

RESPONSE BY DIGITAL REGION LIMITED TO OFCOM'S REVIEW OF THE WHOLESALE LOCAL ACCESS MARKET: CONSULTATION ON MARKET DEFINITION, MARKET POWER DETERMINATIONS AND REMEDIES

Executive summary

Digital Region Limited (DRL) is a predominantly publicly funded entity which is in the process of deploying a next generation access (NGA) network across South Yorkshire. This is an opportunity to transform South Yorkshire and achieve a step change that will positively impact on the entire sub-region – over 1.3million citizens, 546,000 homes and 40,000 businesses and public sector organizations.

The DRL network uses a fibre-to-the-cabinet (FTTC) architecture which uses BT's sub-loop unbundling (SLU) product. The economic and commercial viability of the business is heavily dependent on the "fitness for purpose" of these products in terms of process robustness and price, particularly in comparison to the end to end price and customer experience of competing services being launched by BT under the "BT Infinity" brand.

In its document "The Coalition: our programme for government", the new Government has said that it will introduce measures to ensure the rapid roll-out of superfast broadband and "will ensure that BT and other infrastructure providers allow the use of their assets to deliver such broadband...". DRL welcomes this signal of support for the principle that the entire Digital Region project was founded on; that early and widespread availability of NGA-based services is a critical element of social and economic regeneration.

Policy makers and regulators must now ensure that appropriate decisions are made to encourage this roll-out. Ofcom's Wholesale Local Access (WLA) market review is a key part of this process; the regulatory remedies it can impose, by creating the right incentives for investment and opportunities for competition and innovation, offers the best short term prospects for meeting the Government's policy objectives.

DRL agrees with Ofcom's conclusions regarding product and geographic market definition and its findings of market power. In particular, we support Ofcom's decision to include non-physical access services in the WLA product market, where such services have key characteristics which are consistent with other physical services in that market.

DRL also agrees with Ofcom's choice of remedies. Given current uncertainty over how markets and competition will evolve, and potential variations in competitive dynamics in different geographies, it is vital that the set of remedies includes LLU, SLU, PIA and VULA. This will permit a new and effective "ladder of investment" that encourages private sector investment and makes sure that both private and public sector funding is used as efficiently as possible.

As a pioneer in the use of BT's SLU products, DRL has encountered a number of commercial and operational deficiencies which jeopardise DRL's business and could frustrate future infrastructure competition based on SLU. These include:

- unreasonable charges for surveys, chamber break-ins, tie cables and end-user connections;
- manual (spreadsheet-based) processes for ordering and in-life management;
- absence of service level agreements (SLAs) and service level guarantees (SLGs) to give confidence in the level of service that will be provided.

DRL agrees that the current set of SMP conditions is appropriate in the circumstances, and should provide an adequate basis for Ofcom to exercise its dispute resolution powers in respect of pricing and other well-defined issues.

However, not all issues are sufficiently well-defined for formal dispute resolution. We have reached a critical juncture in the evolution of the SLU product, and there is now a pressing need for more proactive involvement from Ofcom, in the same way that it has intervened in the past for LLU. In particular, we request that Ofcom:

- a) facilitate industry-BT negotiations with a view to defining a fit for purpose product set for SLU by a specified date;
- b) allocate OTA resource to support the above negotiations and also resolve ongoing operational issues ("industrialization" of the processes);
- c) set expectations that Ofcom will, if appropriate, intervene in the course of the market review period to specify in more detail the product set to be provided by BT;
- d) set a timetable for BT to comply with transparency obligations regarding self-supply of SLU inputs;
- e) clarify the relationship between the undertakings relating to FTTC passive inputs and the current market review.

1. Introduction

Digital Region Limited (DRL) is a predominantly publicly funded NGA network project across South Yorkshire. It will cover the city, towns and villages of Sheffield, Doncaster, Barnsley and Rotherham and serve a population of over 1.3 million citizens, 546,000 homes and 40,000 businesses. This is a major opportunity to transform South Yorkshire and achieve a step change that will positively impact on the entire sub-region – businesses, residents and public sector organisations.

DRL is wholly owned by Yorkshire Forward, Barnsley Metropolitan Borough Council, Doncaster Metropolitan Borough Council, Rotherham Metropolitan Borough Council and Sheffield City Council. Thales UK has been appointed to deliver, manage and operate the state of the art fibre-optic cable infrastructure on behalf of DRL. Thales UK leads a consortium that includes Alcatel-lucent and KCOM Group.

