

Response to the
Consultation on implementation measures of
The European Broadband Cost Reduction
Directive
by the
Infrastructure Investors Group



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1 Introduction and Summary

- 1.1.1 The IIG is pleased to respond to this consultation and welcomes the Government's transparent approach to the implementation of this important Directive.
- 1.1.2 The IIG is encouraged by the proposed approach to transposition set out by the Government. We support, in particular, the focus on ensuring that access arrangements would be mutually beneficial to both access seeker and provider; and that the pricing should compensate the access provider in accordance with that operator's business plan, were it to utilise the infrastructure itself.
- 1.1.3 The IIG welcomes the Government's proposals that terms of granting access under the Directive should be mutually beneficial to both parties and that PCN operators should be compensated for granting access in accordance with their business plans and the planned rates of return on their network investments. The IIG, however, considers it very important that non-PCN operators are also treated in fairly under the Directive and as such we have concerns with the Government's proposals to design significantly different pricing regimes for the two groups of network operators, covered by the Directive.
- 1.1.4 Whilst understanding the motivation behind the Directive and acknowledging the significant costs involved in building new infrastructure, the IIG would have severe concerns if it were to be implemented in such a manner as to reduce incentives for investment in PCN infrastructure.
- 1.1.5 This concern is particularly relevant in the current environment, which has seen a sharp upturn in infrastructure investment by private sector companies in recent years, including Virgin Media's £3bn investment in Project Lightning and CityFibre's Gigabit City investments and its joint venture with Sky and TalkTalk in York to deliver FTTP broadband. These initiatives are delivering the same benefits that the Directive seeks to achieve, namely increasing the roll out of high speed broadband to consumers.
- 1.1.6 In this document, we respond on a subset of the questions posed, and comment on some aspects additional aspects of the proposed implementation of the Directive. This response complements any individual responses made by the IIG members and is therefore not a comprehensive response to all points raised in the consultation document.

2 The Infrastructure Investors Group

- 2.1.1 The Infrastructure Investors Group (The IIG) is a collective of alternative infrastructure providers who have built, own and operate high-speed electronic communications networks within the UK, independently of BT. Whilst the members of the IIG normally compete intensely with each other, they believe that it is important to present a strong voice to protect a pro-investment environment for electronic communications networks in the UK and have come together for this sole purpose.
- 2.1.2 The members of the IIG are (in alphabetical order):

- CityFibre Infrastructure Holdings plc
- euNetworks Group Limited
- Virgin Media plc
- Zayo Group LLC

2.2 CityFibre Holdings

2.2.1 CityFibre is the UK's largest alternative provider of wholesale fibre network infrastructure. It has major metro footprints in 36 cities across the UK and a national long distance network that connects these cities to major data-centres across the UK and to key peering points in London. The company has an extensive customer base spanning service integrators, enterprise and consumer service providers and mobile operators. Providing a portfolio of active and dark fibre services, CityFibre's networks address 24,500 public sites, 7,000 mobile masts, 245,000 businesses and 3.5 million homes. CityFibre is based in London, United Kingdom, and its shares trade on the AIM Market of the London Stock Exchange (AIM: CFHL).

2.3 euNetworks

2.3.1 euNetworks is a Western European provider of bandwidth infrastructure services. It owns and operates 13 fibre based metropolitan city networks in 5 countries, connected with a high capacity intercity backbone covering 45 cities in 10 countries. euNetworks is the leading data centre and cloud connectivity provider in Europe, directly connecting over 280 key data centres, with further data centres indirectly connected. euNetworks was founded in 2002 and has its headquarters in London.

2.4 Virgin Media

2.4.1 Virgin Media is the second largest provider of broadband infrastructure within the UK. Its cable network – the result of multi-billion pound private investment – delivers ultrafast broadband with speeds of up to 300Mbps, as well as market leading connectivity to thousands of public and private sector organisations. Virgin Media is a part of Liberty Global plc, the world's largest international cable company, together serving 24 million customers across 14 countries.

