

euNetworks response to Ofcom's Wholesale Fixed Telecoms Market Review – May 22nd 2020

Executive Summary

1. euNetworks is pleased to respond to the WFTMR. This response is primarily focused on two issues that are of particular significance to euNetworks, namely the use of the PIA product to meet business connectivity requirements and issues in the UK mobile backhaul market. As euNetworks only operates in the Business Connectivity Market (BCM), we do not comment on Ofcom's proposals for other markets covered by this review.

The PIA Product

2. euNetworks has started using the PIA product and has participated actively in the Passives Industry Working Group (PIWG) to ensure that the product will be fit for purpose for use by BCM-only users.
3. We have found that Openreach has not been willing to consider changes necessary to make the product usable for BCM-only providers and that the OTA has not been able to overcome Openreach's intransigence.
4. Of particular concern are the forecasting process and the contractual term for spine duct.
 - a. Forecasts are required for the following 9 months and failure to provide these is a breach of contract. However, we may only have 1-3 months' visibility of our customers' requirements making the process meaningless.
 - b. The minimum contract term of 5 years, is a risk for us and our customers who require long-term infrastructure. Our customers often look for 20-year contracts and are concerned that the PIA supply is not guaranteed for that period. This represents a significant disadvantage for PIA users versus BT. BT is not subject to that condition, which is unduly discriminatory.
5. euNetworks considers that Ofcom ought to transition the PIA product to being subject to equivalence of inputs (EoI) conditions. BT otherwise has strong incentives to favour its downstream businesses and to make the PIA product as difficult to use as possible.
6. This will need to be managed over time, not by leaving the PIA product as is until full compliance can be achieved.
7. Ultimately, the most effective means of preventing BT favouring its downstream business would be to structurally (or at least functionally) separate the duct and poles business from the rest of Openreach. Meanwhile, implementing EoI would be a critical step towards ensuring that PIA can support Ofcom's objectives and the Government's targets for fibre deployment across the UK.

Regulation of the market for mobile backhaul services

8. In Annex 15 Ofcom identifies a number of potentially anticompetitive pricing and contractual practices that BT could engage in to deter competitive fibre investment. euNetworks agrees that Ofcom needs to take action to prevent such practices by dominant providers across the different markets covered by the WFTMR.
9. One example of such behaviours is the way BT supplies mobile backhaul services to mobile network operators (MNOs). The majority of BT's supply to MNOs is done by BT Wholesale (BTW), not Openreach, but as it is BT overall that has been found to have SMP in the wholesale leased lines market (the BCM), this supply is still covered by the remedies applied by Ofcom.
10. Ofcom ought to request details of the BTW contractual provisions and to consider whether they constitute anticompetitive practices.

Proposed price remedies for the BCM

11. euNetworks welcomes Ofcom's overall approach to price regulation in the business connectivity market (BCM). euNetworks notes that BT's wholesale leased line prices are already below BT's fully allocated costs (FAC) which will not be economically viable to deploy competing leased line infrastructure.

12. In our experience, treating 65% network reach of two or more competitive networks as sufficient competitive threat on BT to remove price regulation still enables BT to price tactically in such areas and cause significant harm to competitive network providers growing their businesses.

About euNetworks

13. euNetworks is a Western European provider of bandwidth infrastructure services. We focus on delivering scalable, fibre based products and solutions to a customer base that is at the centre of technology transformation. Our customers require fibre based data centre to data centre connectivity, both within the key cities in Europe and between these cities, supporting both their bandwidth growth and the performance requirements that their applications demand. Our customers' needs shape how we develop our network further. We own and operate 17 dense fibre based metropolitan city networks. These are connected with an intercity backbone covering 51 cities in 15 countries. Our metro networks are in London, Manchester, Dublin, Amsterdam, Rotterdam, Utrecht, Paris, Frankfurt, Cologne, Dusseldorf, Stuttgart, Munich, Hamburg, Berlin, Vienna, Milan & Madrid. euNetworks leads the market in data centre connectivity, directly connecting over 430 in Europe today, with further data centres indirectly connected. We are also a leading cloud connectivity provider, direct connection to all key cloud platforms and access to additional platforms. Our product set of Fibre, Wavelengths and Ethernet is bundled to deliver bandwidth solutions for our customers, from euTrade to Cloud Connect, DC Connect, and Media Connect.

