
Statement on adding dark fibre to the temporary remedies for business connectivity markets

STATEMENT:

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About this document

Leased lines are high-quality, dedicated, point-to-point data transmission services used by businesses and providers of communications services. As well as being essential components of many businesses communications systems, they are also essential to support the provision of mobile telephone and fixed residential broadband services.

This statement sets out our decision not to introduce a temporary remedy requiring BT to provide a restricted form of dark fibre in the leased lines markets for the period until March 2019. We remain of the view that dark fibre can play an important role in promoting competition in leased lines.

1. Ofcom's decision not to add dark fibre to the remedies running to March 2019

- 1.1 BT is currently subject to a package of temporary regulation in relation to certain Ethernet services, including a charge control. This temporary regulation covers the period to 31 March 2019. In November 2017 we consulted on whether it would be appropriate to add a restricted form of dark fibre remedy to this package of temporary measures. In this document we explain why we have decided, following input from stakeholders, not to introduce this restricted form of dark fibre during the period to March 2019.
- 1.2 However, we remain of the view that dark fibre can play an important role in promoting competition in leased lines. In particular, we believe that dark fibre has an important role where duct and pole access ("DPA") is not an effective remedy, for example because usage restrictions may prevent DPA being used. We will therefore be considering an enhanced dark fibre as a remedy in our further market review.

Background

- 1.3 The Business Connectivity Market Review (BCMR) is Ofcom's examination of the markets for the provision of leased lines to businesses in the UK. Leased lines are high-quality, dedicated, point-to-point data transmission services used by businesses and providers of communications services. As well as being essential components of many businesses' communications systems, they are also essential to support the provision of mobile telephone and fixed residential broadband services.
- 1.4 We conducted our BCMR 2016¹ on a forward-looking basis to cover the period from April 2016 to March 2019. We found BT to have significant market power (SMP) in the provision of contemporary interface symmetric broadband origination (CISBO) services in the London Periphery (LP) and the Rest of the UK (RoUK), and imposed regulation to protect the interests of consumers and to promote competition.²
- 1.5 A particular remedy we introduced in the BCMR 2016 was dark fibre access. This remedy required BT to provide unlit strands of its optical fibre, to which access-seekers could attach their own electronic equipment to deliver business connectivity services. The remedy was unrestricted and so available for use at all bandwidths.

¹ A summary of the BCMR 2016 can be found in *Business Connectivity Market Review*, 28 April 2016, Volume 1, Section 1 (the 2016 BCMR Statement). <https://www.ofcom.org.uk/consultations-and-statements/category-1/business-connectivity-market-review-2015>. When referring to the BCMR 2016 or the 2016 BCMR Statement, we also refer to our subsequent decision to amend the way in which non-domestic business rates are treated in the calculation of the dark fibre price as set out in our statement *Non-domestic rates and the price for regulated Dark Fibre*, 30 June 2017 (the 2017 NDR Statement), https://www.ofcom.org.uk/data/assets/pdf_file/0021/103647/statement-non-domestic-rates-dark-fibre.pdf

² CISBO services include Ethernet services and wave division multiplex (WDM) services of all bandwidths, as well as Ethernet First Mile (EFM) services (2016 BCMR Statement, paragraph 4.2).

- 1.6 BT appealed the BCMR 2016 decisions concerning the market definition and the imposition of the dark fibre remedy. The Competition Appeal Tribunal (the Tribunal) decided to hear BT's market definition grounds first. The Tribunal found that Ofcom made some specific errors in relation to the BCMR 2016 market definition. As market definition underpins the setting of regulation, the Tribunal did not proceed to hear BT's challenge to Ofcom's decisions concerning the dark fibre remedy. On 20 November 2017, the Tribunal ordered Ofcom to revoke its SMP findings and regulatory conditions in respect of BT for all CISBO services, including the dark fibre remedy.³
- 1.7 As a result of the Tribunal's judgment, on 23 November 2017 we removed all regulation in the CISBO markets, including the dark fibre remedy.⁴ In order to safeguard competition and protect the interests of consumers, we used our powers to make temporary market identifications, market power determinations and impose temporary SMP conditions and directions on BT.
- 1.8 In the BCMR Temporary Conditions Statement,⁵ we made temporary SMP findings in respect of BT in wholesale leased line services of all bandwidths at and below 1Gbit/s using contemporary interface technologies⁶ (collectively referred to as Lower Bandwidth CISBO services). We imposed a number of regulatory obligations reflecting the SMP conditions and directions in the 2016 BCMR, including a charge control and quality of service measures but not dark fibre access. These temporary conditions may remain in force until 31 March 2019.
- 1.9 At the same time, we also published the 2017 Dark Fibre Consultation⁷ proposing to add a requirement on BT to provide dark fibre in addition to the other remedies imposed in the BCMR Temporary Conditions Statement. Given the conclusions we reached on market definition and SMP, we proposed to allow BT to restrict the supply of regulated dark fibre to bandwidths of 1Gbit/s and below. We consulted on the basis that:
- We considered that BT had already developed the dark fibre product and telecoms providers had invested in systems and processes to launch it. We did not therefore consider it appropriate to postpone consideration of dark fibre until the next review.
 - We recognised that a bandwidth restriction on dark fibre would reduce its attractiveness. We therefore wanted to ask stakeholders whether dark fibre for speeds at and below 1Gbit/s would be of interest to them.