The network being deployed uses a fibre-to-the-cabinet (FTTC) architecture, with final consumer and SME connectivity being provided over existing BT owned copper pair wiring. Connectivity between the DRL core fibre network and the copper sub-loop is achieved at the BT primary connection point (PCP) through the use of sub-loop unbundling (SLU). This is the largest SLU-based deployment in the UK, involving connections to some 1,600 PCPs.

The economic and commercial viability of the business is heavily dependent on the “fitness for purpose” of the SLU product, in terms of process, performance and price, particularly in comparison to the end to end price and customer experience of competitive NGA services, such as those being launched by BT under the “BT Infinity” brand.

DRL therefore welcomes Ofcom’s timely and important consultation on the Wholesale Local Access (WLA) market review. We focus our response on issues relating to SLU in view of DRL’s considerable experience in this area and its importance to our business model.

2. Policy drivers for passive remedies

Early and widespread NGA deployment will be an important determinant of future economic and social well-being for the UK and its population, and this realisation has become a major element of public policy making in the UK and elsewhere.

The recent Government statement on the coalition programme reiterates support for rollout of superfast broadband in remote areas, if necessary with public funding:

“We will introduce measures to ensure the rapid roll-out of superfast broadband across the country. We will ensure that BT and other infrastructure providers allow the use of their assets to deliver such broadband, and we will seek to introduce superfast broadband in remote areas at the same time as in more populated areas. If necessary, we will consider using the part of the TV licence

*fee that is supporting the digital switchover to fund broadband in areas that the market alone will not reach.”*¹

The Queen’s Speech opening the current session of Parliament confirmed that the Government will “enable investment in new high-speed broadband internet connections...”, with the No 10 website commenting that:

*“The next generation of broadband is essential to our future prosperity and important for all communities. ... The UK has made a start on deployment, but we want to go further. ... Government will be looking at ways of ensuring a strong, competitive, market-led approach to next generation broadband roll-out across the country. ... Making it possible for companies wishing to build out new high-speed broadband networks to use the infrastructure that is already in place could significantly reduce costs and drive more commercial investment, including in rural areas where the current market case for investment is less attractive.”*²

The EU Telecoms Council in formulating its new proposals for a “Digital Agenda” recognised the key role that next generation ICT will have in helping the EU recover from recession and incorporated the following NGA commitments into the “Europe 2020 Strategy” adopted by the Commission in March and set for approval at the June Council meeting:

*“The aim [of the Flagship Initiative “A Digital Agenda for Europe”] is to deliver sustainable economic and social benefits from a Digital Single Market based on fast and ultra fast internet and interoperable applications, with broadband access for all by 2013, access for all to much higher internet speeds (30 Mbps or above) by 2020, and 50% or more of European households subscribing to internet connections above 100 Mbps.”*³

To achieve its aim, the Commission proposes a number of actions to be taken at the EU and national levels. At the EU level, these include providing a stable legal framework that stimulates investments in an open and competitive high speed internet infrastructure, and facilitating the use of the EU’s structural funds. At a national level, Member States are asked to draw up operational high speed internet strategies targeting public funding, including structural funds, on areas not fully served by private investment.

The Ofcom WLA market review has a key role in addressing this UK and European agenda, and ensuring the UK continues to prosper in an increasingly globalised digital world; failure to act appropriately could disadvantage the UK relative to G20 comparator

¹ ‘The Coalition: our programme for government’

<http://programmeforgovernment.hmg.gov.uk/files/2010/05/coalition-programme.pdf>

² <http://www.number10.gov.uk/queens-speech/2010/05/queens-speech-high-speed-broadband-connections-50591>

³ ‘A strategy for smart, sustainable and inclusive growth’, Communication from the Commission COM(2010) 2020, 3 March 2010, page 12

nations who are already well on the road to full NGA deployment. As such, the key challenges for Ofcom in the WLA market review are to:

- incentivise the most widespread commercial roll-out possible - consistent with safeguarding the vibrant competition that characterises current generation broadband; and
- ensure that, for those parts of the country beyond the economic reach of commercial roll-out, regulatory remedies allow public sector intervention to achieve maximum benefit from competition and innovation.

In meeting these challenges, it is vital that a new and effective “ladder of investment” is constructed that encourages private sector investment and makes sure that both private and public sector funding is used as efficiently as possible. The growing momentum behind public subsidy for NGA deployment in remoter areas underlines the need for the full range of remedies comprising this ladder.

Whereas active remedies may predominate in areas subject to BT’s commercial roll-out, passive remedies such as SLU and PIA will play a key roll in extending roll-out to ‘the final third’ of the population, either by enabling innovative new commercial models or facilitating more direct public intervention. Even if BT ultimately wins much of the public subsidy, taxpayer value for money will only be achieved if there is genuine competitive tension in the process of awarding it. It is therefore essential that these passive products are developed into workable, fit for purpose solutions that allow alternative infrastructure providers to compete and innovate on equal terms with BT.