2.5 Zayo Group

2.5.1 Zayo Group is a global provider of communications infrastructure services, including dark fibre, Ethernet and IP services. Zayo operates in the United States, Canada, France, Germany, Netherlands, Belgium, Switzerland, Ireland, and the United Kingdom. Its UK fibre optic network spans more than 450,000km and connects over 130 data centres via unique routes alongside the national gas pipeline and within London's sewer system. Zayo was founded in 2007 and is headquartered in Boulder, Colorado, with European headquarters in London and Paris.

3 Scope and intent of the Directive

- 3.1.1 We note that Recital 6 of the Directive refers specifically to the need to improve the coverage of high-speed broadband networks and services. The IIG considers this a significant indication of the primary underlying intention behind the Directive, namely to improve coverage of high-speed broadband services by reducing the costs of reaching currently un-serviced locations.
- 3.1.2 This focus on coverage is further emphasised in Recital 1, which covers the important of all citizens as well as the private and public sectors having the opportunity to participate in the digital economy. Recital 2 also refers to ‘access’ to high internet speeds. Recital 3 speaks directly to this Directive contributing towards the aims set out in the Digital Agenda.
- 3.1.3 In contrast, the Directive only references competition in two contexts – Recitals 9 and 19. In both instances this refers to the need to safeguard competition, and that the Directive is not implemented in such a way as to damage existing and prospective competition.
- 3.1.4 The IIG considers that the explicit reference to improving coverage and the provisions to protect competition are strong indicators that the Directive should be implemented to facilitate provision of access in locations where no high-speed broadband networks are presently available and are unlikely to be built in the foreseeable future, but without undermining the vibrant network based competition that has developed over recent years¹.
- 3.1.5 We acknowledge that the Directive explicitly provides for access to existing PCNs, and as such it could not be implemented in the UK without these provisions. It is however important to take due notice of the focus on improving coverage as well as on preventing negative impacts on competition and investment.
- 3.1.6 The remainder of this response is built on this understanding of the Directive and other sections will cross reference this principle.

4 Request for and provision of ‘information’

4.1 Validating the requestor

- 4.1.1 The IIG agrees with the assertion that a Network Operator will have to assess whether a requestor is bona fide. In the UK, there is a general authorisation framework and no formal licensing process, so it is not possible to refer to a list of licensed or authorised providers. Additionally, it appears that the Directive also embraces the possibility that prospective PCNs would have the right to request information.
- 4.1.2 This extremely wide ‘definition’ of what constitutes a PCN that can request the minimum information, could leave the network operators (including PCNs that own and operate

¹ Purpose-built telecommunications infrastructure is likely to always be superior to the use of other infrastructure. Therefore, incentives should be preserved for investment in specific PCN infrastructure.

network) open for very speculative requests for information. These could be information gathering on behalf of other entities or simple ‘fishing expeditions’.

4.1.3 Therefore, the IIG believes that it will be critical that some form of gateway or hurdle is established. Part of that hurdle should be a charge, payable for each information request. Additionally, the IIG notes that the requestor will have to show “serious intent to deploy...network”. The IIG considers that it will be legitimate for any network operator to require submission of sufficient evidence of this serious intent, as part of any request for information. Such evidence could include business plans for deployment of network in the specific area and supporting market research.

4.1.4 Additionally, as any request is predicated on an intent to deploy, it must follow that individual requests should not cover more than one location. Q8

4.2 Charging for information

4.2.1 The IIG considers that a PCN should have the right to charge for information provided. However, the IIG does not agree that it should be mandated that a charge should reflect cost-recovery only. This does not appear to be required by the Directive and as such could be said to go beyond the scope of transposition. Indeed, given the need to discourage frivolous or speculative requests it may be appropriate for a charge to be set at a level that is not cost reflective.

4.2.2 If the charge were to be cost-based, then it is important to recognise that the cost to PCNs, (in particular smaller PCNs), is not simply the person-hours used to deal with the information requests, but the cost of the critical work not being undertaken whilst that person is processing an information request. PCNs (in particular, smaller PCNs) will not have people dedicated to deal with information requests, instead it will be senior network planners and engineers, taken away from their standard duties, who will be processing the requests.

