



Zayo's response to
Ofcom's Temporary Conditions Statement
and
Dark Fibre Access Consultation
in the
Business Connectivity Market

December 2017

Non-confidential version

Contents

1	Introduction	3
2	Executive Summary.....	4
3	Ofcom’s consultation process.....	5
4	Ofcom’s Temporary Conditions Statement	6
4.2	Ofcom’s use of emergency powers to implement the TC Statement.....	7
4.3	Ofcom’s revised market definitions.....	8
4.4	Ofcom’s SMP analysis	9
5	Ofcom’s DFA Consultation	10

1 Introduction

1.1.1 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. Zayo was founded in 2007 and is headquartered in Boulder, Colorado, with European headquarters in London and Paris.

1.1.2 Zayo's UK fibre optic network spans more than 450,000km and connects over 130 data centres via unique routes including alongside national gas pipelines and within London's sewer system. Zayo provides many customers with dedicated fibre connections utilising a combination of on-net, new construction and off-net leased fibre. Zayo extends its network to customer premises with a combination of purchased dark fibre as well as self-installed new-build fibre.

1.1.3 [X]

2 Executive Summary

- 2.1.1 In this document Zayo comments on Ofcom's Temporary Conditions Statement and Ofcom's Dark Fibre consultation.
- 2.1.2 Zayo considers that Ofcom's Temporary Conditions Statement is unjustified in that Ofcom has not presented data to support its claim that exceptional circumstances exist and that Ofcom has an urgent need to act to safeguard competition and the interests of consumers. Ofcom should instead have commenced its reconsideration of the 2016 BCMR in July when the CAT issued its judgement quashing Ofcom's market definitions.
- 2.1.3 Had Ofcom started collecting up-to-date market information at that time, it would have been able to reconsider the 2016 BCMR in accordance with the CAT's detailed judgement, once that was issued. Zayo considers it would likely have resulted in a 4-6 months period before the full reconsideration could be completed, not the 16 months proposed by Ofcom.
- 2.1.4 Zayo does not agree that Ofcom could not have relied on voluntary undertakings by BT for the short period after the CAT's final judgement until the 2016 BCMR reconsideration had been completed.
- 2.1.5 Zayo believes that the cursory market analysis presented in the TC Statement (using old data) does not support the definition of new product and geographic markets and additionally does not address the significant methodological and procedural errors identified by the CAT in its judgement. The analysis relies overwhelmingly on the discredited 2016 BCMR analysis and results in only headline changes to the 2016 BCMR markets without supporting justification.
- 2.1.6 Ofcom's SMP analysis is flawed, using inappropriate tests and missing others. The resulting SMP markets are not sound and should not be used for the introduction of any significant remedies, including the aggressive leased lines charge control and the dark fibre remedy. For Ofcom to apply nearly identical remedies, as those imposed in the 2016 BCMR, to the new SMP markets, is unjustified and disproportionate.
- 2.1.7 Ofcom's proposal to apply the dark fibre remedy in the new SMP markets appears to rely on superficial cost-benefit analyses and passes the burden to BT of policing a usage restriction to prevent the dark fibre being used for active circuits above 1Gbps. This is an unjustified burden and an impracticable task. Zayo considers that the remedy, if introduced, would be widely abused.
- 2.1.8 Zayo considers Ofcom's dark fibre remedy proposal to be wrong and disproportionate. The remedy was designed for a different market and is not suitable for, nor has it been justified by competition problems found in, the new SMP markets. Dark fibre could cause significant harm to infrastructure investors such as Zayo and should only be introduced after careful analysis and full stakeholder engagement.