3. Market definition and remedies

In DRL’s view, the overall approach adopted by Ofcom is generally appropriate. BT has the only nationally ubiquitous network infrastructure that is relevant to “Market 4” and clearly has SMP. The range of remedies consequently proposed constitute a modified form of a true “open access” regime allowing flexible and effective competition based on a range of regulated inputs from a basic form of “layer 2 bitstream”, through variants of “network unbundling” such as LLU and SLU to the mandating of access to incumbent duct and other “passive network infrastructure”.

We support Ofcom’s decision to include non-physical bitstream access services in the WLA product market, where such services have key characteristics which are consistent with other physical services in that market. Applied appropriately, we are confident that these measures should maximise the potential availability and effectiveness of private and public sector investment for NGA deployments by reducing costs significantly and improving business case returns.

Our main concern with the remedies is the absence of an effective fibre unbundling (“dark fibre”) option. This means that the NGA ladder of investment is incomplete and

the chances of maintaining effective competitive intensity - particularly where available duct or pole space is limited - will be diminished.

We would not necessarily quarrel with Ofcom's conclusion that there is a limited economic opportunity for duplicating fundamental network infrastructure for NGA, but that is no reason to under-play the importance of passive remedies. Government and EU policy and subsequent regulatory initiatives for the telecoms sector have for many years been based on the premise that effective competition is the best way to maximize economic benefits by encouraging cost efficiency, innovation and investment in new technologies. Competition based on passive remedies will enable the innovation and value for money in infrastructure provision that is so vital to meeting the Government's targets for 'the final third', and competitive entry (or the threat of it) will provide an additional healthy constraint in areas where BT has established a de facto monopoly.

Ofcom's vision of future competition must not be confined to or biased towards BT, particularly by allowing it to leverage market power gained from legacy network investments made as a state monopoly into a "next generation" environment. The whole market must be able to access re-useable infrastructure from this original national investment in BT's physical network and Ofcom should impose regulated access to any enduring economic bottlenecks to level the playing field, reduce costs and speed up roll-out, as the WLA consultation document is proposing.

Ofcom correctly recognises the danger that BT will favour its own downstream business over those of other CPs consuming upstream regulated inputs, and we support the suite of remedies proposed via the SMP conditions to prevent discriminatory behaviour. Although there are detailed issues with the remedies proposed for VULA (which we leave other CPs to comment on), the general approach to remedies for VULA and LLU seems comprehensive and integrates well with BT's commitments in the relevant undertakings. We are less optimistic about the proposed remedies for SLU and PIA.

In particular, we have concerns that Openreach's approach to SLU provides their own FTTC based NGA deployment a significant cost and operational advantage over CPs seeking to roll-out their own FTTC solution. Ofcom acknowledges in the consultation document that CPs such as DRL have expressed concerns about aspects of SLU, and we urge Ofcom to act decisively to ensure that these problems are addressed and resolved.

4. SLU

Given DRL's pioneering role in the use of SLU, we focus our response on aspects of the market review relating to SLU. We first summarise our concerns around the current SLU product and the status of negotiations with BT, and then consider what measures Ofcom should take to promote timely development of a fit for purpose product set.

Current issues with SLU

DRL and its contractors have been engaged with Openreach since the original tender process for the project in 2005/6. The SLU product and the contractual arrangements surrounding them have evolved significantly over this period as a result both of bilateral negotiation and more general industry development. Whilst forecasting, operational liaison and initial network connection activities are progressing well, a number of concerns remain about costs and process that may have an adverse effect on the commercial case and/or the customer experience.

These include:

- Survey costs – each PCP has to be surveyed prior to SLU service initiation and a standard charge of £350 is applied. The Openreach price list notes that up to 5 surveys can be completed per day, but this does not attract any change in the charge per survey, despite the obvious likely reduction in travel time and costs. In the context of a relatively large scale project such as DRL (with over 1,600 PCPs being connected), we would expect a further project related discount, to reflect the elimination or reduction of common elements in the one-off charge.
- PCP chamber “break-in” costs – Openreach insistence on their undertaking this activity for an inflated charge of £600 has a material impact on network construction costs. DRL has sought to reach a compromise position on this issue with Openreach for over 12 months, soliciting Ofcom’s support in the process, but they are now unwilling to negotiate further. DRL believe that the charge is unreasonable, based on benchmarking data from its own contractors, and that the work would most efficiently be done by DRL contractors as a part of overall new network construction, to agreed standards with minimal supervision by Openreach.
- PCP copper “tie cable” – this connects the Openreach PCP to the DRL cabinet and currently is chargeable as a minimum 100m length, despite actual installations to date being significantly shorter (typically less than 5m), with a consequent effective cost penalty.
- End user connections – the process assumes a single customer is provisioned in isolation with no allowance for the savings that will result from multiple customers being provisioned on the same or adjacent PCPs at the same time. The charge levied per connection is £127.61. This seems to bear no relation to the input costs imputed in the connection charges for Openreach’s GEA bitstream service which is £75 and requires less activity. This apparent price discrimination is further exacerbated by current S2specila offers” that reduce the GEA charge to £35.
- SLU connection and maintenance processes – despite an original commitment to include SLU within the EMP automated gateway for ordering and maintenance activity, there is still no visibility of when this will occur. This is likely to result in