Regulation of BT's pricing and pricing behaviour

Proposed approach and charge regulation

14. euNetworks welcomes Ofcom's focus on supporting investment across all markets and across the whole of the UK. Ofcom's proposal to halt the historically steep reductions in regulated prices for wholesale leased lines is extremely important for companies like euNetworks to be able to compete effectively with BT¹ and other providers that use the Openreach wholesale products. The significant reductions imposed by Ofcom in recent charge controls and even the CPI-CPI charge control make investment in competing fibre infrastructure to serve the BCM extremely challenging.
15. The proposed CPI-0% charge control to be applied nationally - except where Ofcom finds that BT does not have significant market power (SMP) or competition is (in Ofcom's opinion) sufficiently established to negate the need for a charge control to be applied – is a welcome change, although euNetworks wishes to draw Ofcom's attention to the following concerns.
 - According to the 2019 BT regulatory financial statement (RFS), BT's wholesale leased line prices for CISBO products of 1Gbps or less were below BT's FAC costs (with a ROCE of 3.9% against the relevant cost of capital of 9.8%). Although going forward the basket is now widened to include higher speeds, which have greater profitability, for the next two years a CPI-CPI charge control applies, so further real-terms price declines are expected before the start of the new review period. It is therefore likely that the proposed CPI-0% charge control from 2021 will result in continued losses for 1Gbps products.
 - Whilst some providers that build combined broadband and BCM networks may be able to subsidise the BCM services from the broadband services (although we doubt that would be feasible), a stand-alone BCM service provider relies on that service being able to support itself.
 - Ofcom assumes that high network reach areas (HNRS) have sufficient competition for it not being necessary to impose a charge control in the BCM. Ofcom's threshold for the HNR definition is two competitive providers being able to reach 65% or more of leased lines customers in the area, therefore leaving up to 35% of customers with no alternative provider. It also means that the competitive providers are unlikely to be fully established in the relevant location and thus vulnerable to potential anticompetitive pricing behaviour by BT.

¹ In this response, unless specifically required by the context, euNetworks refers to BT throughout, regardless of Ofcom occasionally referring to Openreach in its text. It is euNetworks' understanding that the entity found to have SMP is BT, not Openreach. As such, euNetworks considers it appropriate that the remedies should be discussed as applicable to BT, not just to Openreach.

16. euNetworks asks that Ofcom gives further consideration to the proposed charge control and where it is to be applied. The UK's future economic strength is likely to be directly linked to the strength and diversity of its communications infrastructure; now is the time to ensure that competition has optimal conditions to become established, not to underregulate with the hope of being able to correct for that later, should competition not emerge to the extent hoped.
17. A CPI-0% charge control would be acceptable if it were combined with an up-front adjustment to compensate for the fact that BT's current charges are below costs. Also, the charge control should be applied across all areas where BT has been found to have SMP, including in HNRs.

Proposed measures to prevent anticompetitive pricing

18. Ofcom proposes to impose restrictions on BT's ability to introduce geographic price discounts, applicable both in the BCM and in the broadband market, although it is proposed that the restrictions should not apply to the BCM in Area 3. Ofcom also proposes general restrictions on BT's ability to introduce volume-based or other types of loyalty discounts and/or bundling/tying.
19. euNetworks welcomes these proposals in general, but (in line with our response to the charge control proposals) we consider that Ofcom is being too cautious and should strengthen its proposals to ensure that opportunistic, creative anticompetitive initiatives cannot be deployed to harm the deployment of competitive fibre networks across the country and to all customers groups.