3 Ofcom's consultation process

- 3.1.1 Although Ofcom is not consulting on its Temporary Conditions (TC) Statement, it invites comments on the contents of the TC Statement as part of its consultation on adding dark fibre access (DFA) to the remedies already imposed through the TC Statement.
- 3.1.2 Both documents (the TC Statement and the DFA Consultation) were issued on 23rd November 2017, with responses due no later than 29th December 2017. Although the number of working days included in this consultation period exceeds the minimum consultation period that Ofcom must allow stakeholders to comment on its proposed analyses and interventions, it does in fact only provide approximately 3.5 weeks for preparing a response. This is due to the requirement to obtain board-level sign-off on the response and the availability of the relevant board members and internal stakeholders is foreseeably difficult during the holiday period.
- 3.1.3 Given the importance of the documents to which Ofcom is seeking stakeholder contributions, Zayo is concerned that the rushed consultation process does not afford sufficient time to analyse Ofcom's documents and gather data and input from Zayo internal stakeholders, as well as discuss the documents with other industry stakeholders. The responses Ofcom will receive will likely bear the characteristics of having been put together very quickly and it is entirely feasible that Zayo or other stakeholders may miss significant issues due to this unnecessarily rushed process.
- 3.1.4 This document represents Zayo's response to Ofcom's documents, to the extent that we have been able to perform the necessary analysis. Zayo is also a member of the IIG and this response should be read in conjunction with the IIG response.

4 Ofcom's Temporary Conditions Statement

- 4.1.1 Ofcom's Temporary Conditions Statement (TC Statement) appears to be an attempt by Ofcom to partially implement the Judgement by the Competition Appeals Tribunal (CAT) of the appeals made against Ofcom's 2016 BCMR (the 2016 BCMR) by BT and CityFibre. The CAT found that Ofcom has erred in its product and geographic market definitions in relation to CISBO¹ services. It quashed those market definitions and consequently has remitted the entire 2016 BCMR to Ofcom for reconsideration.
- 4.1.2 Zayo was not a party to the appeal and does therefore not comment in detail on the CAT's findings, but considers it nevertheless highly unusual (and potentially not in compliance with the CAT's Judgement), that Ofcom appears to have selectively reconsidered parts of the 2016 BCMR, but claims that other parts stand, notwithstanding the entire 2016 BCMR having been remitted to Ofcom for reconsideration.
- 4.1.3 In particular, Zayo notes that Ofcom in its TC Statement, has not taken into account, that the CAT found that Ofcom had not taken utmost account of the comments made by the European Commission (the Commission) on the draft 2016 Statement during the statutory Article 7 review of Ofcom's analyses and proposals in the draft statement. As part of the consultation process that preceded the 2016 BCMR, Zayo, as part of the Infrastructure Investors Group (IIG), submitted to Ofcom that its remedies were not sufficiently nuanced and that Ofcom had not identified where markets were prospectively competitive. Ofcom had very simplistically applied the exact same remedies in all areas where it found BT to have SMP, with little or no regard for where there were clear signs of competitive infrastructure investment and emerging competition².
- 4.1.4 Further, Ofcom's application of the CAT's findings to product and geographic market definitions appear perfunctory at best. With regards to the product market definitions, Ofcom has simply carved out CISBO circuits of > 1Gbps, and for the CI Core market, Ofcom has again simply redrawn the boundary between access and core. In neither case has Ofcom reconsidered its 2016 BCMR analyses. The CAT did not consider it appropriate for it to replace Ofcom's 2016 market definitions with its own due to the need to reconsider the definitions in light of the many process and methodological flaws it identified in Ofcom's analyses. It therefore follows that Ofcom should not simply apply the CAT's headline findings without undertaking a proper reconsideration and consult on the results of that reconsideration.
- 4.1.5 Ofcom's geographic market definition processes and methodologies were also strongly criticised by the CAT, with the CAT finding that Ofcom had erred in finding that the five central business districts (CBDs) that Ofcom had identified in the 2016 BCMR formed part of the Rest of the UK (RoUK) market. Again, however, the CAT did not tell Ofcom to simply

¹ Please note that Zayo uses the term CISBO in this response for convenience, despite the CAT having found that there is no such market as the CISBO market defined by Ofcom in the 2016 BCMR.

