

## Introduction

The FTTH Council welcomes the opportunity to reply to these consultations, ‘Review of the wholesale local access market’ and ‘Review of the wholesale broadband access market’.

The FTTH Council Europe is an industry organisation with a mission to accelerate the availability of fibre-based, ultra-high-speed access networks to consumers and businesses. The Council promotes this technology because it will deliver a flow of new services that enhances the quality of life, contributes to a better environment and increased competitiveness. The FTTH Council Europe consists of more than 130 member companies. Its members include leading telecommunications companies and many world leaders in the telecommunications industry (additional information is available at [www.ftthcouncil.eu](http://www.ftthcouncil.eu)). We do not allow any telecoms operators as members of the FTTH and we have our own perspectives regarding the appropriate regulatory policies to accelerate NGA deployments.

The FTTH Council is concerned by a number of specific aspects of this consultation which it would like to set out at the outset.

1. The implicit vision of Ofcom is one where BT has a monopoly access network and alternative operators have to take access quite far down the value chain.
2. The case for infrastructure competition is undermined by the inclusion of a Wholesale Broadband Access (market 5) remedy in the Wholesale local access market (market 4). The FTTH Council see the need for the best available bitstream access remedies but they are a market 5 remedy, to include them in market 4 implies that they are something that they are not.
3. The merging of markets 4 and 5 is somewhat off in the UK and would at a minimum require a widely deployed FTTH/FTTP network which could either be physically (P2P) or virtually unbundled (by unbundling lightwaves or IP Routing over Layer 3).

### *1. Ofcom’s vision*

Very early in the consultation document<sup>1</sup>, Ofcom state that  
*At this point, we consider VULA to be the primary focus of NGA competition, to supplement the continuing effective LLU remedy over at least the next four years. Our economic analysis suggests that VULA is very likely to be the most cost-effective NGA remedy to support competition. However, we think that both SLU and access to BT’s ducts and poles could also play a part in supporting competition, as well as investment in NGA. Partly, this is because VULA will only be available where BT deploys its NGA network.*

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<sup>1</sup> Paragraph 1.20

It would be instructive to consider what the assessment of DSL networks would have been when LLU was initially considered and it is clear that in those circumstances bitstream services would have been the most cost effective remedy to support competition. However, bitstream was and is a second best solution providing limited scope for service differentiation and limited control over the value chain.

## *2. Promoting infrastructure competition*

BT is only starting its NGA deployment and already Ofcom is conceding that physical access remedies are likely to have very limited success. There is a very real danger that Ofcom will create a self-fulfilling prophesy. By making an enhanced bitstream service available as a remedy on market 4, Ofcom is facilitating a migration of alternative operators back up the ladder of investment and facilitating investments in infrastructures which are unlikely to be adequate in the medium term.

Strict obligations to facilitate infrastructure competition should be the only focus of remedies placed in market 4. Such infrastructure competition can be based on parallel infrastructures or based on shared infrastructures (in the case of LLU). The facilitation of a monopoly infrastructure sends a very strong signal that Ofcom's vision for the future is one primarily based on a single infrastructure which may be FTTC or FTTP hosting with alternative operators taking wholesale products quite far down the value chain. Such a vision does not encourage investment in infrastructures by alternative operators or by BT itself.

Ofcom dismisses the possibility of investments in parallel infrastructures at paragraphs 7.48-7.50 seeing some cause for operators to lay one or two extra fibres for expansion or breakages 'spares' are not likely to happen. This is as developed as the case for infrastructure investment gets and ignores the dynamics that happen in other jurisdictions where co-operative roll-outs can lower costs and reduce risks in deployment.

## *3. Conditions required for the merging of markets 4 and 5*

Ofcom relies at length on the explanatory memorandum to the Recommendation on Relevant Markets in particular to extend its view of what might constitute the appropriate market and to justify an extension from the physical to the virtual access markets (paragraphs 3.123-3.145).

The FTTH Council disagrees with Ofcom's assessment of what is contained therein. The Council believe that what the Commission had in mind when it suggested that markets 4 and 5 could merge over time is a situation where the services which could be provided over these infrastructures are such that the differences between some forms of virtual access and various forms of physical access would be so close in practice that they would be in the same market given the likely price points that could emerge. For instance, a network which had weak physical unbundling properties (i.e. which could only be physically unbundled at significant expense) but which could be virtually unbundled by using lightwave unbundling or Layer 3 Routing could easily find both wholesale products in the same market.

The danger is that by facilitating an insufficient remedy in market 4, Ofcom will achieve the opposite of their intention and undermine efficient investment in infrastructure based competition.

*“ ....it is difficult to be absolutely precise about the boundaries of the relevant prospective wholesale markets that are linked to the retail broadband market, in terms of their various possible technical characteristics. This suggests a more generic and forward-looking approach to market identification in this area at EU level (based on the two currently defined wholesale markets), within which regulatory authorities can analyse markets, with the twin aim of facilitating as much infrastructure-based competition as is economically efficient and addressing market power via appropriate access regulation ”<sup>2</sup>*

The FTTH Council believes that there are also many positive elements in this consultation, in particular Ofcom’s willingness to address geographic market and the innovation in the PIA remedy to address local backhaul issues.

