



# BUSINESS CONNECTIVITY MARKET REVIEW



Rather than waiting for the outcome of its recently announced strategic review, or the merger decisions expected this year on BT/EE and O2/Hutchison, Ofcom is ploughing ahead with some radical proposals for dark fibre wholesale services. In this briefing note we provide an overview of Ofcom's proposals.

In its Business Connectivity Market Review consultation published on May 15, Ofcom proposes that BT should be required to allow competitors access to dark fibre terminating segments, including disaggregated access, backhaul segments and short range end-to-end segments. The proposals do, however, exclude the Central London Area where BT does not have SMP, but otherwise apply across the whole of the UK.

Access to dark fibre (a form of passive access) is highly contentious and the imposition of such remedies relatively novel globally.

Pricing will be key, and Ofcom is addressing this by requiring that the pricing of dark fibre is on an "active minus" basis by reference to EAD/EAD Local Access 1 Gbit/s active products and the LRIC of its active elements. In other words, Ofcom's proposal is not to set a fixed "minus" but to provide further detail on the active minus assessment and how it is calculated in its forthcoming leased line charge control consultation. Ofcom acknowledges that although this approach is flexible, it does carry some uncertainty, and our view is that it is likely to give rise to a series of disagreements and formal disputes about the way in which BT has or will calculate this element.

Much of Ofcom's reasoning for the introduction of dark fibre access rests on the much referenced potential for innovation and the ability to give competing CPs a first

mover advantage. Ofcom appears to have accepted the argument of Talk Talk that it is not necessary to pinpoint what the innovation will be, but that it is sufficient that there is the possibility for innovation. The current lack of innovation and ability for a competing CP to obtain a first mover advantage is seen by Ofcom as a by-product of the current statement of requirement (SOR) process, where Openreach makes a product available to all CPs on equivalent terms. But rather than addressing the SOR process and the ability for Openreach to introduce products for particular CPs, Ofcom argues that the best option is the introduction of this form of passive access.

BT's competitors are still pushing Ofcom to force BT to provide duct access for these services in the business connectivity market, but, in the consultation, Ofcom has stated the requirement of dark fibre is sufficient. Duct and pole access are already available in the Wholesale Local Access Market.

In addition to the proposals for passive infrastructure, new UK legislation in 2016 will implement the EU Civil Infrastructure Directive (CID). The Directive requires that all utility networks meet reasonable requests for infrastructure access from network operators who wish to deploy high speed electronic communications networks (dark fibre is excluded).

The requirement for BT to make available both active and passive products at different levels of the value chain



within the same market is hardly consistent with the principle that regulation should be imposed only at one level of the value chain within a market. Whilst Ofcom states that imposing regulation in this way is not its preference and that the introduction of dark fibre may lead to the rollback of regulation on active products in the Business Connectivity market, it is clear that this will not be happening any time soon. Whilst Ofcom refers to the way that the introduction of LLU allowed regulation on wholesale broadband products to be withdrawn, it says that “any evolution from the current regulatory regime to one where competition is based on passive remedies is sustainable and effective may take a longer period than in the case of LLU”.

LLU was first introduced in the UK in 2000 and substantial deregulation of wholesale broadband markets followed ten years later and then again in 2014. If the deregulation of active leased lines is a longer process, we might therefore expect that the continued requirement for both active and passive products within the Business Connectivity market will persist well beyond the conclusion of Ofcom’s next ten year strategic review.

BT is concerned that the introduction of dark fibre is likely to deter future investment and also strand investments that they have already made as CPs migrate from active services to dark fibre, and this suggests that an appeal of the proposal, if it remains in the present form, is highly likely. Any such appeal may well be supported by Virgin Media and KCOM, the other two major fixed infrastructure providers in the UK. It is clear from the consultation that significant demand for passive access is likely to be in the area of mobile backhaul and fixed broadband backhaul, although the remedy can be used for any product within the business connectivity market. The introduction of a requirement on BT to provide dark fibre that is likely to be used extensively by the mobile operators for mobile backhaul is likely to devalue Virgin Media’s investment in its network by reducing the possibility for it to sell

active services over its network, particularly to the mobile operators.

The other major area that Ofcom has tackled in this consultation is quality of service with Ofcom setting standards that BT must meet over the life of the market review with a focus on certainty of delivery date. Interestingly, Ofcom suggests that it proposes to assess performance standards on a national level despite the fact that BT does not have SMP in the central London area. Ofcom justifies this assessment of performance standards nationally on the basis that to take smaller regional areas might result in statistical invalidity because of smaller samples. It also proposes to include events classified as Matters Beyond Our Reasonable Control (MBORC) within the assessment process. These include events such as extreme weather conditions, with Ofcom arguing that if these were excluded then it would provide BT with a perverse incentive to declare an event an MBORC. It is likely that we will see push back from BT on this given the likely impact of these revised service standards on its costs, particularly given the effort BT will need to make a dark fibre product available within the one year timescale required by Ofcom.

It is not clear whether the proposed new remedies will have any impact on the CMA’s review of the merger between BT and EE. Other mobile operators had been concerned that, as a result of the merger, EE might have preferential access to mobile backhaul, thus providing it with a competitive advantage. The introduction of the access requirement on dark fibre which can be used for mobile backhaul is a material change in the marketplace, but, at this stage, it is only a consultation, and there is a long road between now and implementation and the decision on the merger will likely be made before the present consultation process is closed so the CMA can rely only on the potential for the imposition of these remedies in its assessment.

If you require advice or further information on any of the matters raised in this update, please get in touch with Gordon Moir or your usual Shepherd and Wedderburn contact.

### Key contact



Gordon Moir  
Partner  
T +44 (0)207 429 4988  
M +44(0)741 426 7467  
E [gordon.moir@shepwedd.co.uk](mailto:gordon.moir@shepwedd.co.uk)