² With the exception of the safeguard cap applied in the LP market.

carve out those five CBDs. It remitted the analysis to Ofcom for reconsideration, something that we cannot see that Ofcom has done.

- 4.1.6 Lastly, all the remedies applied to the revised SMP markets in the TC Statement are almost exactly the same as those applied in the now quashed 2016 BCMR. Again, Zayo does not consider that Ofcom can simply carry over remedies defined for a different set of markets, and which were criticised by the Commission as not being sufficiently nuanced. Remedies should be designed to fit the specific market conditions and to address specific market failures identified in those markets.
- 4.1.7 The TC Statement suggests that Ofcom is now working on the reconsideration of the 2016 BCMR, but that this will take some time and not be completed until it is time to introduce a new BCMR in April 2019. Zayo does not consider that the potential incorporation of the CAT's findings and the Commission's Article 7 comments in the next regular BCMR constitutes a reconsideration of the 2016 BCMR.
- 4.1.8 From the perspective of an objective observer, Ofcom's actions appear to pay lip service to the CAT's judgement and result in the reintroduction of the 2016 BCMR via the backdoor, with some relatively minor adjustments. That cannot have been the intention of the CAT when it roundly criticised Ofcom's approach and remitted the entire 2016 for Ofcom's reconsideration.

4.2 Ofcom's use of emergency powers to implement the TC Statement

- 4.2.1 As set out above, Zayo considers that Ofcom should have undertaken a deeper analysis of the 2016 BCMR, one that constitutes a proper reconsideration. That process would likely have required the collection of more up-to-date market data and should most certainly have included stakeholder consultation as well as consultation with the Commission as required in Article 7 of the EC Framework Directive.
- 4.2.2 Zayo considers that Ofcom could have performed the necessary analysis in a relatively short period, resulting in only a short period (perhaps four to six months) during which Ofcom would potentially rely on voluntary undertakings from BT. Zayo also considers that, voluntary undertakings from BT to ensure that the competitive conditions would not deteriorate, but which also did not prejudice the outcome of the reconsideration, would be appropriate. Zayo does not consider that Ofcom has established either that the present situation constitutes exceptional circumstances or that Ofcom has an urgent need to act to protect competition and consumers. Those conditions could only be satisfied if Ofcom had demonstrably exhausted alternative options that would not compromise the integrity of its decision-making process and the need for consultation.
- 4.2.3 Zayo considers that the duty must be on Ofcom to demonstrate that the pre-conditions for the use of emergency powers exist and it seems clear that the reasoning presented by Ofcom in the TC Statement does not do so.

4.2.4 As an example of Ofcom not showing that alternative approaches have been exhausted before it has resorted to the use of emergency powers, is that Ofcom summarily dismisses the use of voluntary undertakings by BT to bridge the ‘lacuna’ period, but does not provide its rationale for that position. Zayo understands that Ofcom has successfully relied on voluntary undertakings by BT to effect the functional separation of Openreach from the rest of BT Group. Whilst Ofcom recently found that a more formal legal separation of Openreach would further improve Openreach’s ability to deliver network solutions for all CPs, Zayo is not aware of Ofcom having declared that it considers the use of voluntary undertakings by BT as having failed to deliver most of the benefits Ofcom originally sought from the functional separation.

4.3 Ofcom’s revised market definitions

4.3.1 As highlighted above, Zayo considers that Ofcom’s review of product and geographic market definitions were perfunctory at best and did not take on-board the wide level of criticism included in the CAT’s Judgement of Ofcom’s processes and methodologies. Zayo does not consider it appropriate for Ofcom to say that these new market definitions are appropriate to have in place for the remainder of the term the 2016 BCMR was due to last.