Openreach's incentives

20. euNetworks is concerned that Openreach, as a vertically integrated provider of active wholesale products, dark fibre products² and PIA is incentivised to maximise use of its downstream wholesale products over the upstream products including PIA.
21. euNetworks has in the past, in IIG submissions, highlighted this problem and advocated that Ofcom should address this fundamental challenge to an effective provision of PIA services by Openreach.
22. A structural separation of Openreach into a 'Duct and Pole Company' (DPC) from downstream services would be a permanent and strong solution, but euNetworks understands the challenges in effecting that change and also the perceived risks in doing so.
23. A functional separation, however could also result in significant changes to Openreach's incentives and would require that equivalence of inputs (Eol) is introduced as the DPC would function separately both from the other parts of Openreach and from the remainder of BT Group.
24. Further, euNetworks considers that Ofcom's proposals for accounting separation for the PI market do not comply with the EC accounting separation guidelines in that, instead of stating internal and external costs and revenues, it will only state external costs and revenues and assume that internal consumption represents the balance of revenues required for the market to cover its costs, including the relevant WACC. Such reporting gives no insight into how BT itself uses its duct and pole infrastructure and is therefore largely meaningless.
25. euNetworks urges Ofcom to commence the process towards either functional or operational separation of the DPA, and to change its proposals for accounting separation to include meaningful reporting on BT's own uses of its duct and pole infrastructure.
26. The logical first step is to start the specification of an Eol product interface, whilst in the meantime strengthening the existing no undue discrimination provisions. We address those points later in this section.

Changes needed to the PIA product

27. euNetworks has been represented at the Passives Industry Working Group (PIWG), chaired by the OTA2 (OTA) for the past 12 months in the anticipation that the usage restrictions would be lifted, as was the case from July 2019.

² Proposed by Ofcom in the WFTMR.

28. We have worked with the rest of industry to seek changes to the product to make it suitable and fit-for-purpose for use by BCM-only providers in particular but also to improve it generally for all users of the product.
29. It has, however, been our experience that very little change and improvement has been achieved and we believe that Ofcom's current duct and pole access (DPA) remedy is specified in a manner and at a level that makes it possible for Openreach to resist very reasonable requests from industry. We set out below our key concerns and urge Ofcom to take the opportunity of this review to improve and strengthen the DPA remedy.
30. Ofcom cites the PIA product throughout the WFTMR documents as the cornerstone of its full-fibre deployment strategy, but proposes no changes to strengthen the product despite clear evidence that it is not fit for purpose. euNetworks is concerned that Openreach is strongly incentivised to make the PIA product difficult to use and that the current Ofcom interventions are not sufficient to safeguard against that.

Product characteristics unsuitable for BCM-only use

31. The PIA product, as it exists today, was specified when Ofcom's 'mixed use' restrictions were in place, with a clear focus on the 'primary use' which was for the deployment of broadband infrastructure. The mixed use restriction was removed nearly one year ago, but despite repeated requests for changes to reflect that, no such changes have as yet been agreed even in principle. Openreach states that it considers the product to be fit for purpose for all uses and that it plans no changes in response to the removal of the usage restrictions.

Forecasting

32. One prime example of the need to make changes to the PIA product to make it fit for purpose is forecasting.
33. Forecasting is mandatory in the PIA Agreement; if a CP does not forecast, Openreach may refuse supply as this constitutes a breach of contract. But it is in fact not possible for BCM providers to provide a meaningful forecast.
34. The current forecasting provisions require that a PIA customer forecasts its PIA requirements by region (there are 25 regions across the UK) nine months in advance. The forecast is for a six-month period, starting three months after the date of the forecast. The provision of BCM, however is typically on a one to three-months sales cycle, so it is not feasible for such PIA customers to comply with the forecasting requirements.
35. We have repeatedly called for a review of forecasting requirements to make it possible for BCM providers to provide meaningful forecasts to Openreach, but Openreach has blankly refused to entertain such changes. At the six-months review point we asked the OTA to ensure that forecasting was included in the review scope, but despite the OTA scheduling a review session for forecasting, Openreach refused to engage and only reported back on the mechanics of the current forecasting framework³.
36. euNetworks and other BCM providers have been asking that the forecasting regime be changed to include a shorter period forecast, perhaps submitted monthly, as well as a materiality threshold under which the consequences for not having submitted a forecast for a specific requirement do not apply. We are aware that the OTA is presently working on a potential solution, but that remains subject to Openreach agreement. It is our view that the DPA remedy needs to be modified to ensure that such critical changes are not subject to the approval of a reluctant supplier.

Consequences of not forecasting or mis-forecasting

37. Until April this year, a bedding in period had been agreed, so the only consequence of not providing a forecast that proved accurate within the parameters specified could be Openreach refusal to supply, due to contract breach. Whilst Openreach has not as yet exercised that right, it would be meaningless for it to insist that this constitutes contract breach if it had no intention to exercise it in the future.