DRL having to rely on essentially manual (Excel spreadsheet) order and repair processes for a period of time which will increase costs and will put DRL at a considerable disadvantage in the market against both current generation and GEA based broadband, which are based on automated processes.

- Service harmonisation – the integrated approach to in-life service management has not been applied to SLU, despite its application to FTTC GEA with the absence of a “Level 4”/Enhanced Care capability again putting DRL at a competitive disadvantage.
- There are no SLAs specifying performance targets for SLU (time to provide, time to repair etc) and hence no SLGs specifying compensation to be paid for poor performance⁴. This runs contrary to the principles set out in Ofcom’s March 2008 statement⁵, and given that SLAs will be available for GEA, this appears to suggest discrimination in favour of BT’s self-supplied variant of SLU. There is no mention of SLU in the weekly key performance indicators (KPI) report⁶ prepared by Openreach.

Whilst attempts have been made to negotiate these issues bilaterally with Openreach, progress in the last 2 months has been disappointing. In both face to face meetings and, more recently, through an exchange of correspondence to provide a formal “crystallisation” of Openreach’s position on the issues under dispute, there has been no substantive movement or any apparent willingness to address DRL’s concerns. We therefore see little benefit in further attempts to resolve the matters in question through purely bilateral negotiation.

Although some of these issues (notably those which are essentially price-related) may best be resolved through Ofcom’s dispute resolution powers, it is becoming clear that additional regulatory oversight and involvement is also required.

Proposed remedies

Whereas SLU was treated as a subset of LLU in the SMP conditions imposed following the 2004 market review, it is now categorised as a distinct remedy alongside LLU, PIA and VULA, and a new condition FAA10 has been introduced to confirm the obligation on BT to provide SLU products. This is a welcome recognition of the increased importance of SLU for the coming wave of NGA deployments.

As far as we can see, the detailed requirements with regard to SLU are essentially unchanged since 2004: an obligation to meet reasonable requests for access, no undue discrimination, cost-orientation, and various transparency conditions. Ofcom considers more prescriptive measures such as a charge control or more detailed specification of the

⁴ despite the fact that penalty charges such as ‘Right When Tested’ are still payable to Openreach

⁵ ‘Service Level Guarantees: Incentivising Performance’, Ofcom, March 2008

<http://www.ofcom.org/consult/condocs/slg/statement/>

⁶ <http://www.openreach.co.uk/orpg/products/llu/kpi/kpi.do>

wholesale product, but rejects them on the grounds that there is still too much uncertainty over the nature of the product required by CPs.

DRL agrees that the current set of SMP conditions is appropriate in the circumstances, and should provide an adequate basis for Ofcom to exercise its dispute resolution powers. However, we have reached a critical juncture in the evolution of the SLU product and there is now a pressing need for more proactive involvement from Ofcom, to complement its reactive dispute resolution. In particular, we believe that Ofcom needs to:

- a) facilitate industry-BT negotiations with a view to defining a fit for purpose product set for SLU by a specified date (such as it is proposing to mandate for PIA);
- b) allocate OTA resource to support the above negotiations and also resolve ongoing operational issues (“industrialisation” of the processes);
- c) set expectations that Ofcom will, if appropriate, intervene in the course of the market review period to specify in more detail the product set to be provided by BT;
- d) set a timetable for BT to comply with transparency obligations regarding self-supply of SLU inputs;
- e) clarify the relationship between the undertakings relating to FTTC passive inputs and the current market review.

These are discussed in more detail in the sections below.

Negotiation of fit for purpose product

As Ofcom recognises in the condoc, the SLU product has not yet been widely used by CPs and has not therefore benefited from the extensive debugging and “industrialisation” which LLU went through. DRL has effectively been pioneering the use of the product and so far has been the main protagonist in attempting to negotiate a fit for purpose offering. However, there is evidence that other CPs are now showing greater interest in alternative infrastructure provision using PIA and SLU – either as a means of serving particular geographies or as a negotiating lever in securing an appropriate active wholesale product. This interest is likely to increase over the coming months as demand for high speed broadband takes off and Government’s plans for intervention in rural areas become clearer.