4.2.3 The charge should be an application fee, accompanying the information request. This could possibly be optional for network operators, in that they could adopt the information request charge and ensure their websites enable a requestor to see what the fee is, and by which means it should be paid and certified, in order that a request can be approved. Q10

4.2.4 The specific amount charged for each information request should be set by each network operator, but could be subject to a maximum level set by the NDSB or to case-by case dispute resolution.

4.3 Charging for surveys

4.3.1 The cost of surveys may differ substantially. The charge for a survey should therefore be set by the network operators on a case-by-case basis. In case of a dispute over the charge, this should be referred to the NDSB. Q11

4.4 Addressing concerns of confidential information for competitive requests

- 4.4.1 The IIG members compete intensely in the provision of electronic communications services and guard their network information and strategies with extreme care. It is critical that PCNs are able to make judgements about what information is commercially sensitive and therefore could impact on competition. The information provided in response to each information request should be determined by the providing PCN.
- 4.4.2 All information provided under a competitive access request should be subject to confidentiality provisions. These should be agreed between the two parties and subject to dispute resolution as required.
- 4.4.3 The IIG does not consider that the use of a 'confidentiality ring' would prove suitable for access requests. A confidentiality ring, where advisors are given access to confidential data that their clients cannot see, is a cumbersome and administratively heavy process, which is unlikely to prove useful for managing ad-hoc information requests under the Directive.
- 4.4.4 Instead, confidentiality provisions should be negotiated between the two parties. The confidentiality provisions may differ between different requests and may in some cases need to include provisions for restricting access to the information provided within the requestor's business.

Exemption from providing information

- 4.4.5 The IIG considers it imperative that a PCN can refuse to provide information concerning specific routes that the PCN has constructed for the purpose of achieving a competitive advantage over other PCNs.
- 4.4.6 An example of such a route would be where a PCN has invested in a direct (short) route between financial institutions to reduce the level of latency and thus offer a faster service for time-critical trading. If a PCN has incurred the risk of building a route that is dedicated to providing low latency connectivity, whereas other routes exist between the two locations, that route should be subject to an exemption from the obligation to provide the minimum information.
- 4.4.7 The reason this information should not be provided is that it would be harmful to competition. Information about, and access to, such high risk routes, would substantially reduce the incentive to build such routes, resulting in a reduction in the level of choice to customers and hence in the level of competition in the market.
- 4.4.8 The IIG also has concerns that information requests could be used in instances where different PCNs compete for a tender. One PCN could issue an information request in order to gain a better understanding of its competitor's capabilities – the amount of space remaining in relevant ducts or the availability of physical redundancy in the competitor's network, for example.
- 4.4.9 The IIG would not consider a refusal to provide information in a situation as described above to be on 'purely anti-competitive grounds'. Information gathered using the obligations of the

Directive could reduce the level of competition in responses to tenders, and thus damage the value to customers.

- 4.4.10 It is essential that the burden of proof on the network operator to justify the refusal, is not such that the sensitive information is provided through that means. It should be a simple statement that the information is exempted due to it being competitively sensitive. A dispute should be handled confidentially between the network operator who refused the information and the NDSB.

5 Access rights to existing physical infrastructure

5.1 Existing and future contractual commitments

- 5.1.1 Whilst the IIG understands that the intention of the Directive is to enable access to existing physical infrastructure, it is important to recognise that infrastructure sharing is already a mature market in the UK and a considerable base of existing contracts are in place.
- 5.1.2 It is not unusual that contractual terms for access to ducts include an exclusivity provision, prohibiting the owner of the infrastructure from providing access to any of the other operator's competitors, or indeed to any other operator at all. It is important that such existing and future arrangements are not at risk due to the implementation of the Directive.
- 5.1.3 In many instances the investment in new PCN infrastructure is predicated on the principle of 'anchor tenants', meaning that a significant customer is identified and makes commitments to use the infrastructure, prior to the network construction starting. In anchor tenancy contracts, it is common that some form of exclusivity is included. Were the implementation of the Directive to prohibit such practices then that could cause a significant reduction in new OCN network investment, to the direct detriment of the objectives of the Digital Agenda.
- 5.1.4 The IIG notes that this vital issue is not addressed in the consultation, despite it having been raised in meetings with the Government prior to the consultation being issued.