³ Which, interestingly was that the forecasting information is currently not helpful to Openreach. euNetworks is aware that many other CPs are also unhappy with the current forecasting framework, for different reasons than those listed in this document.

38. Now, however, the applicability of service level guarantees (SLGs) is subject to accurate forecasting. Whilst euNetworks is not interested in receiving SLG payments from Openreach, it is important that the SLG regime is applicable to BCM-only suppliers as well as to broadband providers.
39. The SLG regime is designed to incentivise Openreach to meet the service level agreements (SLAs) in the PIA contract and to ensure that PIA customers are compensated fairly against losses and costs incurred as a direct consequence of Openreach not meeting those SLAs. As we will cover later in this response, SLAs are particularly important to BCM provision.

Minimum contract term for duct use

40. Openreach offers only a minimum period of 5 years. This is despite PIA customers repeatedly requesting a longer term in order that their customers see security of supply. Openreach has consistently blankly refused to offer a longer minimum contract period.
41. Although we understand that Openreach has an obligation to supply after the minimum contract period has expired (until such time that the regulatory obligation to supply is removed), the short minimum term is consistently raised as a risk by customers for long term connectivity supply. Our customers often contract for periods of 10 or 20 years.
42. It is clear that neither BT nor Openreach are subject to that contractual term and they therefore have a significant commercial advantage over providers that rely on PIA for meeting the customer connectivity requirements. euNetworks considers this to be unduly discriminatory and Ofcom should intervene to ensure that the discrepancy is removed. We recommend an option for a minimum term of at least 20 years and perhaps a longer-term indefeasible right of use (IRU) option as well.

Proposal for NUD improvement

43. euNetworks understands that Ofcom cannot set detailed forecasting rules (and other such detailed rules) for a regulated product, but it would be possible to introduce parameters that reduce the ability of Openreach to effectively veto reasonable improvements to the product. This could be achieved through an escalation process in which the OTA remits to Ofcom any issues on which negotiations have failed but which the OTA agrees are reasonable and proportionate in order that the product can serve the important function of enabling country-wide fibre deployment.
44. euNetworks believes that an escalation process along these lines would influence Openreach's incentives to reach negotiated solutions and that this would result in a levelling of the negotiation situation between Openreach and PIA customers.
45. At present, there is little meaningful negotiation at the PIWG, more a situation of providers explaining problems they are experiencing and Openreach explaining why it believes that the product is functioning adequately or that making the changes requested would not be feasible due to the way current systems are designed etc. The OTA plays an important role in ensuring that significant issues are not entirely brushed away, but then cannot impose changes to the PIA product.

SLAs and SLGs and KPIs

46. SLAs and SLGs are important to all PIA customers, but it is more likely that a provider rolling out a large broadband network can absorb delays into its internal deployment programme than is the case for a BCM provider that often has stretched deadlines to deliver point-to-point connectivity. Often BCM providers have SLAs and SLGs with their retail customers and they are therefore often more sensitive to delays in the PIA process.

SLAs

47. At present there are very few SLAs in the PIA contract. Only the processes for acknowledging, responding to, and implementing network adjustments have SLAs. There are many other interfaces where PIA customers depend on Openreach to deliver or respond, but for which no SLAs exist.
48. PIWG members have in the past submitted lists of activities they believe should be subject to either SLAs or KPIs, but these have been roundly rejected by Openreach. To reduce dependency on Openreach, PIA

customers can perform a number of activities themselves, including some categories of network adjustments. But even then, they often depend on Openreach.

49. For example, a PIA customer can only claim against the network adjustment fund if the network adjustment has been approved by Openreach. If that is delayed then the customer cannot proceed with the network adjustment without waiving the right to compensation for fixing the Openreach infrastructure. Further, some such network adjustments require access to locked lids, so the customer is again dependent on Openreach to provide the relevant key(s). No SLA is associated with the provision of keys for locked lids.
50. There are many other such examples, but PIA customers have no power to negotiate the addition of relevant SLAs with Openreach and the OTA likewise has no power to impose them.
51. euNetworks is aware that a systems SLA is being considered by Openreach, but the scope of that SLA is uncertain. At present it looks like it may be a simple binary question of: are all the PIA systems down? If so then there is an SLA for bringing them back up again. But there are many different systems that could be down separately or at the same time and it is not our understanding that Openreach is willing to consider SLAs for each of those systems.