Nevertheless, the FTTH Council believes that Ofcom must reconsider the inclusion of the VULA remedy in market 4 on the grounds that it is inappropriate because it facilitates a second best network evolution by the SMP operators and is likely to undermine investment incentives for alternative access operators.

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<sup>2</sup> Commission Recommendation of 17 December 2007 2007/879/EC, OJ L344, 28.12.2007, p.65: and also the accompanying Explanatory Note, Commission Staff Working Document, Explanatory Note to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (Second edition) [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l\\_344/l\\_34420071228en00650069.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_344/l_34420071228en00650069.pdf)

## Consultation Questions

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

**No.**

The FTTH Council believes that an appropriate market definition procedure should be based on the demand and supply characteristics of a particular product. The effectiveness or otherwise of a particular remedy should not be a primary consideration in the market definition stage.

Ofcom has not conducted a standard analysis of the retail market which would thereby inform the decision about what constitutes the appropriate wholesale markets. In particular, the FTTH Council believes that there are likely to be more granular retail divisions than those specified by Ofcom at paragraphs 3.27 and later at paragraph 3.88. The evolution of customer usage has led to a situation where breaks in the chain of substitution can be envisaged within the retail broadband market (with corresponding impacts at the wholesale level). The speeds in questions refer not only to download speeds which are above those available on the existing DSL technologies but more importantly on the upstream speeds which are available. However, there is no evidence that Ofcom has conducted any examination of any product characteristics in terms of what appropriate wholesale product characteristics would be, how they might differ and what the appropriate wholesale product would be in the context of market 4. While Ofcom conduct an analysis of the retail market in their market 5 analysis, their market 4 analysis does not.

Ofcom explains that current physical access remedies may not be effective in an NGA context. The FTTH Council believes that this is why a separate WBA market exists. If physical access remedies could be made fully effective then there would be no need to specify a remedy further down the value chain (virtual access remedies).

Ofcom suggests that markets 4 and 5 merge to some extent in an NGA context since remedies are better for market 5 (and more difficult in some areas in market 4). However, the FTTH Council believes that these markets can only merge where the virtual access is functionally equivalent to physical access (as is likely to be the case in a WDM context). Such equivalence should be demonstrated by reference to the normal demand and supply assessments conducted in these cases (but notably absent here).

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

**No.**

For the UK (excluding Hull), the FTTH Council believes that the imposition of different remedies in different geographic areas is inherently necessary to set the correct incentives for competition and welcomes Ofcom's consideration of these factors but regrets the conclusions reached in relation to market 4. The Council recognises that there are likely to be large differences in the possibility for network competition in the UK between densely populated urban centres, sparsely populated rural areas and the areas in-between. The FTTH Council also believes that there can be competing networks (either duplicated or based on LLU) in urban centres, that there may be no FTTH network in rural areas without public support and that there may be very limited competition on fibre networks in-between.

The FTTH Council believes that Ofcom needs to geographically isolate areas where the prospects for physical competition are greater from those areas where such prospects are not so great the analysis presented is too static and is based on what has happened in the past. The FTTH Council believes that the assessment that needs to take place should be forward looking and should happen regardless of the current state of competition in these areas but be based on an identified potential to support competition in order to ensure the broadest geographic areas for infrastructure competition.

While the FTTH Council welcomes Ofcom's consideration of a greater need for geographic differentiation, there needs to be a willingness to accept that different competition is likely to emerge in different areas based on a more forward looking approach.

The FTTH Council believes that there can be a stronger correlation between the treatment of geographic segmentation in this market analysis and the treatment of geographic markets in the State Aid Guidelines. The SMP process which includes both product and geographic market definition in stage 1 must be conducted on a forward looking basis. This is also true of a State Aid assessment which takes a (proposed) five year forward looking perspective to determine which areas are to be classified as white (no prospective infrastructure) grey (only one prospective infrastructure) or black (more than one prospective infrastructure). In the UK many State Aid decisions have been conducted with different perspectives in this regards but seems to be overlooked in the current analysis.

A determination of where, geographically more than one prospective infrastructure could be deployed, or where a single infrastructure could effectively support multiple networks through unbundling, would warrant a different treatment of those areas. In particular, other remedies which would undermine the incentives to make the appropriate investments should not be available on that market and more importantly, it should be clearly signalled ahead of time that they will not be available. Where

parallel networks are not viable or effective infrastructure sharing is not feasible, NRAs should concentrate their efforts to making sure that other forms of access are put in place as effectively as possible in the appropriate market analysis (market 5).

Please see also the response to question 10 below.

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.

Yes.

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

Yes.

**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.

The FTTH Council does not accept the analysis set out and the forward looking assessment put forward by Ofcom.

The FTTH Council believes that infrastructure competition is more possible than suggested by Ofcom in its analysis. The assessment of the case for deployment of multiple fibres is perfunctory (see paragraphs 7.48-7.50) and does not consider the competitive dynamics that may exist (and which may in turn be impacted by the current analysis).

