Telecoms Update
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Passive infrastructure access: Ofcom's October 2010 review of wholesale local access and BT's new pricing proposals for access to ducts and poles

In October 2010, Ofcom published its review of the wholesale local access ("WLA") market[1], pursuant to which BT was required, among other things, to produce a draft reference offer for physical infrastructure access ("PIA") by mid-January 2011 with a view to launching a product by the middle of this year. BT duly announced draft pricing proposals for duct and pole access on 14 January[2]. This update looks at the new remedies in Ofcom's WLA review relating to PIA and virtual unbundled local access ("VULA")[3], and at BT's draft pricing proposals for PIA.

Ofcom's WLA Review concluded that BT continues to have **significant market power** ("**SMP**") in the market for WLA services in the UK excluding the Hull area, WLA services being those based on copper loops, cable networks and optical fibre at a fixed location. It also concluded that BT's local access network remained "*critical*" for those companies seeking to compete to provide downstream services like broadband and traditional voice services.

Accordingly, and in line with the EU's NGA Recommendation[4], Ofcom has put in place what it calls a "*new regulatory model*" with the new regulatory remedies VULA and PIA alongside the existing Local Loop Unbundling ("**LLU**") remedy as its core elements.

VULA remedies

VULA allows competitors to deliver broadband telephony services over BT's NGA network with "*a degree of control that is similar to that achieved when taking over the physical line to the consumer*" according to Ofcom. BT is to provide access to communications providers ("**CPs**") wherever it deploys its NGA network.

Ofcom expects VULA to be a more attractive option to CPs than PIA where BT has already upgraded its local access network, and **the main basis for NGA competition over BT's network**. It is also expected to be the most cost-effective remedy, and the remedy "*most likely to emulate the level of competition currently delivered by LLU*".

Ofcom has decided that the **prices** for VULA products should not be regulated at this time so as to allow BT the flexibility to price those services according to emerging information on the demand for and costs of NGA services. However, VULA is to be provided unbundled as a stand alone product and on an **'Equivalence of Inputs'** basis, meaning that it must be made available to third parties on the same timescales, terms and conditions, including price and service levels, as it is to its own downstream operations.

Ofcom says that BT intends to comply with its VULA obligations through its provision of Generic Ethernet Access ("**GEA**") NGA wholesale products, and Ofcom comments in the Review on how GEA compares with the VULA key characteristics ("*moving in the right direction*" according to Ofcom, but issues remain).

PIA remedies

PIA allows competitors to deliver 'superfast' broadband, telephony and cable TV services by deploying fibre in the access network **using BT's duct and pole infrastructure** in order to support either fibre-to-the-premises ("**FTTP**") or fibre-to-the-cabinet ("**FTTC**") technology by enabling a backhaul connection between street cabinets and the CP's own network. The remedy does not currently cover PIA services to support leased lines but extending the scope to do so will be considered in Ofcom's next business connectivity market review due for completion in 2012 (see further below regarding the 'allowed purposes' for PIA).

Ofcom expects that PIA will be a more attractive option to CPs wishing to address market opportunities before BT and to those wishing to provide service in locations which are in receipt of public funding support. However, with the exception of Virgin Media's stated interest in making use of the remedy, Ofcom considers that **demand for it is uncertain and appears limited** at least in the short term.

BT will be required to meet reasonable requests for duct and pole (and associated infrastructure e.g. chamber) access on cost-oriented and non-discriminatory terms and to publish a reference offer (which BT has now done in draft – see below). The remedy will be technology neutral to allow any type of cable, not just fibre cables, to be deployed. Cost-oriented pricing for PIA will be based on the efficiently incurred long-run incremental costs of provision including a return which reflects the associated risks plus an appropriate contribution to BT's common costs including the common capital and operating costs (**LRIC+**).

Charges for infrastructure should also "*reflect the proportion of the useable capacity that is occupied*" and may vary according to the **investment risk** (existing infrastructure and new infrastructure constructed for current generation services represent a low risk, whilst new infrastructure constructed for new high bandwidth services represents a higher risk).

Ofcom also set out a **timetable** for the implementation of this remedy comprising BT's publication of a draft reference offer by mid-January 2011 followed by a three month period during which an industry working group would review the offer and refine the service to meet CPs' needs. BT has of course now issued its draft reference offer for PIA and meetings of the industry working group are currently taking place.

In addition to the specific remedies mentioned above, BT will continue to be subject to a number of **general access remedies** including obligations to provide network access, not to discriminate unduly and requirements on transparency and separate accounting.

Whilst **KCOM** continues to have SMP (in fact a monopoly) in the WLA market in Hull, KCOM will continue to be bound by the general WLA access remedies (a requirement to provide network access, not to unduly discriminate etc.), but will not be subject to additional requirements to provide any specific access products due to the limited interest among CPs in competing in the Hull area.