Given the growing importance of SLU, DRL believes Ofcom should be taking similar steps to facilitate industry-BT engagement over SLU as it is doing for PIA. (Although there has been more “noise” of late around PIA, the two remedies are complementary: PIA will most likely be used in conjunction with SLU to deploy FTTC, and the success of PIA will therefore be bound up with the success of SLU). In our view there are three main strands to such negotiations:

- a) Fixes to the existing SLU product set – commercial, technical and process – broadly as summarised in the section above;
- b) New elements needed to extend the SLU product set: for example different permutations of active cabinet sharing;
- c) An appropriate suite of options for backhaul: these might include variants of BES/Gig E, or in certain circumstances access to dark fibre.

We would therefore encourage Ofcom to proactively support BT-industry negotiations over the SLU product definition, with the aim of establishing within a fixed timescale a clear view of the product set that would best meet industry requirements. Given its pressing business needs, DRL would favour a relatively short time-scale, say 3 months, though we recognise that if there is duplication of industry resource between SLU and PIA, negotiations may need to be staggered.

Finally, we note that section 5.58 of the undertakings⁷ obliges BT to conduct a review with Ofcom of the obligations relating to FTTC passive inputs, with a view to agreeing if any additional commitments or variations to existing obligations are required, or whether any obligations are superseded. The review is required to be completed before 31 December 2011. It would be highly desirable for industry-BT negotiations to have been concluded ahead of the review so that Ofcom goes into the review with a clear understanding of industry requirements. This therefore adds weight to our proposal that Ofcom facilitate such negotiations on a reasonably urgent timescale.

Allocate OTA resource

The OTA has previously played an invaluable role in resolving process issues associated with LLU, and we believe their involvement in any industry engagement with BT over the SLU product could be equally beneficial. In addition to supporting negotiation over physical product definition (as discussed above), we see OTA having a particularly important role in the industrialisation and debugging needed to achieve a fit for purpose product. This may include:

- a) agreeing with industry a process and timescales for extending EMP ordering and fault management functionality to include SLU (to replace current spreadsheet-based processes);
- b) ensuring interim manual processes are working as well as can be reasonably expected, pending proper EMP processes (and extending manual processes where relevant, eg to include SLG payments should Ofcom mandate them);
- c) extending the ‘service harmonisation’ approach to in-life management to include SLU, including adding a “Level 4” Enhanced Care capability;

⁷ ‘Variation to BT’s Undertakings under the Enterprise Act 2002 related to Fibre-to-the-Cabinet’, Ofcom Statement, 11 June 2009

- d) ensuring that adequate migration processes exist to support migrations to and from SLU, including all relevant configurations of losing/gaining service provider (WLR, WLR+SMPF, MPF, WLR+GEA, etc);
- e) facilitating industry-Openreach negotiations over introduction of appropriate SLG payments for SLU, in accordance with the general principles in Ofcom's March 2008 statement;
- f) extending the Openreach Key Performance Indicators (KPI) report to include SLU-specific indicators (eg % orders provisioned on time, % faults cleared on time, etc);
- g) working with Openreach to address problems with KPIs as and when they arise; for example, experience with LLU suggests that the % of 'right first time' orders may initially be very low, and require programme of methodical analysis and process fixes to achieve satisfactory levels.

Regulatory product specification

Ofcom discusses three options for dealing with SLU regulation going forward: (i) relying solely on the general access obligation and removing the specific SLU requirement; (ii) maintaining the specific SLU requirement without change; and (iii) extending the SLU requirement by further specifying the SLU product(s) that BT should provide.

Ofcom comes down in favour of the second option, arguing that there will be sufficient demand and interest in SLU during the period of the review to justify maintaining the specific SLU requirement (as opposed to relying solely on the general access obligation), but that CPs' detailed requirements are not yet sufficiently well defined to justify further specification of the SLU products and arrangement that BT should provide.

This conclusion is reflected in a relatively high-level requirement to provide SLU in the new SMP condition FAA10, but an absence any specific requirements around the RO to be provided for SLU (in contrast to LLU and PIA where specific requirements are introduced in conditions FAA5.3 (LLU) and FAA5.3 (PIA).

DRL agrees with Ofcom that at present there is too much uncertainty over the SLU arrangements required by industry (eg cabinet sharing versus adjacent cabinets or cabinets in vicinity) to specify the product that BT should provide to the same level of detail as has been done for LLU. However, we do not believe this should necessarily be an obstacle to Ofcom imposing a more detailed specification within the timescales of the current market review. Indeed, if sufficient resource is devoted to defining the SLU product (including, where appropriate OTA facilitation), there is no reason why a sufficiently detailed product definition should not be developed within a matter for months.

