Consultation on the Strategic Review of Telecommunications, Phase 2

Response of the Communications Management Association

This response is in three parts:
- A Summary,
- Responses to Specific Questions,
- General Observations

Summary

1. For the last decade CMA has consistently promoted its belief that real and effective competition (as seen from the perspective of the business user) has yet to materialise in the UK. We have been similarly consistent in pointing to the cause: the inherent weakness of a market dominated by BT Group being vertically integrated and where business process – and thus financial - bottlenecks endure. We have in the past claimed that accounting separation between BT's wholesale and retail activities was not enough and we have even gone so far as to advocate structural separation between retail and core, and between core and local access businesses. It is somewhat easier to advocate than to implement, however, and we are keenly aware of trade-offs that have to be struck by Ofcom, and of the difficulties associated with mitigating the combined effects of dominance and vertical integration.

2. Those considerations influenced CMA's response to the proposal to bundle regulated and unregulated offerings to business users (TSR2 para 8.34), where we proposed a trial period during which the concept of "replicability" could be tested. We stand by that response – a trial period might still be a practical way forward.

3. We therefore welcome Ofcom's analysis set out in TSR2 and we are optimistic that the outcome of the review will set the stage for a sustainable new industry structure and the investment required to create it.

4. However, we caveat that endorsement with three main concerns:
    a. That the search for equivalence might not be successful or, if initially successful might not be enduring, thus resulting in an increasing amount of 'ex-post' regulation to sustain it;
    b. That the imminence of BT's NGN is likely to have an impact on regulation policy and practice that is disproportionate to the exposure it has been given within the Strategic Review. It dominates the emergent regulatory agenda - both in terms of radical change to service delivery and the potential scope for increased wholesale and retail competition and innovation. We are therefore disappointed that Ofcom has not made proposals for regulation in the environment of the 21st Century Network more central to the Review. The consultation "NGN – Future Arrangements for Access and Interconnection", while an impressive 'tour d'horizon', is really a collection of suggestions and reads more like a response to a consultation rather than a consultation offering positive proposals. Furthermore, the consultation period for the NGN document was truncated. While we can understand that Ofcom perhaps wanted some reaction to its "set of issues" so that any decision on TSR2 could be better informed and a full-blooded consultation could be launched later this year, we have some concern that regulatory policy is being

made against the background of yesterday's PSTN rather than tomorrow's IP world. (We made a similar point in our response to the recent consultation on Number Translation Services). For business customers planning ahead the NGN is already hugely significant and deserves far greater attention than is evident in this review. We would like to see a much stronger lead coming from Ofcom on NGN.

c. We would prefer to see a much stronger impetus in Ofcom's approach to the extension of the USO to incorporate access to "real" broadband.

Ofcom's Specific Questions

CMA has chosen not to respond to those questions that have little or no direct bearing on the business user, or are outside the competence of our respondents.

1. Do you agree with Ofcom's proposed principles for regulation of telecoms markets?

The proposed principles are:

1. "Promote competition at the deepest levels of infrastructure where it will be effective and sustainable". CMA is unsure what this means in practice. Geographically speaking, it could refer to anything from regulation of core infrastructure to regulation of the local loop wherever an economic bottleneck persists. It might be better to re-state the principle from the perspective of the NGN. See our response at para 9 below.

2. "Focus regulation to deliver equality of access beyond those levels". In the context of our response to Principle 1, we agree.

3. "As soon as competitive conditions allow, withdraw from regulation at other levels". As stated elsewhere in our response, we are concerned that any withdrawal must be effectively reversible. We suggest that Ofcom provide clarity on what would trigger regulatory forbearance, who might trigger it, and the procedure to be followed.

4. "Promote a favourable climate for efficient and timely investment and stimulate innovation, in particular by ensuring a consistent and transparent regulatory approach". We agree. But see our response to Q20, below. Ofcom would appear to be departing from of one of its main principles in this case.

5. "Accommodate varying regulatory solutions for different products and, where appropriate, different geographies". We are uncertain about varying regulation for different geographies. See our response to Q1d below.

6. "Create scope for market entry that could, over time, remove economic bottlenecks". Agreed. And see our comments under Principle 4 above.