4.3.2 The CAT remitted the 2016 BCMR to Ofcom for reconsideration, but instead of reconsidering the 2016 BCMR, Ofcom has developed a stop-gap set of market definitions, loosely based on the CAT’s findings but including little or no actual reconsideration by Ofcom itself. The CAT did not choose to replace Ofcom’s decisions in the 2016 BCMR with its own, but rather to remit the whole 2016 BCMR to Ofcom for reconsideration. The CAT’s decision was that Ofcom’s processes and methodologies in defining the relevant markets were flawed and should be redone. Ofcom’s statement that *“However, because the Tribunal has found that Ofcom erred in relation to the final conclusions it reached on the scope of the product and geographic markets, those definitions can no longer apply, undermining the basis for all of the regulation that was imposed”*³ (emphasis added), suggests that only the final conclusions were in error and does not recognise the depth of the critique of Ofcom’s overall approach to the market definition process. Thereby Ofcom attempts to reduce the CAT’s findings to overturning only the final conclusions of the market definition processes rather than the integrity of the process itself.

4.3.3 With regards to the reconsideration of the geographic markets, the CAT commented that: *“In particular, we would envisage that if, as a result of its reconsideration, Ofcom were to define the product market(s) differently, it would likely have to adjust the main criteria that drive the design of its infrastructure presence test”*⁴. Despite this statement, Ofcom refers repeatedly to its 2016 BCMR network reach tests and criteria. Zayo has not identified where in the TC Statement, Ofcom acknowledges that its network reach (or infrastructure presence) analysis needs to be reviewed. Ofcom’s continued reliance on the widely discredited analysis in its 2016 BCMR is surprising.

³ See the TC Statement paragraph 1.29.

⁴ See the CAT Judgement paragraph 400

4.4 Ofcom's SMP analysis

- 4.4.1 Zayo considers that Ofcom's SMP analysis, as set out in paragraphs 2.29 onwards of the TC Statement, is flawed and that it should be based on updated market data. Zayo also considers that, whilst Ofcom may find that BT has SMP in many of the markets identified, it should consider the level of existing and likely emerging competition over a period longer than the next 16 months to determine where some SMP markets are prospectively competitive. Given the long term investments required to establish competitive network infrastructure, Zayo recommends that, for markets involving physical fixed infrastructure, the review period should be no less than five years.
- 4.4.2 Ofcom states that as it relies on 2014 data for the SMP analysis, it errs on the side of caution by using 50% market share as the threshold for justifying closer analysis, as opposed to the 40% market share contained in the Commissions' guidelines on market analysis. Why Ofcom did not collect updated market share data is puzzling. Ofcom appears to have spent the time since late July till the 23rd November developing the analyses and proposals in the TC Statement, but did not see it fit to collect up-to-date data to make that analysis robust.
- 4.4.3 Ofcom further states that it finds that BT's combined market share with that of Virgin Media instructive as to whether BT has SMP in a relevant market, concluding that where that combined market share is high, BT is more likely to have SMP⁵. Zayo does not understand Ofcom's rationale in this respect.
- 4.4.4 When determining SMP of a single undertaking (as opposed to joint SMP of two or more undertakings), a regulator should consider the status of that one undertaking separately from other market players. It is also instructive to consider whether that undertaking faces effective or emerging competition. In that analysis it would generally be considered that the undertaking is likely to face more effective competition if there is a smaller number of large competitors than if there were a large number of very small competitors. Zayo therefore considers Ofcom's analysis in this respect to be flawed and misleading.
- 4.4.5 Zayo also considers that Ofcom's omission of an analysis of changes in BT's market shares, to represent a significant weakness to the SMP analysis. A market high share that has nevertheless gone down over time is more indicative of competition or emerging competition than of a situation where BT's market power is reducing such that it is appropriate to consider the application of safeguard remedies only, or even withdrawing regulation⁶.

⁵ See paragraph 2,32 of the TC Statement.