SLGs

52. A significant amount of discussions in the PIWG centred around Openreach's SLG proposals, which included punitive SLGs on PIA customers, but meaningless SLGs for Openreach. The proposals were clearly inequitable, but PIWG members had no option than to go through a protracted process to get these changed.
53. Eventually, SLGs on PIA customers were removed, but the level and structure of Openreach SLGs remained unchanged until last summer when a subgroup was created to address the issue. euNetworks was represented on that subgroup. Although it was difficult to gather PIA customer information to calculate costs and losses incurred due to Openreach not meeting the current (three) SLAs, it also became clear that Openreach had no intention of enabling the conclusion of more meaningful SLGs.
54. For several meetings Openreach presented theoretical models with dummy numbers. It was very difficult to relate to. Only right before the deadline for having the SLGs agreed for implementation in April 2020 did Openreach present its model populated with its proposed numbers. It became apparent that the resulting SLGs remained meaningless both in terms of compensating customers for the costs and losses incurred and in terms of providing any kind of incentive to Openreach to meet its SLAs.
55. Also, issues were identified with Openreach's SLG calculations including that Openreach proposes to distribute the cost incurred to a customer over the average number of days of a PIA delay. This despite the fact that such costs are incurred up-front by the customers. Thus, customers with short delays will not be fairly compensated and those suffering longer delays may be overcompensated. This is regardless of the level of compensation, simply a question of fair compensation for costs incurred by each customer.
56. Due to the last-minute presentation by Openreach of its proposed SLG cost inputs, it has not been possible to reach agreement for implementation by April 2020. Consequently, Openreach has simply implemented its proposed SLGs. There is something wrong with a process that enables this to happen. Whilst it would have been helpful to have more costing inputs from PIA customers, that could have been facilitated if Openreach had presented its actual proposals in time for customers to make counter-proposals.

Key performance Indicators

57. The setting of KPIs for the PIA product is voluntary. Ofcom does not impose KPIs on Openreach, but negotiates a set of KPIs for which Openreach regularly publishes performance data.
58. The process of agreeing KPIs for the PIA product is conducted between Openreach and Ofcom. It is not transparent to the PIWG, although Ofcom and Openreach have occasionally presented to the PIWG what KPIs are being developed as well as actual KPI performance data. PIWG members did present to Ofcom a list of parameters for which it considered KPIs should be developed and reported on, but only very few of those have been adopted.



59. euNetworks notes that Ofcom considers that the KPI process has progressed satisfactorily and therefore proposes to leave the voluntary KPI arrangement unchanged. euNetworks considers that a firmer and more proactive approach should be taken for the setting of KPIs and that PIA customers should play a more formal role in the process. This is particularly important in the short term while an EoI product is under development.
60. When KPIs are defined, it is critical that they use directly comparable and relevant processes. Although Openreach does not use the PIA product, it does use its own duct and pole infrastructure and thus it should be possible to identify comparable and relevant processes for the KPI measurements. euNetworks understands, however, that a new KPI being developed for the desk-based processing of network adjustment requests for poles is using a desk-based assessment of Ethernet service requests as the comparator. Whilst both processes are desk-based assessments, they have nothing else in common. If KPIs are developed in that manner, then they are unlikely to deliver meaningful comparisons and as such would add little value and could in reality be misleading or cause confusion.

A route towards EoI for PIA

61. Underlying the problems with the PIA product is the clear commercial incentive for Openreach to make the product as unattractive and difficult to use as it can within the regulatory framework. Openreach has on many occasions stated openly that it does not want to offer duct and pole access, but is doing so in response to a regulatory imposition. Openreach is therefore a reluctant supplier.
62. Openreach is vertically integrated and has natural incentives to favour its downstream products, which allow it to retail very strong market power in the upstream infrastructure market. The PIA product enables the erosion of Openreach's market share at the infrastructure level and poses a significant threat to Openreach's downstream products as well as to the further downstream BT Group businesses.
63. Ultimately, the only way to completely remove those incentives is to structurally separate the ducts and poles infrastructure from the rest of Openreach and the rest of BT Group. euNetworks would welcome an initiative from Ofcom to make this happen, but understands that this is unlikely in the immediate future and that the imposition of such a remedy is not straightforward in the context of Ofcom's powers.
64. Functional or legal separation would also be options that could reduce Openreach's incentives to favour its downstream activities, but euNetworks is not certain that they offer significant incremental advantages over the introduction of an EoI version of the PIA product. euNetworks is aware that the equivalent product in France has been subject to EoI from the outset and is generally considered to function well without the need to separate the duct and poles part of Orange.
65. Ofcom offers no justification in the WFTMR consultation for why it considers that EoI is not proportionate and appropriate for the PIA product. In consultations over the past 2-3 years on the subject, Ofcom stated that the creation of systems and processes that are suitable for both Openreach itself and other providers to use, would be a costly and time-consuming exercise and that it considered that making improvements to the (then) existing product may well be all that is needed to make the product fit-for-purpose.