7. "In the wider communications value chain, unless there are enduring economic bottlenecks, adopt light-touch economic regulation based on competition law and the promotion of interoperability". We do not agree that the application of Competition Law by Ofcom is 'light-touch' regulation!

In more general terms, CMA welcomes the 2nd stage of the Sector Review, and was very pleased to read the thorough assessment of the state of telecoms regulation in the UK. We fully endorse the Ofcom view that continuing with the status quo is not an option. After 20 years of market liberalisation we still do not have effective competition in the sector, as the condoc itself makes clear in no uncertain terms. Moving forward it is essential that Ofcom be stable, consistent and equitable in its decision-making and foster a new confidence in the telecommunications industry so that substantial investment decisions are made by all competitors.

However, CMA members are not unanimous in their support for Ofcom's option 3. A minority group of our members believe that competition law now provides Ofcom and BT's competitors with effective sanctions to control abuse of market power. They favour Option 1 which they assert is not "deregulation" at all. A rather larger minority group considers that the history of the last 20 years leads them to conclude that equivalence will not succeed even with the full support of the BT Board. This body of CMA opinion believes that best solution is for Ofcom to 'take the pain now' and go for an Enterprise Act referral, which they trust will lead to a complete separation of BT into two separate entities. This is the only solution that, in their view, will result in real equivalence.

The majority view, and the one supported by the CMA Board, favours Ofcom's option 3. If equivalence can be made to work, then it will deliver the same outcome as full separation, but without the disruption and uncertainty that option 2 would cause.

For this reason the CMA supports Ofcom's preferred option 3, provided we are satisfied with the detailed commitments and undertakings from both BT and Ofcom that will be necessary to ensure that the equivalence targets are measurable, time-bound and will be monitored in detail and the results published. We believe that BT must demonstrate its commitment in practice both to internal structural separation (including moving staff into separate buildings and behavioural changes) and on its equivalence targets, particularly those related to IT systems support for competitors ordering wholesale products. In our response below under "General Considerations" we note the importance of cost modelling and regulatory accounting as areas where complete detailed transparency will be required to deliver true equivalence. We are also very concerned that Ofcom appears to be underestimating the detailed negotiation and policing work that that will be required for a successful outcome.

We are also generally concerned about the need for 'joined-up' regulatory consultations from Ofcom. We believe that the consultations on spectrum trading, universal service, and BT's 21CN network are an integral part of any major review of the telecoms sector, and cannot be considered in isolation. We are disappointed to detect a note of complacency in review regarding the UK's position in the roll-out of broadband; our view is that while recent progress has been encouraging, the leading countries in Asia, Europe (and the US) are moving faster then we are. We need to accelerate roll-out, access speeds, and price reductions if the UK is to be competitive in the world economy.

We are concerned that Ofcom continues to focus on BT and the markets for fixed network services. We have consistently complained over many years that the mobile market does not behave as a user would expect from a truly competitive market. This is an area that we believe requires regulatory intervention from Ofcom, particularly in relation to international roaming charges, call termination costs, and lack of transparency of tariffs. We also perceive a need to ensure that any strategic alliance between major fixed and mobile players can be provided for within the existing regulatory framework. See Para 23 below.

We comment further on these areas in our responses to the rest of Ofcom's questions and also under the heading "General Considerations" below.

1 a) What regulatory role should Ofcom play in the wider telecoms value chain?

It will soon be irrelevant whether traffic uses wireless or fixed networks and Ofcom must have a strategy for regulation where there is dominance in a converging/converged market.

The school of thought that says that regulation of the upstream market will ensure fair competition downstream is too simplistic. We are concerned that overhasty withdrawal of downstream regulation could have a negative impact on consumers. See paras 19 and 20 below.

1 b) How should Ofcom reflect differences in competitive characteristics in different geographic areas?

By ensuring that the competitive landscape is conducive to the provision of universal access to broadband. But see 1d below.

1c) What factors need to be taken into account when considering the scope of demand and supply-side substitution in telecoms markets on a geographical basis?

No response.

1d) To what extent would it be appropriate in the future to take into account differences in competitive conditions in different areas through (i) the aggregation of similar geographic areas or (ii) through different remedies?