⁶ See paragraph 75 of the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03): *"An undertaking with a large market share may be presumed to have SMP, that is, to be in a dominant position, if its market share has remained stable over time (79). The fact that an undertaking with a significant position on the market is gradually losing market share may well indicate that the market is becoming more competitive"*

- 4.4.6 Given the very aggressive remedies Ofcom has imposed on all SMP markets as part of the TCs, Zayo is deeply concerned that the SMP analysis supporting the imposition of those remedies is weak and potentially wrong. It is clearly inappropriate and disproportionate that Ofcom should be able to apply emergency powers to introduce remedies in markets where its SMP analysis is as weak as that presented in the TC Statement. Whilst the DFA Consultation is not formally part of the measures taken by Ofcom's use of emergency powers, the SMP decisions made under the emergency powers are used as justification of the introduction of the DFA remedy. This is highly inappropriate.

5 Ofcom's DFA Consultation

- 5.1.1 Ofcom proposes to introduce a DFA remedy in the SMP markets applied via the TC Statement. That is SMP markets that result from a very cursory and flawed market definition and SMP analysis process. Zayo's comments on those processes are set out above. One of the consequences of applying the DFA remedy to the new SMP markets, is that the DFA remedy is only applicable to circuits up to and including 1Gbps, but Ofcom proposes to mandate the exact same DFA remedy in the new SMP market as it had previously specified for a market which included VHB circuits. Ofcom also continues to rely on exactly the same analysis as performed for the market including VHB circuits in relation to competition problems identified and benefits that could be derived from the DFA remedy.
- 5.1.2 Zayo responded to the 2016 BCMR consultations as part of the IIG. The IIG response presented clear evidence and arguments that Ofcom's proposed DFA remedy (in particular how the DFA remedy was to be priced) would cause harm to operators like Zayo, which invest in building new fibre networks to compete with BT in the BCM.
- 5.1.3 In CityFibre's appeal of Ofcom's Leased Lines Charge Control (LLCC) in the 2016 BCMR which included the pricing of the DFA remedy (as the active minus pricing of the DFA remedy was linked to the active pricing of BT's 1Gbps services) the Competition and Markets Authority (CMA) agreed with CityFibre's claim that Ofcom's LLCC would cause real harm to infrastructure investors⁷. Zayo is therefore deeply concerned that Ofcom is now seeking to introduce the same DFA remedy at the same price level, without taking into account the harm to investment incentives that will result.
- 5.1.4 Zayo remains of the view that a DFA remedy (if priced at the proposed level) would cause harm to infrastructure competition and it is therefore incumbent on Ofcom to demonstrate that the benefits that result from the remedy substantially outweigh that harm.

The costs savings of DFA

- 5.1.5 Ofcom's assumptions and calculations of benefits appear weak and unsubstantiated. In the 2016 BCMR, Ofcom explained that the pricing of the DFA remedy at the 1Gbps active price minus the LRIC costs of the active electronics would incentivise CPs to use the DFA remedy for bandwidths above 1Gbps and in situations where the use of a DFA circuits would enable

⁷ See paragraph 3.80 of the CMA Final Statement.

the CP to innovate such that the customer would pay for the additional utility resulting from that innovation⁸. The DFA price was thus not designed to provide incentives for CPs to use the DFA remedy to replace 1Gbps active circuits on a cost saving basis only. For Ofcom to apply the same DFA remedy in a BCMR market that excludes VHB circuits, does not make sense and would harm the market including operators like Zayo who invest in competing infrastructure⁹. That harm would increase if the remedy was to be used for the supply of active VHB circuits.