Should the uncertainty over industry requirements be resolved within the timeframe of the review, it would then be open to Ofcom to exercise its powers under the proposed SMP conditions to:

- a) give a direction under Condition FAA10.3 specifying in more detail the nature of the SLU product to be provided;
- b) give a direction under Condition FAA5.10 specifying in more detail the items to be included in BT's reference offer⁸; and/or
- c) give a direction under Condition FAA8.2 specifying SLU-related KPIs to be reported by Openreach.

Whilst dispute resolution may well be the most appropriate means of resolving some of the price-related issues listed above, it is less clear that dispute resolution is the most appropriate means of dealing with broader issues of product specification. It would therefore be helpful if Ofcom were to confirm its willingness to use its powers under FAA10.3, FAA5.10 and FAA8.2 (once uncertainties have been resolved), rather than implying (as in condoc) that the option of further specifying the product that BT should provide has been ruled out for the timeframe of the review.

Transparency of self-supply

The proposed SMP condition FAA5.4 requires that:

To the extent that the Dominant Provider provides to itself Network Access that (a) is the same, similar or equivalent to that provided to any other person; or (b) may be used for a purpose that is the same, similar or equivalent to that provided to any other person, in a manner that differs from that detailed in a Reference Offer in relation to Network Access provided to any other person, the Dominant Provider shall ensure that it publishes a Reference Offer in relation to the Network Access that it provides to itself which includes, where relevant, at least those matters detailed in paragraphs FAA5.2(a)-(q).

This condition has the purpose of promoting transparency and preventing undue discrimination - particularly important for products such as SLU which are not subject to Equivalence of Input obligations. It means that where BT self-provides wholesale inputs which are different from the wholesale products sold to external CPs, BT has an obligation to document the nature of those products, including (but not limited to) the internal transfer charges for each network component, and a reconciliation to the charges payable by an external CP. This can play a key role in enforcing the no undue discrimination condition (FAA3) since, without the additional transparency provided by

⁸ Eg to a similar level of detail as has been done for LLU in FAA5.3 (LLU)

BT's internal reference offer, competing CPs may have insufficient evidence to detect or demonstrate any non-compliance with condition FAA3.⁹

This is not a new obligation for the WLA market; SMP condition FA4.4 imposed in the 2004 market review has identical wording. However, as far as we are aware, BT has not yet complied with this obligation in respect of its consumption of sub-loops and other physical inputs to its FTTC GEA product. If BT were to publish such an internal RO, it could be of immediate benefit in helping understand whether the some of the current issues with SLU discussed above do indeed constitute discrimination. We therefore urge Ofcom to:

- a) clarify to BT (if there is any doubt in the matter) that condition FA4.4/FAA5.4 applies to BT's consumption of sub-loops;
- b) set a deadline for BT to comply with condition FAA5.4 in respect of its consumption of sub loops (and associated ancillary services) for its FTTC GEA product.

Interaction between Undertakings and SMP conditions

Section 5.57 of the undertakings¹⁰ includes two important commitments from BT with regard to FTTC passive inputs:

- (i) *"In providing any FTTC Passive Inputs, AS shall use the same components, processes and systems it uses itself for the purposes of its BT Active FTTC Product where reasonably practicable and on the most cost-efficient basis.*
- (ii) *Where AS cannot provide FTTC Passive Inputs in accordance with sub-para (i), it shall provide FTTC Passive Inputs as far as possible to the same specifications with the same functionality and performance as the inputs it uses itself for the BT Active Product."*

These two commitments are expressly dependent on the outcome of the current WLA market review. Section 5.57 applies two tests as follows:

" This section will apply to the provision of FTTC Passive Inputs by AS until such time or to the extent that: they are determined by Ofcom to fall within a market for Network Access in which BT has not been determined from time to time to

⁹ An example of how such transparency obligations can assist in enforcing SMP conditions recently arose in partial private circuits (PPCs), where BT's publication of analysis reconciling external and internal supply was helpful in highlighting discriminatory pricing between external and internal customers. See 'Determination to resolve disputes between each of Cable & Wireless, THUS, Global Crossing, Verizon, Virgin Media and COLT and BT regarding BT's charges for partial private circuits Determinations and Explanatory Statement', Ofcom, 14 October 2009

http://www.ofcom.org.uk/consult/condocs/draft_deter_ppc/PPC_final_determination.pdf

¹⁰ 'Variation to BT's Undertakings under the Enterprise Act 2002 related to Fibre-to-the-Cabinet', Ofcom Statement, 11 June 2009

have SMP; or they are not included in SMP Conditions imposed upon BT following such a market review concluded after 01 June 2009 in which BT has been determined from time to time by Ofcom as having SMP.”