We believe that any disaggregation of the conditions governing supply to different geographic areas would lead to unintended and unwelcome effects on the attractiveness (or otherwise) of locations already having a business presence or where a presence is being considered. Specifically, the availability of genuinely competitive broadband services is vital to business development in less densely populated areas. Relaxing regulation in such areas would probably lead to a downward spiral in the prospects of business users there. We hope that Ofcom will not pursue this line of thinking.

1e) Would you support a requirement to provide Ofcom with data on particular products on a geographic basis as part of the regular reporting requirements? What is the correct level of disaggregation?

The fact that competition is not evenly spread across the country is one of the enduring frustrations for customers and challenges for the regulator. If Ofcom is serious about being an evidence based regulator, then it needs to collect data to inform its views and actions. Data at a high level regional basis (eg 'The South-East') would fail to distinguish between the dense urban and rural parts of such regions. Collecting data on a postcode zone basis, while it may be to a degree burdensome for operators, would nevertheless reflect the fact that this system already takes into account the relative density of population in the country.

2. Where and to what extent should Ofcom rely on *ex post* competition law rather than *ex ante* regulatory conditions?

See para 4a above. We are doubtful about Ofcom's ability to police equivalence in the outyears. If Ofcom is unable to do so it will be forced back on extensive downstream regulation with the associated risk that market distortions will be introduced. A majority of our members believe that it may be very difficult to abandon sector-specific regulation other than on a limited and case-by-case basis.

3. In what circumstances would it be appropriate for Ofcom to make a reference under Section 131 of the Enterprise Act?

If it becomes clear that equivalence is not delivering, for whatever reasons, an environment in which a competitive market can flourish, then a reference under Section 131 of the Enterprise Act may be the only remaining course of action. In these circumstances, reverting to detailed regulation is not an option likely to be any more successful in the future than it was in the past. It follows that it is essential to agree upfront how to assess whether equivalence is effective – otherwise the success or otherwise of the equivalence process will not be known for several years. Indeed, it is possible to argue that a protracted timescale would be favoured by BT and that it would be very likely to seek to extend the process of transition.

4. Should Ofcom adopt a broad approach of focusing regulation on enduring economic bottlenecks while tackling the problem of inequality of access head-on?

This approach addresses the "over-simplistic" application of upstream regulation where this is thought to be enough to free-up the downstream market. See response to 1a above. For example, Ofcom has no choice but to focus on the local loop until such time as alternative (broadband) access providers are allowed to enter the market (even where those new providers disturb the technology playing field already occupied by others).

5. How can real equality of access be achieved at the product level?

This is a question requiring a response from the Altnets. The only authority able to confirm whether or not true equivalence has been achieved resides within BT's competitors themselves. The necessary level of equivalence can only be achieved if those competitors are involved in the process of defining the required products and processes. This will demand the establishment of joint working groups – such as the NICC - with relevant independent arbitration. See para 4 below and also our response to Q12.

5 a) Do you agree with Ofcom's definitions of the various forms of equivalence?

Yes – so far. Modifications can be expected as experience grows. However, we believe that Q5a, b, c and d would be better posed in the context of the NGN.

5 b) Do you agree that equivalence of inputs can deliver more effective equality than application of equivalence of outcomes?

.See Q5a

5 c) Do you agree with the principles proposed on where equivalence should be applied and the specific suggestions for individual products?

See Q5a

5 d) How do you suggest the principle of equality is achieved for 'associated products' that BT does not depend on (such as migration products)?

See Q5a.

6. What behavioural changes by BT do you believe would be necessary to achieve real equality of access?

See paras15 – 18 below

7. How should Ofcom reflect the competing considerations of efficient investment and consumer protection in determining the regulated returns that BT may earn from its network?

No response

8. Do you agree with Ofcom's proposed approach to current generation broadband?

See paras11 – 14 below

8 a) What should Ofcom's approach be to naked DSL?

We understand that "naked DSL" is a completely unbundled copper local loop, bought by suppliers such as Bulldog. In which case we hope that Ofcom will agree with us that naked DSL wholesale prices are still far too high in the UK, compared with OECD figures for other countries.

8 b) Should there be different regulated wholesale products for current generation broadband in different locations?

No. there should be geographically averaged prices, otherwise we will never reach universal access.

