

OFCOM BCMR Passive Remedies Consultation

Introduction

INCA welcomes the opportunity to respond to the Business Connectivity Market Review – Preliminary Consultation on passive Remedies, published by Ofcom on 5th November 2014.

INCA is an association representing the non-incumbent builders and operators of next generation network digital networks. Our membership is diverse and includes large companies like Vodafone and Sky alongside new entrants CityFibre, Gigaclear, UK Broadband, Hyperoptic, Fluidata and ITS Technology Group. Our members build and operate fibre, wireless, satellite and hybrid networks. They operate in both urban and rural areas. They work on the basis of private sector investment and do not demand large state subsidies to address harder to reach areas. Some of our members are public sector organisations; others are community-based networks. Taken together they represent a new generation of organisations building and promoting the development of next generation digital infrastructure - fibre (particularly FTTP/H/B) and wireless. A number of INCA members consider that they are building 'Transformational Digital Infrastructure' upon which much of the UK's future prosperity will depend.

INCA was involved in the project team surveying the non-major providers of next generation broadband access for the 2014 Ofcom Communications Infrastructure Report. In the course of this work 51 'altnets' were surveyed and 37 were interviewed. Access to BT's passive infrastructure featured strongly as an issue, particularly for altnets actively developing rural networks.

In relation to the BCMR Passive consultation we have consulted with a limited number of members and associates. The comments below reflect the views expressed.

Question 1: Do you agree with our preliminary framework for considering the case for passive remedies?

BT's recent investments and announcements in regard to TV sports services, mobile operations, plus its obligations in relation to existing services necessarily limit its appetite for investing in the transition to new digital infrastructure that the UK requires in order to remain globally competitive. Policy-makers and regulators

should therefore embrace the new generation of digital network builders and help to ensure their investment decisions are based on a solid and supportive foundation.

Passive remedies are strongly supported by INCA members building networks in rural areas. However at least one important INCA member, CityFibre, has expressed reservations that passive remedies could undermine their investment case in urban fibre projects if introduced too soon, or poorly considered. Some form of geographic segmentation would therefore seem worth pursuing, as is discussed in the consultation document.

Consideration is given in the framework to economic efficiency including investment and innovation, competition, distributional effects on consumers, service availability etc. and there is discussion of the issues around BT's cost recovery. However there is no reference to the fact that BT is in receipt of £1.2bn of state aid (and potentially another £500m) for its rural infrastructure. Arguably BT now requires substantial public subsidy to upgrade and keep its rural network 'fit for purpose.'

On the broader issue of the regulatory framework one INCA member made the point that:

The ultimate goal of any regulator should be to find long-term solutions to competition issues rather than to constantly treat symptoms in ever more complex ways. With this in mind, Ofcom could be encouraged to create a new "Market 4 - NGA" definition applied to areas where operators without Significant Market Power have installed a qualifying open-access long-term NGA solution (i.e. very heavy fibre element which is likely to result in a natural monopoly). Qualifying conditions can be set with 'benchmarked and affordable' pricing. Carriers with SMP are then forbidden from investing in areas that receive the designation for a specified period. At the end of the initial moratorium, and assuming it passes appropriate tests, the operator is offered the opportunity to take on an NGA Universal Service Obligation which carries with it a long term regulatory responsibility as the prime natural infrastructure monopoly for the area. If this is accepted, the traditional USO obligations for the area fall away from the SMP operator (usually BT) which would trigger an opportunity for a copper switch-off.

Clearly any development of the regulatory approach like this would require detailed consideration and analysis, beyond the scope of the current BCMR passives consultation, but ultimately it is the sort of thinking that could help the UK to develop a more competitive market in telecoms infrastructure.

Some INCA members we consulted have extensive experience of overseas markets, particularly Scandinavia where there is far greater access to high-speed broadband services, particularly in rural areas. In Sweden the incumbent operator has been

offering dark fibre access for around 10 years and as one member put it ‘the world hasn’t ended.’ If we want to get more fibre and high speed wireless services (fixed and mobile) to more people in more geographies, dark fibre and other passive remedies - properly introduced, priced and regulated - are clearly part of the solution.