On our reading, the implication of the first test is that section 5.57 would cease to apply if Ofcom determined that FTTC Passive Inputs fell in a market for network access in which BT did not have SMP. Since the current market review finds that BT *does* have SMP, the test is not satisfied and there no reason to disapply section 5.57.

On our reading, the implication of the second test is that section 5.57 would cease to apply to the extent that FTTC Passive Inputs are included in SMP conditions imposed on BT following a market review in which BT has been determined to have SMP. FTTC Passive Inputs are defined in the undertakings as:

- (i) *“access to the copper wires that connect the End-User premises to a Local Access Node contained in the BT FTTC street cabinet;*
- (ii) *the provision to a Communications Provider of a FTTC street cabinet (which for the avoidance of doubt could include a cabinet facility attached to or otherwise integrated with a BT FTTC street cabinet), cooling, ventilation and power therein where practicable, and copper tie-cables, where required; and*
- (iii) *the various associated components of the Physical Layer of BT’s Access Network connecting the Local Access Node in the BT FTTC street cabinet and the End-Users premises to the extent that these components are only to be used in connection with the provision of services that are run over the entirety of FTTC.”*

The SMP conditions resulting from the WLA market review will apply to ‘Network Access’ in the WLA market. Our understanding is that item (i) above clearly constitutes network access in the WLA market, and items (ii) and (iii) should also be considered to do so. Hence FTTC Passive Inputs *are* included in the WLA SMP conditions. On that basis, one would conclude that the effect of this WLA market review will be to relieve BT of the two key commitments made in section 5.57 of the undertakings.

If that is the case, we would urge Ofcom to amend the SMP conditions associated with SLU to replicate as far as possible the two commitments that will now fall away from the undertakings. This could perhaps be done by means of an additional non-discrimination clause in condition FAA10 (in the same way that clause FAA11.3 addresses non-discrimination for VULA).

Alternatively, given the convoluted drafting of section 5.57, it is possible that a different meaning was intended. It may have been intended that the section would cease to apply ‘to the extent that the substance of the section (ie the two commitments) was included in SMP conditions’. This reading would make more sense, and would give less cause for concern. If this reading is correct, we would appreciate confirmation from Ofcom and BT that that is how both parties interpret the section.

5. PIA

We welcome Ofcom's decision to include a physical infrastructure remedy in SMP conditions, and believe the approach of setting a timetable for industry-BT negotiations followed by a formal reference offer from BT is broadly correct. However, we believe the timescale proposed by Ofcom is too slow, and fails to take account of the excellent progress already made within the BSG's PISWG. We would also suggest that it is vital that PIA is complemented by some form of "dark fibre" obligation where available duct or pole space is limited. As PISWG suggest, where there is limited capacity in a duct, it should not be given out on a simple "first come first served" basis. Rather than limit overall operator access to the duct for PIA, there should be a requirement in such circumstances that Openreach install fibre in the remaining capacity and lease the fibre strands to operators. Alternatively the first operator who takes PIA must lease fibre in that duct to other operators.

Given that the process of product definition is likely to be iterative - ie it is only when the first version of the product has been launched and used in earnest that further requirements will become apparent – it is important that the first iteration is completed relatively quickly. Ofcom suggest that BT and industry could start considering the contents of PIA RO before the formal RO development process commences and that any such pre-work could shorten the formal regulatory process. In order for this to happen, the current BSG PISWG product outline and the WLA review requirement can be used as the basis of an SOR definition for discussion with Openreach as the basis for the RO. This should also accelerate the timetable to completion of the RO.

The work done by PISWG shows that some of the information and operational challenges identified by Ofcom should not be as onerous as implied. Consequently, the timetable for RO preparation seems excessive, particularly if industry can engage effectively with Openreach in the near term on a collaborative basis to maintain momentum. We note and welcome the recent Openreach announcement of a programme of workshops to initiate this engagement.

6. Regulatory treatment of publicly funded infrastructure

We note Ofcom's comments regarding the potential for CPs other than BT to take a significant market share over time in isolated geographic areas and the need to consider the proportionality of regulating other CPs in very small, sub-national markets.

We also note Ofcom's comments regarding the provision of public funding and the difference between open access requirements specified contractually and/or by State Aid rules and access remedies imposed as a result of a finding of SMP.

At this stage we would simply flag that should further regional deployments of NGA develop (as we anticipate) we expect that an appropriate and proportionate approach would be taken by Ofcom when assessing SMP and considering appropriate regulation for those new network deployments.

