4.
 - Zayo response section 4.2.

³ It should be noted that as BT would remain subject to competition law provisions and to existing undertakings, it is unlikely that BT would be able to abuse any market power in the short term. This is particularly true as the BCM is characterised by long-term contracts (of often between 3 and 7 years), so only a small number of contracts would in fact be available for competition during the short period between the CAT Order and Ofcom completion the reconsideration.

5 Ofcom's Market definitions, SMP analyses and remedies

- 5.1.1 In the TC Statement, Ofcom presents its justification for defining new relevant product and geographic markets, SMP findings and for the imposition of a range of remedies on those SMP markets.
- 5.1.2 Several individual IIG members have submitted detailed analyses of Ofcom's justification, and this will not be repeated here. For those analyses, please see:
- CityFibre response paragraphs 5.3 through 5.6.16.
 - Virgin Media response section 3.3.
 - Zayo response sections 4.3 and 4.4.
- 5.1.3 The IIG does, however consider it important to highlight that Ofcom's use of scant analysis, out-of-date data and application of flawed and incomplete SMP analysis criteria⁴, in a situation where it is not subject to public consultation, comments or interventions from the European Commission (the Commission) or other regulators through the Body of European Regulators for Electronic Communications (BEREC), represents irresponsible regulation that risks investment in the UK.
- 5.1.4 The TC Statement makes very limited adjustments to the relevant markets Ofcom found in the 2016 BCMR, purporting to reflect the CAT's findings on market definition, but in fact ignoring the many faults described by the CAT on Ofcom's process and methodologies.
- 5.1.5 With regard to the SMP findings in the TC Statement, Ofcom states that it only applies SMP where it can be "sure" that BT has SMP and thereby implies that there is no risk of over-regulation and therefore the application of the extensive suite of remedies is by definition justified. A regulator can virtually never be sure about SMP unless it has performed appropriate analyses using appropriate and up-to-date market data. Ofcom's presumption of SMP, having performed limited and flawed analyses using old data, is not sound and could cause real harm in the market.
- 5.1.6 Further, Ofcom ignores the CAT's finding that Ofcom was wrong to presume that all SMP markets justify the imposition of the same remedies. The CAT found that remedies should be tailored to address the specific market conditions in each SMP market⁵ so, for Ofcom to simply reapply a virtually identical set of remedies to the slightly revised SMP markets ignores the CAT's findings, does not implement the Judgement, but rather repeats the errors identified by the CAT.
- 5.1.7 Whilst the IIG was not a party to the appeal of the 2016 BCMR, two if its members were and it seems beyond doubt that Ofcom has not taken due account of the CAT's findings.

⁴ See CityFibre's response section 5.5.

⁵ See CAT Judgement paragraph 399.

- 1) The CAT quashed the market definitions in the 2016 BCMR and referred the entire decision back to Ofcom for reconsideration, but Ofcom has nevertheless used the 2016 BCMR as the starting point for the justifications presented in the TC Statement;
 - 2) The CAT found that Ofcom had not taken utmost account of the Commission’s Article 7 comments, but still Ofcom does not even mention the Commission’s concerns in relation to granularity of market analysis and differentiation of remedies to reflect competition conditions in its justifications for the market definitions and remedies included in the TC Statement;
 - 3) The CAT referred the entire 2016 to Ofcom for reconsideration, but still Ofcom states that the CAT found that “Ofcom erred in relation to the final conclusions”⁶, but proceeds to state that the 2016 BCMR remedies were not overturned in court and therefore, remain valid. This despite the CAT stating that: *In short, the relevant legislative framework and guidance makes clear that market definition should precede the analysis of SMP (which should in turn precede the question of remedies)*⁷.
- 5.1.8 The remedies imposed as part of the TC Statement are near carbon-copies of those imposed by Ofcom in the 2016 BCMR, with only the bare minimal adjustments to reflect the changes to SMP market definitions.
- 5.1.9 The IIG considers that Ofcom’s actions leading to the TC Statement and the impact of the TCs to be detrimental to infrastructure investment and not in the interest of consumers and citizens of the UK.
- 5.1.10 The IIG considers that Ofcom has not taken account of the CAT’s findings and is, through the TC Statement and the proposed DFA remedy, seeking to circumvent the CAT’s Judgement.

⁶ See paragraph 1.29 of the TC Statement.

⁷ See paragraph 393 of the CAT Judgement.

6 Ofcom's proposed dark fibre access remedy

- 6.1.1 Based on the flawed market definitions and SMP findings set out in the TC Statement, Ofcom is proposing to apply a DFA remedy. It is not correct to impose any remedies on those conclusions, certainly not a remedy which marks a significant departure from the way the market has been regulated and operated to date.
- 6.1.2 As was the case for the remedies included in the TC Statement, Ofcom appears to be simply seeking to apply the DFA remedy it developed in the 2016 BCMR. Whilst Ofcom has not claimed that the imposition of the DFA remedy is urgent and must be imposed as part of the TC Statement, it proposes to apply this radical new remedy using the SMP markets resulting from the TC Statement as the foundation.
- 6.1.3 The IIG does not consider that Ofcom has justified the imposition of the DFA remedy during the period governed by the TC Statement (which should in any case be shortened). Ofcom does not present any justification of urgency for the DFA remedy, or indeed any substantive justification for the remedy at all, given the change in the SMP markets to exclude circuits above 1Gbps.
- 6.1.4 The proposed DFA remedy would be reliant on BT imposing contractual provisions to prevent CPs from using the remedy to provide active circuits > 1Gbps. Ofcom claims that it considers that policing that restrictions should not be complex for BT, should BT choose to impose the restriction in the first place.
- 6.1.5 A dark fibre can by its very nature be used for any bandwidth and BT could not know what speeds a CP is using the circuit for without installing additional equipment or physically inspecting CP equipment on an ongoing basis. This is not a credible or reasonable suggestion.
- 6.1.6 As the DFA remedy would (at least in principle) be limited to the provision of circuits up to 1Gbps and the proposed pricing (unchanged from the 2016 BCMR) would be set at BT's equivalent 1Gbps active service less the incremental costs of the electronics used to deliver the active service (and plus some costs incurred by BT to deliver the DFA product), the DFA remedy may be marginable price-competitive with BT's active 1Gbps services, but only for CPs that currently duplicate BT's electronics on active services. For other uses the remedy would either be unavailable or it would cost substantially more than the equivalent active service.
- 6.1.7 It would appear that Ofcom is therefore proposing a remedy that would only be truly attractive to CPs that intend to breach the usage restrictions.
- 6.1.8 The DFA remedy, once launched would be extremely difficult to remove. Once CPs have started using DFA and have customers connected using DFA, potentially offering different service characteristics than those that could be delivered using wholesale active leased lines from BT, the withdrawal of the DFA remedy would be disruptive and would likely meet with substantial resistance from those CPs using it. The IIG expects that CPs using DFA will make investments in equipment and facilities (including monitoring facilities and staff to maintain the active services delivered over the DFA circuits). Thus, a DFA remedy should only be imposed after careful analysis to ensure that it is an appropriate remedy for the longer term. The IIG therefore considers it inappropriate for Ofcom to impose the DFA remedy based on

temporary SMP market definitions, which are in themselves flawed and may therefore be reversed once a full market review is completed.

6.1.9 Individual IIG members have responded in some detail to Ofcom's DFA consultation and the IIG agrees with those responses. For more details see:

- CityFibre response section 6.
- Virgin Media response section 4.
- Zayo response section 5.