8 c) How should the potential lack of equivalence faced by LLU operators in a 21st Century network environment be addressed?

We note the difficulties addressed in Ofcom's recent NGN Interconnect document. We are not in a position to respond.

9. Do you agree with Ofcom's proposed approach to deregulation of voice services?

CMA agrees.

9 a) Do you agree that Ofcom should review regulation of retail voice markets in 2005?

CMA thinks this is too soon. Even though we recognise the need for stability we believe that the market is unlikely to have changed much while BT's attention is on rolling out the NGN. And there's too much going on in 2005 – we are suffering from consultation overload. 2006 might be a better target.

9 b) Do you agree with Ofcom's proposals for deregulating call conveyance markets and wholesale IDD?

No response

9 c) When would it be appropriate to remove the requirement on BT to provide indirect access?

CPS is likely to be an essential element of competition until well into the NGN era.

9 d) How should PSTN-specific regulation evolve under NGNs? What should next generation CPS and WLR products look like?

No response

9 e) What are the prospects for increased competition for voice services provided using broadband access products (such as LLU and the evolution of DataStream)? What conditions and transitional arrangements would need to be in place to allow service providers to secure access on the basis of commercial terms rather than PSTN-specific regulated products?

We see this as a critical issue. There is little doubt that BT will seek to leverage its PSTN dominance into the VoIP era.

9 f) How should Ofcom ensure competition in areas where alternative platforms were not in place?

No response.

9 g) When do you expect fixed-mobile substitution to result in a single economic market for voice call origination?

The Holy Grail here for the business consumer is "seamless mobility" – ie: being unaware of the means of delivery for both voice and data. See our response to Q1a above.

10. Do you agree with Ofcom's proposals for deregulation of business voice services?

See para 2 above

10 a) Has the voice market for large business become more competitive since Ofcom issued its large business pricing statement, necessitating the conduct of a new market review?

Subjectively, it has not. (Ofcom no doubt has access to the statistics that will give an objective view).

10 b) What wholesale inputs should be provided on an equivalent basis before BT should be granted greater freedom in relation to the pricing of voice services to large businesses?

We prefer to leave this to the Altnets to answer.

11. How should regulation of narrowband internet evolve as networks migrate to NGNs, and how will functional, low bandwidth internet access be provided in future?

If Ofcom does its job, the market for narrowband internet will be an anachronism by 2007. The regulator should be straining every nerve to ensure that "low bandwidth internet access" becomes a thing of the past within the next 24 months.

12. How can the arrangements for access and interconnection to next generation networks best address our proposed regulatory principles?

Empower and reinvigorate the NICC. Focus on achieving universal broadband access before the NGN begins to offer "bandwidth on demand".

13. What should Ofcom's regulatory approach be to next generation access networks?

This is worthy of a separate consultation, following up the recent exercise on NGN Interconnection and Access. In fact, we believe that the Strategic Review itself could have been better positioned had it addressed the advent of the NGN as a core theme. Major changes in PSTN regulation are unlikely to take effect until the NGN is with us, and further changes then are likely to inject uncertainty and instability. However, even in the NGN era, BT's ownership of the physical rights of way, (unless wireless access is given a major regulatory boost) will still demand regulation.

13 a) In what circumstances should Ofcom forbear from regulating next generation access?

Only when the business process and financial bottlenecks are removed.

13 b) How important is it that the investment be made contestable; is this achievable?

No response

13 c) How should Ofcom regulate next generation access if market power were to emerge in this market?

This question is too hypothetical at this early stage. It seems to us, however, that Ofcom has substantial powers to regulate under Competition rules.

13 d) How might structural options help to eliminate the problems of monopoly access assets being owned by vertically integrated operators?

Apply the same behavioural criteria and policing methods as are about to be applied to the current vertically integrated wielder of SMP.

14. What set of wholesale access services should BT be required to provide in order to promote competition in the business market?

No response

15. What can be done to facilitate the migration of complex corporate services (e.g. VPNs) between suppliers?

Some large corporates have claimed that they have never achieved a seamless, multi supplier, voice VPN. Whilst technical problems are a rarity, there are serious qualitative issues such as different charging regimes (eg: between two suppliers, one being rental based and the other rental + usage based) and commercial considerations by the suppliers. Regulatory interfacing standards on such issues would presumably be needed if we wanted to prevent any dominant supplier from thwarting achievement of the objective.