5.2 Refusal of competitive access requests

Refusal on grounds of competitive impact

- 5.2.1 The IIG considers that a refusal to supply based on competitive impact on the PCN operator receiving the request, could be justified within the parameters of article 3 of the Directive (objective, transparent and proportionate).
- 5.2.2 The Government acknowledges that the pricing for access should take into account the competitive impact on the access provider's core business and that the resulting price may be unacceptable to any access seeker. Whilst not a direct refusal to provide access, the result would likely be the same. The IIG considers that instead of using pricing to reflect the competitive impact on the access provider, it would be more transparent to refuse the access request on the grounds that it would cause competitive harm to the access provider, and potentially to costumers and consumers.

- 5.2.3 The IIG considers that the PCN could present clear, objective, transparent, and proportionate reasons for refusal, which would present the competitive impact on the PCN provider, should the access be granted.
- 5.2.4 The IIG considers that it would be more desirable to have a refusal that clearly states the rationale for the refusal as competitive impact, than an indirect refusal effected through very high pricing.
- 5.2.5 Ensuring that the genuine reason for refusal of access was known and understood by the access seeker would also have benefits in ensuring that any dispute of the refusal was equally well understood by the NDSB. The ability of the NDSB (or subsequent appellate body) to focus on the crux of the refusal would increase the efficiency of any dispute resolution.
- 5.2.6 The IIG therefore recommends that the legislation includes ‘competitive impact on the PCN providing the access’ as a valid reason for refusal.
- 5.2.7 It is, however, important to recognise that the rationale for the refusal may in itself be sensitive. This means that a PCN may not be able to qualify its refusal over and beyond a specific refusal category (e.g. due to negative competitive impact). Further justification would need to be provided to the NDSB, in the event of a dispute.
- 5.2.8 In this context we refer to our analysis in section 4 of this response, where we review the objective of the Directive and conclude that the primary objective is to increase coverage, not competition.

Discrimination between competitive access seekers

- 5.2.9 The Government proposes that a PCN should not be able to discriminate between different competitive access seekers. The main reason for this being that the Directive requires that reasons for refusal should be objective, transparent and proportionate.
- 5.2.10 However, as demonstrated above in our discussion of refusal of access on grounds of competitive impact, it is possible to discriminate for reasons that are objective, transparent and proportionate. Indeed, the Government appears to be proposing that a PCN can exercise discriminatory pricing, depending on the likely competitive impact the individual access seeker would have on the PCNs business, competitive standing, and revenue potential.
- 5.2.11 The IIG therefore proposes that the implementation of the Directive in the UK should clarify that discrimination on objective, transparent and proportionate grounds is allowed. The alternative would be that the UK implementation of the Directive is silent on the issue of non-discrimination.

5.3 Pricing of access

- 5.3.1 The Government presents three material principles to guide price-setting for access to physical infrastructure under the Directive. Suggesting that fair and reasonable prices should:

- Enable recovery of efficiently incurred costs,
- Provide benefits to consumer and not entail material competition distortion, and
- Be reasonably practicable.

- 5.3.2 These pricing principles are not referenced in the Directive, nor are they relevant to either the pricing principles stated throughout the Directive, nor to the two pricing regimes outlined in the consultation. The IIG consider that reference to these principles is at best confusing or at worst misleading.
- 5.3.3 The IIG understands that the principles are those derived by Ofcom in their consideration of disputes brought under the Communications Act in relation to non-geographic termination rates. Therefore, the principles are a regulatory construct by Ofcom created to resolve a specific dispute brought under the Communications Act. Indeed, the court case referred to in the consultation² was the Supreme Court judgment in that case. It is of note that the Court did not uphold the principles, as these were not in dispute. Rather it was the way in which the principles (in particular the second principle), were applied by Ofcom that was in question. The IIG consider that the case referenced cannot be considered to be analogous to the CID, as it was subject to the Communications Act, whereas the rights under the CID are not.
- 5.3.4 The IIG considers it of critical importance that Ofcom's duties under the Directive are kept strictly separate from their duties under the Communications Act. The reference in the Directive to Article 8 of the Framework Directive, does not make the Directive subsidiary to the Communications Act.
- 5.3.5 For these reasons, the IIG believes that the inclusion of these pricing principles, and the consequent implication that they are relevant to the proposed pricing regimes, is misleading. The IIG therefore proposes that there is no need whatsoever to state these three principles as the pricing approach is clear in the text of the Directive.