BT had argued that Ofcom should **apply similar remedies to other network providers** who have deployed NGA networks, namely Virgin Media. At a minimum, BT considered that Ofcom should carry out a survey of **Virgin Media**'s ducts to assess their suitability for sharing. Ofcom declined to do so on the grounds that its powers to impose such remedies depending on a finding of SMP, and only BT and KCOM have SMP in the WLA market. BT also proposed making its reference offer for PIA **subject to reciprocal access** to other providers' infrastructure, but Ofcom concluded that such terms would be incompatible with an SMP remedy, which was by nature asymmetric, and unlikely to constitute fair and reasonable terms.

One slightly unusual aspect of Ofcom's PIA remedy is the **restriction on the purposes for which it can be used by CPs**. Ofcom says that "*usage should be limited to the deployment of access networks for broadband and telephony services and SLU backhaul services between cabinets and serving MDF sites*". A number of stakeholders argued that the narrow scope of the remedy to just these **'allowed uses'** would make PIA of limited use and potentially unworkable, in that it would artificially limit CPs' use of their PIA based access networks, reducing economies or scale and scope thereby making PIA less attractive. They argued that any use which falls within the WLA market should be permitted, including upstream inputs to leased lines, and that fixed and mobile backhaul services should be permitted as they would support the provision of NGA services.

BT unsurprisingly supported the limited scope of the PIA remedy, but noted that there might be difficulties in defining usage terms and conditions (stakeholders agreed) and that Ofcom might have to intervene if CPs used fibre installed in BT ducts to and poles for non-NGA purposes such as leased lines – something which BT would find hard to prevent.

Ofcom's view was that **leased line and backhaul services are currently regulated under the business connectivity market**, and **introducing PIA** as a remedy into that market **would undermine the remedies already imposed there**. However, Ofcom has said that it will consider extending the scope of the remedy to cover leased lines in Ofcom's next business connectivity market review (starting in the first half of 2011 and due for completion in 2012).

Ofcom was sceptical about the argument that use of PIA for leased lines would improve the business case for NGA deployment, citing its view that VULA would be the primary focus of NGA-based competition over the next four years. Ofcom also noted, in relation to fixed and mobile backhaul services, that BT is already regulated to supply a range of regulated backhaul products.

It seems surprising to us that Ofcom has sought to limit the scope of PIA in this way and to rely on BT to enforce the limitation on usage through its terms and conditions.

BT's draft pricing proposals for duct and pole access

With regard to the draft reference offer which BT has now published as directed by Ofcom, BT is proposing that **duct access will start from £0.95 per metre per year**, with various additional charges for ancillary services, while **pole sharing access will be around £21 per pole per year**[5].

In the WLA Review, Ofcom acknowledges that there is a risk that BT and CPs will not be able to reach agreement on BT's PIA charges and envisages conducting a formal review of those charges if that situation arises. According to Ofcom, this could lead to a direction setting BT's PIA charges or a charge control.

As trailed by Ofcom in the Review, BT's proposals will now be reviewed for the next three months by the appointed industry working group possibly with the involvement of the OTA.

For further information, please contact Rob Bratby (Rob.Bratby@olswang.com) or Ginny O'Flinn (Ginny.O'Flinn@olswang.com). You can also read Rob's blog *Watching the connectives* at http://robbratby.com/ or follow Rob on Twitter at http://twitter.com/rbratby.

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[1]*Review of the wholesale local access market: Statement on market definition, market power determinations and remedies*, Ofcom, 7 October 2010 (**http://stakeholders.ofcom.org.uk/binaries/consultations/wla/statement/WLA_statement.pdf**).

[2]BT Press Release of 14 January 2011, **http://www.btplc.com/news/articles/showarticle.cfm?articleid={f057a8e0-950d-4fbd-a9b7-a484b2ef6c51}**. See also: **http://www.openreach.co.uk/orpg/home/products/ductandpolesharing/ductandpolesharing/ductandpolesharing.do**.

[3]Existing remedies which will continue to apply include local-loop unbundling ("LLU") and sub-loop unbundling ("SLU"), both of which BT must provide on a cost-oriented basis.

[4]*COMMISSION RECOMMENDATION of 20.9.2010 on regulated access to Next Generation Access Networks (NGA)*, C(2010) 6223 final (**http://ec.**

europa.eu/information_society/policy/ecomm/doc/library/recomm_guidelines/nga/en.pdf).

[5]See footnote 2 above and Rob Bratby's post on the subject at http://robbratby.com/2011/01/17/bt-sets-prices-for-passive-access-to-ducts-and-poles/.