³ <http://www.catribunal.org.uk/237-9285/1260-3-3-16-British-Telecommunications-.html>. The provision of dark fibre under the remedy was originally scheduled to begin from October 2017, but BT decided not to provide the product following the announcement of the outcome of the Tribunal's judgment in July 2017.

⁴ Ofcom, *Business Connectivity Market Review 2016, Revocation of certain measures imposed in the business connectivity markets*, 23 November 2017, https://www.ofcom.org.uk/_data/assets/pdf_file/0018/108018/BCMR-Revocation-Notification.pdf

⁵ Ofcom, *Business Connectivity Markets, Temporary SMP conditions in relation to business connectivity services*, 23 November 2017 (BCMR Temporary Conditions Statement), https://www.ofcom.org.uk/_data/assets/pdf_file/0019/108019/BCMR-Temporary-Conditions.pdf

⁶ Including Ethernet in the First Mile (EFM).

⁷ Ofcom, *Dark Fibre Consultation, Consultation on adding dark fibre to the remedies for business connectivity markets*, 23 November 2017, (the 2017 Dark Fibre Consultation), https://www.ofcom.org.uk/_data/assets/pdf_file/0014/108032/Dark-Fibre-Consultation.pdf

- 1.10 We proposed that the product should be launched in April 2018.
- 1.11 As part of the 2017 Dark Fibre Consultation, we also consulted on the market definition and SMP assessment set out in the BCMR Temporary Conditions Statement.

We are not introducing the restricted form of dark fibre to the temporary package of remedies

- 1.12 In light of the responses to the 2017 Dark Fibre Consultation, we have decided not to introduce an obligation on BT to provide dark fibre at and below 1Gbit/s for the period until March 2019.
- 1.13 Stakeholders who we consider to be potential purchasers of dark fibre (e.g. TalkTalk, Three, Vodafone) provided some support for dark fibre at and below 1Gbit/s. They agreed with our provisional view that there were still cost savings to be realised from using the restricted dark fibre. However, they also made it clear that a dark fibre service which was available at higher bandwidths would be significantly more useful in allowing them to become less reliant on Openreach, particularly in relation to bandwidth upgrades.
- 1.14 One of the benefits of dark fibre is the flexibility to upgrade to higher bandwidth with very low additional costs (unlike BT's active services). Such upgrades would be curtailed under the proposed dark fibre remedy because the product would be restricted to services at and below 1Gbit/s.
- 1.15 Some telecoms providers informed us that, although a considerable number of their existing leased lines are at 1Gbit/s, they would only migrate very low volumes to dark fibre, despite the potential for immediate cost savings, because they were likely to need to upgrade to higher bandwidth within the next few years. This was one of the main reasons why they forecast limited use of dark fibre for new connections. It is clear from this that the interest in a restricted dark fibre product is lower than we anticipated. Some telecoms providers said that another reason why their use of dark fibre in 2018/19 will be low is the novelty of the product which necessitates that they run a trial first.
- 1.16 Stakeholders who own significant fibre infrastructure (BT, Virgin Media and CityFibre) opposed our proposal to impose restricted dark fibre, due to their concerns about:
- introducing the dark fibre remedy on the basis of temporary SMP findings;
 - potential costs associated with monitoring the usage of the remedy; and
 - potential stifling of investment in rival infrastructure.
- 1.17 Having carefully considered all of the consultation responses, we have decided not to introduce a restricted dark fibre remedy as a temporary condition for the period until March 2019.
- 1.18 As set out above, we remain of the view that dark fibre can play an important role in promoting competition in leased lines. In particular, we believe that dark fibre has an important role where DPA is not an effective remedy, for example because usage

restrictions may prevent DPA being used. We will therefore be considering an enhanced dark fibre as a remedy in our further market review.

Market assessment and charge control

- 1.19 At the same time as consulting on a temporary dark fibre remedy, we asked for views and evidence on the markets as defined in the BCMR Temporary Conditions Statement.
- 1.20 Some stakeholders provided views that we have been too conservative in our market assessment. Other stakeholders raised concerns about whether the conservative approach adequately takes into account the Tribunal's judgment, and about whether we should conduct our market definition and SMP assessment using fresh data.
- 1.21 The BCMR Temporary Conditions acknowledged that further analysis was required to fully consider the remitted matters and recognised that this is likely to form part of the next review of these markets.⁸ Despite arguing in response to the consultation that we needed to consider fresh market data, we did not receive evidence from stakeholders in their responses. We have therefore sent formal information requests to stakeholders to obtain evidence including in relation to current network reach and market shares. That process is continuing and we will take account of this evidence in the next review and earlier if possible.
- 1.22 In the BCMR Temporary Conditions Statement we set charge controls on Ethernet services with bandwidths of 1Gbit/s and below provided in the markets in which we found BT to have SMP. We also explained that the proposed introduction of dark fibre affected the level of the Ethernet charge controls and estimated an adjustment to the levels of the charge controls in the event that we decided not to introduce dark fibre.⁹
- 1.23 Given that we are still gathering and analysing new evidence, we consider that it would not be appropriate to adjust the levels of the temporary charge controls at this time. In the meantime, BT is required to comply with the temporary charge controls imposed in the BCMR Temporary Conditions Statement.

⁸ For example, at paragraph 2.13.

⁹ BCMR Temporary Conditions Statement, paragraph 5.43 and the Dark Fibre Consultation, paragraph 5.16.