16. Are any alternative structures for call termination appropriate? Could evolution to IP interconnection introduce market mechanisms that make intrusive regulation unnecessary?

No response

17. What approaches should Ofcom adopt to reducing search and switching costs in telecoms?

Be more proactive in advising consumers of the choices and in helping to simplify comparisons – not only in basic telephony prices but also in all IP-based services, such as ISP charges and services.

It is unlikely that Ofcom would contemplate prescribing a common basis for charging, length of minimum contract etc. “Best Buy” tables in the building society sector are abused. Some suppliers deliberately set out to keep their products high in these charts by continually changing their best offers, so that existing customers are penalised or forced to keep changing accounts to stay on top. It is difficult for a Comms Manager to judge best VFM over a time period, not at a particular point in time. It's not often a residential user is able to judge the quality/longevity of installation practice or service.

18. What should be the arrangements for funding the USO in future?

CMA would like to see the USO broadened and expects shared funding to be a necessary precursor - so this should not be delayed, even if it isn't strictly needed for the current narrowband USO. Given that the UK is starting from a disadvantaged position, this could be a vital element in retrieving the UK's lag in broadband installation/takeup compared with other countries. See para 12 below.

19. How could competition for the delivery of the USO be organised in future?

Firstly, by focusing on the potential of wireless and by removing every barrier to the entry of wireless operators. Secondly, by applying a reverse auction process.

If BT were to be split up, BT Retail could remain dominant in some areas and therefore might carry a USO. However, we would expect dominance to be reduced over time with the emergence of effective retail competition.

20. Should mobile technologies be used to help address the existing USO?

The existing USO is essentially a narrowband USO and is increasingly irrelevant to the needs of businesses and domestic consumers alike. However, GSM operators could be required to serve different areas of the UK under an allocation scheme that allows national roaming, accessing the network of one operator for plain vanilla voice while subscribing to the network of another. The existing walled garden services of the home operator would not be part of such a scheme.

But it is feared that any such "improvement" to the existing narrowband USO will be seen as only a device to extend its useful life and an excuse not to make progress towards an extension to always-on broadband.

Extension of the USO to broadband throws up some emerging and overwhelming reasons for lifting restraints on new and entrepreneurial entrants to the mobile wireless market. The ability of business users in Australia and South Africa (and soon we understand, in Eire) to access broadband data services while on the move is jealously regarded by business users in the UK. The market niche currently occupied by the 3G providers is apparently being protected in apparent disregard of the concept of technology-neutral regulation and acts to the discouragement of new entrants and new technologies. This cannot possibly be consistent with Commission policy (and perhaps conformant with European law).

Although we have tended, in this response, to focus on universal access, there is one area where universal service might be extended to serve the public good. In the aftermath of the Asian earthquake disaster, and with a growing understanding of the range of natural threats that the UK might have to face at any time, there is a case for extending the USO to incorporate a public warning system. Other countries are contemplating such a scheme. See http://www.regulateonline.org/content/view/256/32/ as a source of further information.

General Considerations

Recognition of the Business User

1. We have, on several occasions during and after the passage of the Communications Act, reminded that the business user market is a primary focus for suppliers and also has an important role to play in the regulatory process. It is clear from the content of the Strategic Review document that Ofcom has recognised that fact. So while there is still room for major consultations to be slanted more towards the concerns of the business user, CMA is pleased to see that the practices and needs of business users are addressed in TSR2 Annex M and elsewhere in the document. The appreciation of CMA members is reflected in the simple chart at Fig 1 (below).

2. Satisfaction of the concerns of the business user usually has knock-on benefits to the advantage of the citizen-consumer (or is at worst neutral). The reverse direction can also apply; for example, where there is widespread access to broadband there is added opportunity for home-working and there is an incentive to establish a local footprint for large enterprises.