Pricing of competitive access

- 5.3.6 The IIG supports the Directive's pricing approach for competitive access, in that pricing for competitive access should be set to reflect the investments and projected returns of the individual PCN providing the access.
- 5.3.7 True infrastructure competition results in benefits to dynamic efficiency from improved network topologies and technologies as well as improved network performance and quality of service resulting from competing network providers' efforts to attract retail and wholesale customers.
- 5.3.8 However, the risks associated with investments in such network infrastructure are considerable. Future customer demand for high bandwidth and the services which make use of such infrastructure is uncertain. Investors will understandably require a minimum level of return in order to compensate for these risks.

² Consultation document page 23, Footnote 4

5.3.9 It is also important to consider the impact on the incumbent PCN. For BT, the main investment and innovation incentive arises from the presence of competing networks. Studies^{3,4,5,6,7} have proven that there is a clear correlation between the presence of competing access networks and incumbent investment in super and ultrafast interconnection services; this further underlines the importance of encouraging sustainable competition in network infrastructure.

Transparency, consistency and predictability are paramount in creating a pro-investment market. The absence of one or more of these, results in a significant increase in regulatory risk and presents a direct disincentive to investment.

5.3.10 For these reasons, the IIG believes it is of paramount importance that the pricing regime for competitive access should result in a stable and predictable pricing regime (while accepting that actual prices will vary substantially on a case-by-case basis), ensuring that investment incentives are maintained. Prices which are set at too low a level will directly undermine such incentives, resulting in foreclosure to investment and end-to-end infrastructure competition. A regulatory environment which causes uncertainty will result in extra risks, again undermining incentives.

5.3.11 Whilst agreeing that prices should be set to reflect the investment risks and planned return of the PCN (Recital 19 of the Directive and the relevant implementation proposals), the IIG has concerns that the references to the need to prevent distortion of competition refer to downstream competition only.

5.3.12 It is important that the implementation of the Directive in the UK is designed to prevent competitive distortions in both upstream and downstream markets. By upstream markets, we mean the market for competing physical infrastructure including ducts and poles.

5.3.13 Competition in upstream markets is vitally important to the development of a competitive market in ultra-fast broadband services and high-speed business connectivity; regulated passive access as a basis for competition will not deliver the same level of benefits that can be realised with end-to-end infrastructure competition.

5.3.14 For example, competition based on regulated access to ducts of other PCNs is subject to the network topology and availability of the access provider's network. BT's local access network is typically constructed based on the 'tree and branch' design associated with the historical structure of BT exchanges deployed for voice PSTN. Therefore, if passive access were provided by BT only, PCNs would be denied the innovation and efficiencies possible from an

³ Woroch, G. 'Facilities Competition and Local Network Investment: Theory, Evidence and Policy Implications' in *Industrial and Corporate Change* Vol. 7 No. 4 1998 pp601 - 614

⁴ Bauer, J. 'Regulation, Public Policy and investment in communications infrastructure' in *Telecommunications Policy* Vol. 34, 2010 pp. 65 - 79

⁵ Cave, M. 'Encouraging infrastructure competition via the ladder of investment' in *Telecommunications Policy* Vol. 30, 2006 pp223 - 237

⁶ Mattia Nardotto, Tommaso Valletti and Frank Verboven; *Unbundling the Incumbent: Evidence from UK Broadband*. Centre for Economic Policy Research, Discussion Paper No. 914, October 2012.

⁷ Jan Bouckaert, Theon van Dijk, Frank Verboven; *Access regulation, competition, and broadband penetration: An international study*. *Telecommunications Policy* 34 (2010) pp 661 – 671.

optimised duct network constructed to deliver capacity to the key areas of present and future demand.