Experience of the new PIA product since its introduction in April 2018

66. Since April 2018, the new and improved PIA product has been available, with a number of functionalities and improvements being phased in over the first 12 months after that. Although euNetworks has only been actively involved since January 2019, it is aware of the work conducted through the PIWG over the full 24-months period.
67. The examples set out above in this response of Openreach's refusal to make straightforward changes to the product along with a long list of other issues experienced with the product (including overzealous in-life auditing behaviour by Openreach of work in progress by PIA customers that is causing delays and admin costs for customers, inability to change orders to become self-provide orders if Openreach's delivery dates are unacceptably long, etc.) demonstrates that the imposition of the current DPA remedy is not sufficient to ensure that a fit-for-purpose PIA product is made available to support Ofcom's strategy for full-fibre deployment in the UK.

Time is of the essence

68. Ofcom relies extensively on the access to a fit-for-purpose PIA product for its UK-wide full-fibre deployment strategy. It is, however, becoming clear that the current product is not (and is unlikely to become) fit-for-purpose.
69. The main fibre network deployment period is likely to be over the next 5-8 years, with the main deployments in 2-5 years from now as different providers build up scale of their deployment capability. It is likely that the development of an EoI-compliant PIA product will take time, perhaps as long as 2 years?
70. Given the evidence available at present that Openreach continues to act as a reluctant supplier and ensuring that progress on improvements is at the slowest pace it can justify, given the circumstances (which is commercially rational behaviour by Openreach, and therefore fully understandable and predictable), Ofcom should waste no time in commencing the work to specify the requirements for the EoI compliant PIA product in order that the specification is ready for Ofcom's WFTMR Final statement at the end of march 2021.

Strengthening of no undue discrimination provisions

71. During the period of developing the EoI-compliant PIA product it is important that the current PIA product is improved and operated in a manner that ensures that customers are not disadvantaged unduly relative to how Openreach itself can access its passive infrastructure.
72. The most common response from Openreach when a customer queries whether a feature of the PIA product is aligned with how Openreach itself uses its infrastructure, is that Openreach does not use PIA, so it is not possible to compare. euNetworks believes that Ofcom should expand the scope of the NUD remedy such that more general comparisons can be made. euNetworks would welcome the opportunity to work with Ofcom the OTA and other stakeholders to define specific parameters for such comparisons.
73. Ofcom's proposed implementation of the no NUD remedy should, in principle, be a good compromise, given Ofcom's concerns that EoI may be inappropriate or disproportionate. The description of the NUD remedy includes statements like: "we would interpret that obligation as requiring strict equivalence in respect of all processes and sub-products that contribute to the supply and consumption of network access, with discrimination permitted only in cases where Openreach demonstrates that a difference in respect of a specific process step or sub-product is justified."⁴
74. However, Ofcom then proceeds to state that: "we do not consider it necessary for Openreach to set out the entire end-to-end process on how passive infrastructure is used (with differences being individually identified and justified" and "We are not proposing an upfront obligation on Openreach to justify all instances of non-equivalence"⁵.
75. These statements effectively mean that the onus is on PIA customers to make strong cases for why Openreach is favouring itself. That is extremely hard to prove, as customers do not have access to Openreach's internal processes or performance data. This has been clearly demonstrated through the difficulty experienced in finding KPIs where comparable data is available between the Openreach access terms and the access terms offered to customers via PIA.
76. Openreach has implemented new processes and systems to support the PIA product, but there has been no effort, to the best of our knowledge, to ensure that those processes and systems reflect the way Openreach uses its own infrastructure as much as possible. euNetworks considers that this is not in compliance with Ofcom's NUD remedy, even without the need to prove compliance with existing processes and systems.
77. Ofcom's statement that "We are not proposing an upfront obligation on Openreach to justify all instances of non-equivalence, however, we are provisionally retaining the requirement on Openreach to produce an Internal Reference Offer that requires it to set out its internal processes to some degree. This will allow Ofcom and telecoms providers to identify any differences in process." suggests that the Openreach Internal

⁴ Annex 12. Paragraph A12.27

⁵ Annex A. Paragraph A12.28.

