

Future broadband - Policy approach to next generation access

Sky response to Ofcom consultation

Ofcom's general approach

Sky is broadly supportive of Ofcom's proposed approach to regulation in relation to the development of next generation access (NGA) networks in the UK. Investment in next generation access raises difficult policy issues due to the interaction between several issues which pull in different directions, namely:

- the need to provide regulatory certainty to potential investors in such networks – particularly in view of the potential magnitude of NGA investments;
- the potential that specifying regulatory rules ex ante may disincentivise timely socially and economically valuable investments;
- the potential that specifying such rules may distort the nature and commercial sustainability of operators' investments; and
- the scope for control over inputs by needed by third parties in order to invest efficiently in NGA by operators with Significant Market Power in relevant markets to impede such investments.

At the same time, Sky recognises that Ofcom is required to operate within the framework of its general duties and formal powers which themselves both constrain Ofcom's ability to intervene, and do not produce clear-cut answers about the form of intervention that might be warranted. In particular, Ofcom needs to balance its general duties to regulate only in cases where it is needed, and to ensure that no unnecessary regulatory burdens are imposed, with its duties to have regard to the desirability of encouraging investment and innovation, and the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom.

In Sky's view, Ofcom's five "high level principles" on NGA investments, therefore strike a broadly appropriate balance between these different elements at this point in time, recognising, however, that they do not in fact fully resolve these tensions.

Sky supports Ofcom's current view that investment in NGA should be driven by commercial incentives. As Ofcom and the DTI have recognised public intervention to promote such investment carries with it several risks that potentially result in inefficient investments, and reduced consumer choice.¹

Remedies for SMP

Imposition of any broader regulatory remedies relating to NGA products should be considered in the context of formal market reviews and should only apply where an operator is found to have SMP. There is an assumption that NGA would be considered as part of the Wholesale Local Access and the Wholesale Broadband Access market reviews. Ofcom's NGA high level principles are likely to provide a useful context and background for these market reviews, the process for which will be sufficient to allow Ofcom to consider introduction of appropriate remedies, were an operator be found to have SMP in the relevant market.

In Sky's view, it would be premature for Ofcom to either dismiss or positively favour particular remedies (including duct access, dark fibre access and sub-loop unbundling (SLU)) at this stage, given the considerable uncertainties that exist as to how the market may develop and what access demands operators may have.

With regards to SLU, specifically, BT is currently required to provide SLU facilities to Communications Providers. The current Openreach SLU products are comparable to that of LLU products as available in 2000, in that they still exist more as a "theoretical" product, and are not yet fit for purpose for scale

¹ Public Broadband Schemes, A Best Practice Guide.
http://www.ofcom.org.uk/media/mofaq/telecoms/pbs/dti_pbs.pdf

deployment.

Sky welcomes the fact that Ofcom has tasked the Office of the Telecommunications Adjudicator (OTA) to work with industry to assess demand for SLU and work to ensure that SLU is appropriately industrialised. Ofcom should ensure the OTA's work is adequately supported by Openreach.

Implications for current generation broadband

The promotion of competition in the delivery of broadband services via Local Loop Unbundling has been a key focus of Ofcom's activities since its inception, and continues to be so.² A range of operators, including Sky, have invested very significantly in the provision of LLU-based broadband services as a result.

Sky welcomes Ofcom's recognition in its consultation document that changes to existing regulatory products may have implications for operators who currently rely on them. Sky would, however, encourage Ofcom when formulating policy on NGA to take full account of the encouragement of investment in LLU-based broadband services that has occurred to date.

Sky

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² See, for example, Paragraph 1.2 in Wholesale Broadband Access Consultation 15 November 2007 paragraph 1.2, which states: *"Ofcom has identified that competition between networks based on LLU, rather than competition based on wholesale broadband products, is crucial to maintaining the UK's broadband progress. Promoting competition based on LLU continues to be central to Ofcom's approach in making sure that consumers can access the services they demand."*