3. However, there is also evidence that a more tailored approach towards regulation of the business market and that of residential market might be appropriate in some cases. For example, recent changes to CPS process now prevent BT from making a single phone call to their customer who has signed up to a CPS service, due to earlier alleged abuse of the privilege. This

is clearly beneficial to the residential sector, but can be detrimental to the business sector. CMA members have reported examples of hospitals losing their telephony service for several days, due to rogue employees asking CPS suppliers to take over the hospital's main outbound telephone number. It is not clear how this led to a formal order and order acceptance on the part of the CPS supplier, but it did, perhaps indicating that the supplier's processes were somewhat lacking. Whilst known examples haven't caused any deaths to date, they could have. Because of other aspects of the CPS ordering process, created to prevent market abuse, these also served to cause difficulties in resolving the problem once known about, including difficulties in reverting service back to BT within the allowed for 10 day "cooling off" period.

Influence of the NGN

4. *Interface with the Altnets*. It is obvious that the advent of the NGN, involving as it does so many uncertainties, has the potential for massive market disruption. The pace of technical change is now so great that the version of NGN we will see in 2008 will be very different from the version now being planned and to some degree, implemented. It is vital, therefore, that operators open their interface specifications to each other, otherwise equivalence will fail before it begins. To that end we urge Ofcom to pursue its proposal to include CTOs in NICC Board meetings. This would add teeth and credibility to the recently revived NICC and encourage all network operators and large business users to play an active part. (NGN consultation, para 1.33)

5. *Equivalence*. But technical change is only part of the unknown. All the guiding principles behind equivalence must be addressed, now, in the context of the NGN. Unless that happens we fear that innovation and investment in competing IP-based products and services will be restrained until such time as the mist clears.

6. *Timescale*. Given that the 21CN is being driven by cost reduction rather than new service provision, we are concerned that the proposed 3 year roll out period may be extended in geographically challenging areas, to the detriment of new service roll out by other suppliers depending on it for service provision and/or process equivalence. CMA members recall how long it took to upgrade BT exchanges so that they were capable of delivering ISDN lines.

7. *Leadership*. CMA would like to see the regulatory issues of the NGN moved up towards the top of Ofcom's agenda, with a senior member of staff heading a team dedicated to the NGN and able to demonstrate leadership to the industry.

Infrastructure Competition

8. We note Ofcom's conviction that infrastructure competition remains an essential part of the structure of the industry. While infrastructure competition in the core is evidently achievable, such competition in backhaul and in the local loop is likely to remain patchy for the foreseeable future. In other words, the access network will remain a bottleneck and it will continue to have attendant regulatory implications. (TSR2 condoc para 8.49). Extensive LLU would be very welcome to the business user, (see para 15) but LLU is not a universal solution for a universal access problem – it is a (geographically-limited) solution to deployment of an interim technology (DSL) and is unlikely to provide the long-term answer to the need for access to broadband to serve home workers and geographically remote business locations. The demand

for universal FTTH will become increasingly strident with the passage of time (see comment on Unlit Fibre, below).

9. The notion of network "depth" for competition and regulation (TSR 5.6 and surrounding paragraphs) is confusing (given the two dimensions mentioned) and could actually be misleading. It is not necessarily the case that competition can flourish continuously up to a certain point when moving from the core towards end users, and from content towards infrastructure. We would prefer formulations like "promote infrastructure competition in circumstances where it will be effective and sustainable", and "deliver equality of access elsewhere".

10. In this connection, it is important to note that with so much technical change, competition in particular network components or services may become more or less effective with the passage of time. It would be dangerous to assume a one-way process. Implications include:
    d. The need for a flexible boundary of the regulated network (this is recognised in the document and is a major advantage of the "equivalence" proposal over structural separation of BT)
    e. Continuous oversight of technical and market developments to ensure the boundary is in the right place, and that regulation where needed is of the right kind (in our view this is inadequately stressed in the document). Both competitor and user interests must be strongly represented in this oversight process. These interests must also be given due weight in decisions about the design of the regulated part of the network - as the "building blocks" here will largely determine what is available to everyone.