Question 2: Do you agree with our preliminary views on the potential benefits of passive remedies? Please provide evidence to support your view.

Broadly INCA members favour greater infrastructure competition in both the access and backhaul networks. However those building rural networks face the challenge of gaining access to affordable backhaul that meets their needs. Here the analysis provided in the consultation clearly reflects our understanding of the views of many of the companies involved in both mobile and fixed service provision. Passive remedies offer an opportunity to facilitate infrastructure competition and improved services in rural areas and would be welcomed by many of these providers. In particular companies like IFNL have put forward cogent arguments as to why lack of access to affordable backhaul holds back their ability to deploy FTTH in new building developments.

Question 3: Do you agree with our preliminary views on the impacts and risks of passive remedies? Please provide evidence to support your view.

CityFibre has articulated the strongest concerns about passive remedies. These can be summarised as:

- Reduced market share of passive connections – BT providing passive products in the same geographic markets as CityFibre is likely to reduce the number (or take up) of passive connections served. This would have a negative effect on the investment case.
- Regulated pricing undermines their investment case – If pricing of passive remedies is set at levels below CityFibre’s pricing of passive products then CityFibre’s investment case may be challenging or unviable.
- Fear, uncertainty and doubt delays decision-making – FUD may delay CP’s decisions to contract with CityFibre and hence negatively impact the take up of CityFibre’s passive products in the short to mid term.
- Stranded investments – Reduced market share and or reduction in revenues in our current geographic markets may lead to stranded investments and part built networks.
- Future investments – Negative impacts to our business case may reduce their incentive for future rollout, thus limiting efficient infrastructure competition in further geographic markets.

At this stage we have no comments on BT's 'cherry-picking' or 'fair bet' concerns other than to say that the benefits in extending rural services clearly outweigh these risks to the dominant market player, which is in any case the recipient of substantial public funds for upgrading its rural network.

Question 4: What are your views about the potential impact of passive remedies on the pattern of common cost recovery and the associated distributional impacts?

We think that the investment and cost recovery needs of companies building alternative infrastructure need to be taken into account in pricing or charge controls over BT, rather than simply referring to BT's recovery of common costs alone.

Question 5: Do you agree with our initial view that mobile backhaul and fixed broadband backhaul are likely to be the primary applications with significant demand for passive remedies?

Yes we agree with this analysis. We anticipate that passive access will help develop the market for high speed fixed (http) and wireless networks.

Question 6: What benefits might duct access offer over dark fibre and vice versa? Is there a case for having both remedies?

The discussion in the consultation document is very thorough, demonstrating a clearly articulated demand for dark fibre and potentially duct access. Some existing providers of dark fibre may be able to extend their networks using BT's ducts and poles if demand is there. However it is worth noting that few companies have taken up the existing PIA product, in part because of caveats on the conditions for its use.

Question 7: If passive remedies were restricted to particular product types or geographic areas how might this affect the usefulness and benefits of the passive remedy?

In general INCA members favour extending infrastructure competition and as CityFibre has argued, introducing a dark fibre passive remedy risks undermining investments being made by them and other companies. However there is a general recognition that in rural areas where BT has a de facto monopoly and is in receipt of large amounts of public subsidy, there is a good case for making dark fibre and duct available to companies building competitive fixed and mobile networks.

Question 8: What arrangements would be appropriate for the supply of new infrastructure for passive remedies?

Question 9: Do you agree with our initial views about the non-discrimination arrangements for passive remedies?

Question 10: In light of the trade-offs identified, which broad options on pricing do you consider would be most appropriate for passive remedies and why? Please also provide details if there is another pricing approach you consider would be appropriate in light of the considerations identified in this section.

Question 11: If a value-based (active minus) approach to pricing dark fibre were adopted, what do you think would be an appropriate active wholesale product (or products) to reference?

At this stage we do not have any specific comments on Questions 8-11.

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