- 5.1.6 In this DFA consultation, however, Ofcom focuses on cost savings for CPs using the DFA remedy to replace EAD and EAD-LA circuits of 1Gbps. As the remedy is not intended to deliver active circuits of more than 1Gbps, the cost savings set out in the 2016 BCMR for the VHB circuits are no longer applicable.
- 5.1.7 Zayo does not have first-hand data in relation to the scenarios set out by Ofcom in paragraphs 4.13 through 4.2 of the DFA consultation in relation to available cost savings from reduced duplication of electronics, but considers Ofcom's calculations as presented in that part of the document (as well as in Annex 5 to the consultation) to be overly simplistic and to not take into account a number of additional costs CPs would incur if they consume DFA circuits. Additionally, CPs would need to have maintenance staff available to monitor and service the active circuits delivered through the dark fibre. Each CP would need to operate 24/7/365 network operations centres and have local engineers to attend faults to meet customer service level guarantees. Even if outsourced, individual CPs would not enjoy BT's level of economies of scale and scope. Ofcom's assumption of the CP facing the need to employ an engineer at an annual salary of £30,000, in no way represents a realistic picture of the cost difference for CPs between consuming active wholesale leased lines and consuming DFA circuits for which the CP is almost entirely solely responsible¹⁰.
- 5.1.8 Ofcom should wait until a full reconsideration of the 2016 BCMR has been completed (or perhaps until the 2019 BCMR has been completed, given that Ofcom has no intention of reconsidering the 2016 BCMR), before considering whether to apply a DFA remedy and, if so, define the remedy in accordance with the specific market defined and the competition problems defined therein.

The risks and benefits of DFA

- 5.1.9 Ofcom's assessment of the risks of the DFA remedy suggests that, as the remedy no longer applies to circuits above 1Gbps, the majority of the risks identified in the 2016 BCMR¹¹ no longer apply. When considering the benefits of the DFA remedy, however, Ofcom appears to expect that the full range of benefits will still apply.

⁸ See paragraph 8.16 from the 2015 LLCC consultation document.

⁹ The uncertainty arising from a remedy such as the proposed DFA remedy causes customers to defer purchase decisions and results in disruption to the market.

¹⁰ See DFA consultation Annex 5 paragraph A5.23.

¹¹ Ofcom identified primarily risks to BT's ability to recover its efficiently incurred costs and to the stability of the price gradient for active leased lines.

- 5.1.10 It is Zayo's experience that many of the benefits from using dark fibre result from the ability to provide 'burst' facilities to customers that may have short term peak bandwidth requirements or to increase the permanent bandwidth quickly and without the need to incur the costs and time delays that characterise a move from 1Gbps to 10Gbps active services with BT, for example. None of those types of benefits would however apply to the DFA remedy now proposed, due to it not being applicable to bandwidths above 1Gbps. Given that the DFA price is linked to the active 1Gbps price, it is highly unlikely that the DFA remedy could feasibly be used by a CP to provide active circuits below 1Gbps.
- 5.1.11 A CP purchasing a DFA remedy would also have to consider what would happen when the end customer needs a higher bandwidth service. The move back to an active wholesale leased line may be disruptive to the service characteristics the CP has been able to offer on the 1Gbps service and the investments in facilities and equipment would be lost to a large extent. This could suppress the demand for DFA. Despite this, Ofcom has not adjusted its take-up assumptions for the DFA remedy. In the 2016 BCMR, Ofcom assumed 50% cannibalisation of new circuits of 1Gbps and above in the first six months after the introduction of the DFA remedy, and 95% thereafter. Those assumptions are unchanged in the DFA Consultation.¹² Zayo considers that Ofcom's take-up assumptions are unduly optimistic.
- 5.1.12 Ofcom states throughout the TC Statement that it believes that, if the product market was to include circuits over 1Gbps, then its finding of SMP would remain unchanged¹³. Zayo is concerned that this shows that Ofcom has already made up its mind about what it wants the outcome of the 2019 BCMR to be. Zayo is concerned that Ofcom's assumption that the 2019 BCMR SMP markets will include the VHB circuits is the underlying reason that it feels confident that the benefits of the DFA remedy will remain unchanged from those identified in the 2016 BCMR. If that were so, then that is not a sound basis for the imposition of the DFA remedy now. Ofcom clearly cannot make presumptions about the outcome of markets reviews that have not yet been commenced.
- 5.1.13 With regards to the impact of the DFA remedy on rival investment, Ofcom's approach again appears overly optimistic. Whilst it appears implicit in Ofcom's assessment of the benefits from the DFA remedy that the usage restriction (of not using DFA for active services above 1Gbps) will be lifted once the 2019 BCMR is completed, Ofcom again relies on this restriction to argue that the impact on rival investment will be minimal as the cannibalisation of VHB services that was envisaged in the 2016 BCMR will now not happen.
- 5.1.14 So, when considering the risks of DFA, Ofcom relies on the usage restriction, but when estimating and predicting the benefits, there is an implicit assumption that the restriction will be lifted.