Reference Offer (IRO) should be a means of understanding where discrimination occurs and what impact this might have.

78. Instead, the IRO reads like a marketing document for Openreach's approach and presents the separate PIA processes and systems as almost means of offering better functionality than that which is afforded to Openreach itself using its internal processes and systems. Whilst euNetworks appreciates the intention behind the IRO, we consider the actual document of very limited use.
79. While working on the Eol implementation for PIA, and as an input to that process, we believe Ofcom should amend the NUD provisions to include that Openreach, over the next 12 months, has an obligation to justify any current non-compliance with Eol. We further propose that Ofcom amends the NUD remedy to state that any new systems developed by Openreach to support the PIA product must be developed in such a way that they can support the needs of Openreach once Eol is implemented.
80. The proposed amendments will both help the current and short-term changes to the PIA product and will also contribute towards the Eol compliant PIA product, ensuring that all efforts are efficient towards ultimately having a strong fit-for-purpose PIA product that is Eol compliant.

Preventing anticompetitive behaviour in the mobile backhaul market

81. euNetworks has in the past (as part of the IIG) expressed its concerns that BT Wholesale (BTW)⁶ is dominant in the market for provision of mobile backhaul services and that its practices in terms of contract structures and discount schemes constitutes barriers to entry for new market entrants such as euNetworks. Rather than repeating our entire argument here, we refer Ofcom to past IIG submission(s)⁷. euNetworks also supports the points made by CityFibre in its 2019 BCMR response⁸.
82. In summary, BTW acts as an aggregator of Openreach and BTW services and offers these on a national basis in contract structures that cause the mobile network operators (MNOs) to pay higher prices in locations where there are no competing network providers, if the MNO shifts supply to competing providers where these exist.
83. In essence, BTW's contracts tie the provision of services in non-competitive areas to provision of services in competitive and prospectively competitive areas⁹, thus locking out competitive supply.
84. When Ofcom has reviewed the supply of leased lines (and dark fibre) to MNOs for backhaul purposes, it has stated that the level of competition in that market is similar to the level of competition in other leased lines markets. That is, it is related to the presence of competing networks. This is, however, clearly not the case. In many locations where Ofcom has found that the market for provision of leased lines is competitive or prospectively competitive, BTW is the only or by far the largest supplier of mobile backhaul circuits, despite the presence of other competing networks.
85. Ofcom has also in the past stated that any other CPs could, in principle, replicate the BTW services, simply by procuring wholesale leased lines from Openreach and long-distance connectivity from BT or other suppliers. This is, however, not as straightforward as it might seem. For example, there is anecdotal evidence that there is tacit coordination between Openreach and BTW such that Openreach develops specific products or launches specific offers that enable BTW to present specifically designed packages to the MNOs that later cannot be replicated by other CPs. It is also understood that BTW builds in forward-looking regulatory price reductions on the Openreach components, in a manner that could not be financially supported by a smaller competing CP.
86. Whilst the BTW contractual terms are confidential to the contracting parties, there is substantial anecdotal evidence of the nature of those terms and they appear to be of a nature to cause significant barriers to entry for providers wishing to address the mobile backhaul market in competitive locations. This view was

⁶ It is not clear to euNetworks whether BT Wholesale has been incorporated into BT Enterprise, in this document we use the BT Wholesale name.

⁷ See IIG BCMR response in January 2019, paragraphs 4.4.5 to 4.4.11.

⁸ See CityFibre BSMR response January 2019 paragraph 2.16 and Annex 1.

⁹ By making the pricing in non-competitive areas dependent on supply in the competitive areas.

supported by the findings of the Competitions and Markets Authority in the 2016 BT/EE merger investigation¹⁰.