In particular, the FTTH Council believes that there are a number of scenarios where joint or common investments could be encouraged and where operators would opt to



invest in ‘spare’ fibres. The investments in FTTP/FTTH can be shared between a number of operators and risk can be shared in some pre-agreed proportion as a means to improve investment profiles. Such arrangements can be facilitated by appropriate regulatory interventions which require notification and facilitate co-ordination of investments.

Where it becomes clear that multiple networks may be deployed investors may opt to invest in network designs which are easier to share and other investment considerations and dynamics may take hold.

The FTTH Council believes that sequential network deployments would be much slower and more expensive and consequently less likely to happen. A co-investment model is much more likely to emerge where feasible.

The FTTH Council believes that where alternative operators wish to deploy their own fibre networks they should be in a position to join BT in their deployment in a framework to be set out by Ofcom but where the alternative operator would have to pay an appropriate proportion of the deployment costs.

Therefore the FTTH Council believes that option 3 (set out in paragraphs 7.61 -7.66) may be appropriate but not as set out by Ofcom. Unless a framework is put in place to facilitate alternative operator’s investments then it will not happen. Please see further below in answer to question 10 the FTTH Council’s concerns about the impact that such a lack of competition is likely to have on UK network deployment.

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

Yes

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

Yes

**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?**

No.

The FTTH Council is concerned that Ofcom has opted to put a virtual remedy amongst the suite of physical access remedies available in market 4. As outlined previously, the FTTH Council believe that the appropriate demand and supply analysis has not been conducted which would justify an extension of the defined market to include access product further down the value chain.

The Explanatory Memorandum to the Recommendation on Relevant Markets makes it clear (at page 4) that the objective of NRAs should be to encourage access without undermining the incentives to make investments.

*Competing network infrastructures are essential for achieving sustainable competition in networks and services in the long term. When there is effective competition, the framework requires ex-ante regulatory obligations to be lifted. Where competition is not yet effective granting others access to facilities in a way that levels the playing field but does not remove incentives for new infrastructure investment ensures that users enjoy choice and competition during the transition to a fully competitive market. Investment in new and competing infrastructure will bring forward the day when such transitional access obligations can be further relaxed.*

It is also clear that the reason the Commission has identified two wholesale access markets is precisely because physical access will not be universally effective (page 32 of the Explanatory Memorandum) and that because of their interaction, that they need to be examined together:

*The initial Recommendation identified two wholesale markets that were linked to the broadband retail market: wholesale unbundled access (including shared access) to metallic loops and sub-loops, and wholesale broadband access. The reason for identifying a second separate wholesale market was based on the view that even regulated local loop access would be insufficient in most Member States to constrain potential market power at the retail level and a significant entry barrier would still exist. The fact that the two wholesale markets are linked in this way to the same broadband retail market implies that it is logical for national authorities to undertake a single overall analysis of the broadband market which examines in sequence the impact that (a) regulated infrastructure-based access and (b) regulated (non-physical) network-based access could be expected to have on any significant market power that is identified.*

The FTTH Council believes that by setting out separate markets, based on a demand and supply analysis, the Commission has been able to encourage investment in infrastructure whilst ensuring sufficient access for alternative operators where investment would not be efficient. In such a model, operators can see that where efficient investments are possible, failure to invest may undermine their ability to have access products across the entire territory of the UK. This is so because areas with significant investments in alternative networks may be declared competitive for market 5 and access products further down the value chain may cease to be available. Only by investing where feasible can alternative operators secure their future.

The proposal by Ofcom to now put an enhanced bitstream product in the market and effectively undermine the previous market distinction could be detrimental to the incentives for alternative operators to invest even where it would be efficient to do so. The proposal from Ofcom is detrimental to the vision of the form of competition that can emerge in the future and sends a strong signal to alternative operators that Ofcom does not foresee investments in alternative telecoms networks in the future. There is a



danger that when signalled ahead of time (since BT's investments are still in planning) that this will become a self fulfilling prophecy.

The FTTH Council would also note that the proposed addition of VULA also undoes all the geographic segmentation in market 5 by stealth. In practice Ofcom proposes to make enhance bitstream available throughout the territory of the UK with geographic limitations only applying to more restricted forms of bitstream.

Again, regarding market definition in the context of the VULA remedy, there is no assessment of whether it is appropriate to include remedies which support specific products, such as TV transmission, in the absence of the an assessment of the relevant market. The retail market which informs the wholesale market assessment makes no attempt to assess whether a bundled retail market exists which includes TV service etc. Therefore, the FTTH Council believes that from technical perspective Ofcom is mistaken to include VULA as a remedy in market 4 but remains much more concerned about the broader perspective impacts of this decision.

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

**No.**

The FTTH Council believes that the absence of immediate requests for access or a lack of identified demand is not a sufficient or justified reason for not putting appropriate obligations on BT. The history of LLU shows that it took a long time for copper based LLU processes to be made effective and for processes to become efficient. Taking the current approach and applying in a copper context would have delayed the making effective of copper LLU remedies even longer.

Fibre unbundling solutions should be signalled as a requirement of BT so that when planning and deploying their network they can put these requirements in their build processes and so that alternative operators can plan with confidence in future access.

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?

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?

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