¹² See table 5.2 of the DFA Consultation.

¹³ See for example paragraph 2.94 of the TC Statement.

Policing the usage restriction

- 5.1.15 Ofcom lays the burden of implementing, monitoring and policing the usage restriction on BT. The very nature of dark fibre, is that the user can do with it what they want, so for Ofcom to presume that BT can impose an effective deterrent from breaching the restriction, is a leap of faith. To assume that CPs will comply due to the risk of damage to their reputations if they are found out, depends on a number of factors including: 1) do they think BT can and will monitor the use of DFA effectively, and 2) is BT likely to actually disconnect customers served by a CPs DFA connection, given the likely PR backlash that will inevitable result even if BT would have every right to enforce its legal rights?
- 5.1.16 Zayo does not believe that it is realistic to expect BT to monitor what electronics CPs attach to DFA circuits to determine whether they comply with the usage restriction. The premise seems unenforceable. BT has no access to the CP equipment, which may actually be in CP locations and not in BT exchanges. The only item that BT provides is the fibre (i.e. an empty passive pipe). BT cannot easily monitor this for usage. If it tried there would be security implications (e.g. monitoring using fibre taps). Passing this responsibility for policing compliance with the usage restrictions onto BT appears entirely unreasonable. It would seem that Ofcom has decided to implement DFA, no matter what, even if it cannot in fact police its own remedy.

Duct and pole access

- 5.1.17 Zayo believes that, to encourage competition as deep into the network as possible, and to generate a commercial market for dark fibre services, Ofcom should implement a duct and pole access remedy instead of the proposed DFA remedy.
- 5.1.18 Ofcom's statement that its proposed easing of usage restrictions on the duct and pole access remedy in the WLAMR market provides sufficient flexibility for CPs to also use the remedy in the BCM¹⁴, providing that they use it to primarily provide broadband services, does not address the core problem in the BCM. On the contrary, it creates an unfair and material market distortion in the provision of BCM services. Operators like Zayo, which focus mainly on the BCM, will be seriously curtailed in using the WLAMR-based duct and pole remedy, whereas some of its core competitors in the BCM will be able to use DPA due to their additional market focus in the broadband services sector.
- 5.1.19 Given Ofcom's repeated statement in the WLAMR that it cannot lift the usage restrictions on PIA in such a way that the remedy could be used exclusively for BCM services, it is surprising to see that Ofcom refers to the PIA remedy in the context of solving competition problems in the BCM. Ofcom's inconsistency in regulation across two markets that essentially use the same physical infrastructure, continues to destabilise the markets and only adds to uncertainty and regulatory risk for companies like Zayo, investing in competitive infrastructure.

¹⁴ See the DFA Consultation paragraphs 3.12 and 3.13.

Conclusions on Ofcom's DFA proposals

- 5.1.20 Zayo considers Ofcom's DFA proposals to be rash, ill-considered and not substantiated by facts and transparent analysis. That the remedy is imposed onto SMP markets introduced using emergency powers and also not supported by transparent and rigorous analysis and not subject to public consultation, only serves to make Ofcom's proposals even more unacceptable.
- 5.1.21 Ofcom's assessment of risks and benefits of the DFA remedy appear biased and inconsistent. No remedy as disruptive as DFA should be implemented based on SMP markets that have not been subject to rigorous analysis and stakeholder scrutiny. Ofcom should concentrate on getting the reconsideration of the 2016 BCMR completed as quickly as possible (whilst preparing the 2019 BCMR) and only then consider DFA alongside other potential remedies including duct and pole access for the BCM.