In paragraph 7.113 Ofcom refers to the new EU regulatory framework and amendments¹¹ which, once enacted, will allow widen Ofcom's powers so that any CP could be required to share its physical infrastructure regardless of their SMP status. In the interests of regulatory certainty, it would be helpful if Ofcom would confirm whether it has any plans to do so once the new framework is transposed into UK law.

7. Answers to consultation questions

Question 1. Do you agree with our proposed product market definition? If not, please explain why.

The market definition proposed is broadly in line with the requirements of the EU Recommendation on "Market 4" as it currently stands, and includes copper, cable and fibre, on a nation-wide basis, with BT proposed to be found having SMP, except in the "Hull area". We agree with this market definition, including Ofcom's decision to include non-physical access services in the Wholesale Local Access (WLA) product market, where such services have key characteristics which are consistent with other physical services in that market.

Question 2. Do you agree with our proposed geographic market definition? If not, please explain why.

No comments

Question 3. Do you agree with our proposals that BT and KCOM have SMP in their respective geographic markets? If not, please explain why.

Yes

Question 4. Do you agree with our proposals for the general access requirements that should apply to BT and KCOM respectively? If not, please explain why.

Yes

Question 5 Do you agree that Ofcom should impose a new network access obligation on KCOM, that would require it to follow a statement of requirements process to handle requests for new network access in this market? If not, please explain why.

No comments

Question 6. In relation to LLU, do you agree with the assessment and options set out?

Yes. As NGA deployment will take a number of years to complete, the continued provision of LLU is vital. "Classic" LLU is a well established part of the current access

¹¹ In particular, Article 43 of the Framework Amending Directive.

market and forms an important input into the provision of competitive telecoms services. In future it will increasingly need to be complemented by a full range of other regulatory access remedies which are discussed elsewhere.

Question 7. In relation to fibre access, do you agree with the potential unbundling arrangements for the different fibre architectures and the positions/options set out given the current and expected future availability of fibre within BT's access network?

No fibre unbundling remedy is proposed, based on an inconclusive analysis of GPON and other fibre network architectures. We are not convinced that this conclusion is correct, particularly as part of a broader range of PIA remedies (see below)

Question 8. In relation to SLU, do you agree with the assessment and options set out?

See our comments in Sections 3 and 4 for our detailed comments on SLU which, as stated in the Introduction, is a vital input into DRL's activities. Whilst the consultation document notes the views of some CPs that the current SLU product is deficient we would go further and state that, as it stands, it is unsuitable as the basis for any significant service delivery that would be competitive with BT's own downstream offerings.

DRL believes that the current SLU product is not fit for purpose and is arguably unduly discriminatory in BT's favour, since it is not consumed as part of the Openreach FTTC deployment. In the absence of explicit "EoI" obligations, we are concerned that Openreach may indulge in such unduly discriminatory behaviors with respect to how it designs and prices inputs for other CPs against those it consumes itself.

Question 9. In relation to PIA, do you agree with the proposed PIA obligation structure and the proposed implementation arrangements?

Section 6 contains our comments on the PIA proposals. We are in broad agreement with the proposed remedy structure, but believe implementation could be accelerated.

Question 10. In relation to VULA, do you agree that VULA may be a necessary access remedy in the WLA market and if so, do you agree with the key characteristics identified and how these currently relate to BT's GEA products?

Yes and we would support activities such as COTS aimed at ensuring that access solutions such as VULA can be as widely adopted as possible by Alternative Infrastructure Providers (AIPs) providing as homogeneously competitive a retail service market as possible.

Question 11. Do you agree with the framework for considering specific access remedies on BT?

In broad terms, yes.

Question 12. Do you agree that there is a need to have a complementary set of access remedies and if so, do you agree with the proposed set of remedies on BT?

As noted in our response to the previous questions, we believe that Ofcom need to construct a set of remedies that more accurately reflect the behavioural and economic dynamics of NGA based service consumption and deployment. The absence of an effective fibre unbundling option means that the NGA “ladder of investment” is incomplete and the chances of maintaining effective competitive intensity will be much diminished. Only the creation of a truly “open access” regime with SMP triggered access remedies available at all points in the NGA supply chain will ensure that effective and sustainable competition develops, network investment and deployment are accelerated and welfare benefits maximised.

Question 13. Do you agree that no specific access remedies should be imposed on KCOM in the WLA market at this time? Could any remedies on KCOM at the WLA market level address the competition issues that we have identified?

No comments.

Question 14 Do you agree with our assessment against the legal tests for each specific remedy, as set out in Section 9?

Yes.