The relevance of Annex 15 to mobile backhaul

87. In Annex 15, Ofcom discusses the kind of behaviour it wishes to prevent through its proposed measures, but we note that, in the entire Annex 15, Ofcom refers only to the regulation of Openreach, not to the regulation of BT overall.
88. Paragraph A15.12 explains why Ofcom has concerns in relation to some commercial terms: “However, we are concerned that Openreach could design commercial terms which undermine alternative network operator rollout. For example, a commercial arrangement which penalises access seekers from moving volumes from Openreach to an alternative network operator with the effect that the alternative network operator rollout is deterred. Openreach is the only operator with a national network footprint.” [emphasis added]
89. Further in paragraph A15.59 Ofcom states “An example of our concern is commercial terms which disincentivise access seekers from moving volumes from Openreach to an alternative operator and, in so doing, undermine investment in alternative networks. A contract with a loyalty discount could mean access seekers face significantly higher average charges for services purchased from Openreach if they also purchase from an alternative network. This could create a barrier to using alternative network operators, undermining the business case for entry.” [emphasis added]
90. And, in paragraph A15.60, Ofcom states “However, we would be particularly concerned about the impact of any commercial terms which incorporate an element of loyalty inducement as these could deter nascent alternative network rollout.” [emphasis added]
91. The behaviours described by Ofcom are exactly the behaviour euNetworks and the other IIG members have been highlighting to Ofcom in BCMR responses for the past several years. It is not clear why Ofcom wants to limit the applicability of Annex 15 to Openreach only. It is our understanding that it is BT that Ofcom proposes to find as having SMP in the relevant markets, not Openreach only?
92. In Annex 5, paragraph 61-62, Ofcom states as follows: “A5.61 We consider it appropriate to prevent a dominant provider to whom an SMP services condition is applied, which is part of a group of companies, exploiting the principle of corporate separation. The dominant provider should not use another member of its group to carry out activities or to fail to comply with a condition, which would otherwise render the dominant provider in breach of its obligations.
93. “A5.62 To secure that aim, we apply the SMP conditions to the person in relation to which we have made the market power determination in question by reference to the so-called “Dominant Provider”, which we define as “[X plc], whose registered company number is [000] and any [X plc] subsidiary or holding company, or any subsidiary of that holding company, all as defined in section 1159 of the Companies Act 2006”.
94. It is euNetworks’ understanding that Ofcom finds BT to have SMP in all the relevant markets, not Openreach. It therefore follows that the remedies should apply to all relevant parts of BT and that Ofcom should actively investigate whether remedies at the furthest upstream level (Openreach/DPA) are effective and prevent anticompetitive behaviour and market harm in downstream markets.
95. Ofcom has not conducted that downstream impact analysis and we urge Ofcom to do so. The mobile backhaul market is important to the viability of competing fibre network providers, whether they build multi-service networks (MSNs) or business connectivity-only networks.
96. At present the mobile backhaul market is all but foreclosed as a direct consequence of the BTW contractual and discounting practices. In light of Ofcom’s clear recognition of the harmful effect of such behaviour, euNetworks strongly urges Ofcom to actively investigate the BTW mobile backhaul contract provisions and to change the scope of Annex 15 in such a way that it is clear that any part of BT that engages in such

¹⁰ “For all the MNOs, durations and volume commitments in existing contracts with BT Wholesale make large scale switching difficult in the short to medium term” CMA BT/EE decision paragraph 17.29.

practices and that enjoys a position of dominance in a specific market is covered by the provisions in Annex 15.

Glossary

In this document a number of technical terms and acronyms have been used. Below we set out their meanings:

BC	Business Connectivity
BCM	Business Connectivity market
BTW	BT Wholesale
CP	Communications provider
CPI	Consumer Price Index
DPA	Duct and Pole Access
Eol	Equivalence of Inputs
FAC	Fully Allocated Costs
HNR	High Network Reach
IRU	Indefeasible Right of Use
KPIs	Key Performance Indicators
MNO	Mobile Network Operator
MSN	Multi Service Network
NUD	No Undue Discrimination
PIA	Physical Infrastructure Access
OTA	Office of Telecoms Adjudication
PIWG	Passives Industry Working Group
ROCE	Return On Capital Employed
SLA	Service Level Agreement
SLG	Service Level Guarantee
SMP	Significant Market Power
WACC	Weighted Average Cost of Capital