- 5.3.15 Whilst infrastructure competition, including in the upstream market, leads to significantly improved outcomes for consumers, it requires that alternative providers make the decision to invest and actually build competing networks. It is therefore essential that the pricing regime for competitive access fully supports and encourages the continued growth of such competition by maintaining prices at a level which allows a return to investors consistent with the risks taken.

Pricing of non-competitive access

- 5.3.1 The IIG believes that the pricing regime for non-competitive access should follow similar principles to that for competitive access, it should be mutually beneficial and use a value-based approach to access pricing. The IIG does not believe that access to non-PCN infrastructure should be mandated on terms that are unattractive to the supplying network operator. Option-based pricing should be considered wherever there are alternative potential uses or users of the infrastructure; it is entirely reasonable that the investors in non-PCN should be able to maximise the return on their investments. Where option-based pricing is not relevant, the costs of the non-PCN operator in providing the infrastructure should be considered, as should the impact on investment incentives in bespoke PCNs which will further the Digital Agenda.
- 5.3.2 Provision of access by non-PCN network operators should be mutually beneficial. It would be inappropriate to force network operators to provide access to their networks on terms that are unattractive to them. That type of legislation would send warning signals to potential investors, that regulatory intervention could significantly reduce the value of their UK investments.
- 5.3.3 The networks currently being built by IIG members are designed to meet customer demands well into the future; these networks allow for high bandwidths, capable of delivering >1Gbit/s services to customer premises at a high level of penetration. Such capabilities result from careful and innovative design. When considering any disputed pricing arrangements for either competitive or non-competitive access, the NDSB should take full account of the long-term investment incentives for broadband rollout to maximise future consumer benefit through innovation and the use of cutting edge technology.

Relationship of Directive to existing access remedies relating to significant market power

- 5.3.4 The IIG agrees with the proposed interpretation of this aspect of the Directive.
- 5.3.5 It is worth drawing attention to the way in which the Government has expressed the contrast between the pricing approach recommended by the Directive and that typically used on SMP-based access regulation. The IIG considers that the description of the Directive's pricing approach in this section of the consultation is important and should be used to inform future dispute resolution decisions under the Directive.
- 5.3.6 The consultation document states: *"By contrast, the Directive seeks to activate dormant infrastructure that its owners are unwilling or not incentivised to use"* and it continues: *"Here 'fair and reasonable' must mean that access is equitable to both access seeker and*

infrastructure owner, and should take into account the impact of the requested access on the business plan of the infrastructure owner”.

- 5.3.7 The difference between the purposes and intentions of the Directive and the Communications Act add further weight to the discussion above, about the inappropriateness of using pricing principles from the application of the Communications Act for the pricing of access provided under the Directive.

Wholesale Infrastructure Providers

- 5.3.8 The IIG agrees with the proposed approach to WIPs, but would encourage the Government to produce a clear and concise definition of what types of undertakings fall within the WIP definition.

6 Single Information point

6.1 Publication by Network operators

- 6.1.1 The IIG notes that the Government discusses the possibility of mandating that network operators (including PCNs) should publish responses to requests for minimum information.
- 6.1.2 The IIG does not agree that this would be practicable. As described in section 4.4 of this response, it is likely that bilateral confidentiality agreements will need to be entered into between the requestor and the PCN, and it is very possible that the information a PCN can disclose without risking harm to competition will differ depending on the identity of the requestor.
- 6.1.3 The IIG is therefore strongly opposed to the proposal that network operators should publish responses to requests for minimum information. Q32

7 Exemptions

- 7.1.1 As set out above in sections 4 and 6 of this response, the IIG considers it critical that a new exemption category is introduced, namely ‘refusal due to negative impact on competition’. This refusal category should apply both to the provision of information and to the provision of access. Refusals using this reason, could be disputed through the NDSB, but the investigation by the NDSB should be done confidentially in order to not disclose the sensitive information to the requestor.

8 Dispute resolution

- 8.1.1 The IIG agrees that Ofcom is a suitable NDSB for all disputes arising as a result of the provisions of the Directive. Q45
- 8.1.2 The IIG agrees that the CAT is the appropriate appeal body for decisions from the NDSB. Q47

