

Business Connectivity Market Review

Preliminary consultation on passive remedies

Response by KCOM

5 January 2014

Summary

KCOM Group PLC delivers communications services to a range of businesses and consumers throughout the UK under a number of different brands. In Hull and East Yorkshire, as the incumbent provider KC delivers a range of communications services to businesses, consumers and other CPs. Nationally, Kcom provides services to enterprise customers while Eclipse offers a portfolio of communications services with a focus on the SME market.

We understand that this consultation is very much focused on the role of passive remedies in addressing perceived competition problems in the national market outside of the Hull area however, we are conscious it is possible that passive access might also be seen as a solution to address market power concerns in the Hull area. As such this consultation is of interest to both our national business and our KC brand in the Hull area.

We appreciate that this is a preliminary consultation aimed at seeking views on the framework for assessing the role of passive remedies, their potential costs and benefits and, at a high-level, what passive remedies would actually look like. However, we would like to make our position clear from the outset; KCOM does not see a role for passive remedies in promoting downstream competition in the market for business connectivity services. There is no evidence of demand that cannot be satisfied by existing remedies or the wider market. Indeed, there is a risk that a requirement to provide passive remedies could well undermine the investment in networks and leased line services which has already taken place.

We believe that the issues in the business connectivity market are very different to those in the wholesale local access market which the introduction of passive remedies are designed to address, i.e. the roll-out of NGA. The deployment of NGA has very specific commercial and geographic challenges which passive remedies may be better suited to address. Not least is the fact that the aim is for ubiquitous coverage for residential customers, a very different market to that served by business connectivity services and a very different challenge.

The framework for analysis

We broadly agree with the framework for analysis that Ofcom has set out in the consultation. However, we are concerned that it is not clear from the consultation that this analysis needs to be carried out within the legal framework provided by the Communications Act. In particular, Section 87(4) of the Act identifies the factors that OFCOM must take into account when imposing SMP conditions (emphasis added):

“(1) Where OFCOM have made a determination that a person to whom this section applies (“the dominant provider”) has significant market power in an identified services market, they shall—

(a) set such SMP conditions authorised by this section as they consider it appropriate to apply to that person in respect of the relevant network or relevant facilities; and

(b) apply those conditions to that person.

(2) This section applies to—

(a) a person who provides a public electronic communications network; and

(b) a person who makes available facilities that are associated facilities by reference to such a network.

(3) This section authorises SMP conditions requiring the dominant provider to give such entitlements as OFCOM may from time to time direct as respects—

(a) the provision of network access to the relevant network;

(b) the use of the relevant network; and

(c) the availability of the relevant facilities.

(4) In determining what conditions authorised by subsection (3) to set in a particular case, OFCOM must take into account, in particular, the following factors—

(a) the technical and economic viability [(including the viability of other network access products, whether provided by the dominant provider or another person)], having regard to the state of market development, of installing and using facilities that would make the proposed network access unnecessary;

(b) the feasibility of the provision of the proposed network access;

(c) the investment made by the person initially providing or making available the network or other facility in respect of which an entitlement to network access is proposed [(taking account of any public investment made)];

(d) the need to secure effective competition [(including, where it appears to OFCOM to be appropriate, economically efficient infrastructure based competition)] in the long term;

(e) any rights to intellectual property that are relevant to the proposal; and

(f) the desirability of securing that electronic communications services are provided that are available throughout the member States.”

In particular, we would urge Ofcom to give proper consideration in its analysis to the technical and economic viability of other network access products offered by other providers which would make the imposition of passive remedies unnecessary. At a national level we are able to commercially offer passive access products such as dark fibre and we are aware of other providers doing the same. We would be concerned if our ability to compete successfully in this market were to be hampered by a requirement on BT to offer the same products at regulated prices.

We have also seen moves by other providers to deploy solutions themselves in order to meet particular demand. For example, CityFibre Holdings has recently announced the signing of a long term national framework agreement with EE and Three UK, along with their infrastructure joint venture, Mobile Broadband Network Limited ("MBNL"). The framework agreement will see CityFibre deploy dark fibre backhaul connections to mobile masts (Fibre-to-the-Tower, or "FTTT") across both operators' networks. Deployment has already begun in Hull.

We acknowledge that Ofcom has identified the risk that passive remedies may undermine CPs' incentives to invest in their own infrastructure but believe that Ofcom needs to take a wider view and consider the impact on existing and planned infrastructure build which is already or soon will be providing the capability to meet demands for passive access.

The preliminary consultation also indicates that Ofcom will consider the implications of the Civil Infrastructure Directive. We think that it is right that this be considered. We also believe that there are other steps which could be taken by national and local government and regulators to do to reduce the barriers to investment and improve the business case for infrastructure deployment which should also be considered as part of Ofcom's analysis. For example we are aware that there has been extensive discussion regarding modifications to the Electronic Communications Code which we believe would reduce and in some cases remove barriers to the deployment of infrastructure.

Finally we note that the leased lines market differs from the NGA access market where Ofcom has imposed specific obligations on BT to provide passive access. Ubiquitous cover of NGA was a key driver behind the imposition of those remedies, critically for residential premises where commercial roll-out was unlikely to be viable. The problem that those arguing in favour of passive access believe it will address in the leased lines market is very different to that presented by the NGA access market and should be a key consideration in Ofcom's analysis.

Impacts and risks of passive remedies

We have noted above our concern that mandating passive remedies could undermine incentives to invest and have a negative impact on infrastructure investments already made. We also support Ofcom's intention to explore the other factors identified in the preliminary consultation, in particular the implications for common cost recovery and rebalancing of prices. This could have a significant impact on providers who have invested heavily in BT's current portfolio of regulated leased line services and could face a significant adjustment to their cost base.

We believe there is also a considerable risk regarding actual demand for passive products which cannot be met in other ways or by other providers. This goes to the heart of whether it is reasonable and proportionate to expect BT to develop such a product. Therefore sufficient demand materialising must be considered as a risk. There is a real risk that development of a suitable product might generate costs that could not be directly covered from the sale of passive access.

Scope and Design Considerations

A key question for us in considering the scope of design of any remedies is exactly how Ofcom proposes to define markets for the purposes of the market review. In previous market reviews Ofcom has defined the relevant markets by bandwidth and technology. We are not clear whether it is this approach which Ofcom intends to take this time or whether an alternative approach is being considered that would define a more general access and/or backhaul market as is the case in the fixed access markets.

We believe this is important as it is fundamental to whether or not BT (or any other provider) has SMP. If Ofcom were to continue with defining markets by bandwidth and technology then we would not expect to see passive remedies imposed in areas where no SMP is found. However, defining more general access and/or backhaul markets could lead to a finding of SMP even where there is significant competition in the provision of active services. We are aware that some CPs have proposed an alternative approach to market definition which would see two new wholesale passive markets defined. A finding of SMP in a passive market may result in the introduction of remedies where there is already competition at an active level. We believe this would be a perverse outcome which is neither proportionate nor justified.

Finally we would urge Ofcom to consider the practicalities associated with passive remedies, particularly how reversible they would be in the future. We believe that if passive remedies were to be introduced it would be very difficult to withdraw them in a later market review.