11. The long-term lack of “real” access to bandwidth will have a negative impact, not only on the economies of the unserved areas, but also on the UK’s international competitiveness. Either outcome can be seen as inimical to public policy objectives and it follows that Ofcom has every incentive to ratchet up its intervention in the broadband access market (beyond that of the creation of Offta). We are unable to share in the optimism of TSR2 para O.119 – “Ofcom’s recent action on LLU pricing is not too far behind similar action by ART, and on this basis some similar market growth may emerge in the next few months” – principally because the price per Mb differences between France and UK reflected in Figs 3a and 3b of Annex O do not justify any approach other than a determination “to do better”. Equally, we are unimpressed by the complacent tone of O.120 – “Unlike Japan and Korea, and to some extent also the US, there has been little large scale commercial roll-out of next generation broadband access networks in these European markets, nor any substantial regulatory or government pressure to do so. This state of affairs is in common with the UK. But we expect that, as in the UK, this will become a significant political focus in other European countries in the near future.” We are left wondering what approach Ofcom will take when that political focus sharpens (as it undoubtedly will) and why Ofcom feels unable or unwilling to take pre-emptive action now? We look forward to seeing answers to these questions in TSR3 (TSR2 para 8.55)

Related Consultations - Extension of the USO and the Spectrum Framework

12. Before leaving the area of infrastructure competition it seems appropriate to mention Ofcom’s current consultation on the USO (as one element of the TSR) and Ofom’s Spectrum Framework Review. CMA sees that:

f. Large business users have a strong interest in the availability of "quality" broadband to residential users, because these include both their customers and their employees, with all of whom they want a choice of ways to communicate. The "Review of the USO" is disappointingly dismissive of any prospect of extending the USO to broadband (para 3.7) and is thus largely irrelevant to the business user. CMA is anxious to see the forthcoming Commission consultation on the USO (hopefully before Easter) before responding.
g. The parallel exercise of the Spectrum Framework Review appears to have been carried out remotely from the TSR. We fear that the conclusions of the Spectrum Review might not support or even complement the conclusions of the TSR – for example, Annex Q to the TSR2 contains references to the business need for broadband data mobility. We subsequently note that the decisions announced on 13 Jan by Ofcom show no real commitment to the allocation of operating frequencies to wireless networks supporting mobile broadband data. Meanwhile, our business colleagues in Australia and elsewhere are already enjoying the fruits of commercial systems based on pre-standard 802.20 / ATIS T1P1.4 technology (HC-SDMA for PWDSL) technology. There is thus a growing perception that in this area at least Ofcom might not be as joined up as it should be.

13. As an aside, we are uncertain of Ofcom's attitude towards extension of the USO, especially in the context of a Universal Service Fund. For example, the current USO condoc (9.22) does tend to dismiss the idea of a US Fund. However, the TSR (10.7) suggests that it's inevitable.

<u>The need for Unlit Fibre in the Access Network</u>

14. CMA sees the issue of FTTH as a universal access matter. The lack of dark fibre in the access network, bypassing BT copper, looks like being a running sore for years to come. Until the problems of provision and competition are squarely faced and overcome the social and economic issues associated with unequal regional access to VoIP products (and other, richer services) can only get worse. Annex O to the Strategic Review analyses the situation in Japan, but concludes enigmatically "The early roll-out of fibre is interesting given the price and quality of DSL service in Japan. Japan is very densely populated making roll-out much more realistic than in many other countries – although this cannot be the sole factor. Tax and fiscal incentives may have played a small part but regulatory policy appears to be a more significant factor. (O.76). CMA is left wondering why the UK seems unable to commit to a similar (apparently successful) approach.

<u>Implementing Equivalence</u>

15. Some 50 CMA members attended a briefing by BT on its approach to identifying equivalence and were impressed by the sincerity and determination shown. About half the attendees subsequently submitted their views on the presentation and although the results are very crude, they are considered to be broadly indicative of views held within the business community and heard elsewhere:

Figure 1 – snapshot of opinions held following the BT Briefing of 11 Jan 05

	5	4	3	2	1
How relevant is the current consultation to the Business Consumer?	16	8	1		

Mark boxes 1-5, with 1-not at all relevant; 5-very relevant indeed.					
	yes			no	
Do you think that Ofcom has taken all the relevant Business Consumer concerns into account in its consultation document? Yes/No.	15			8	
What chance do you think BT has of convincing the Regulator (and, by inference, BT's competitors) that equivalence has been satisfactorily achieved? Mark boxes 1-5, with 1-no chance at all: referral to the Competition Commission will result; 5-every chance - a certainty.		4	11	9	1
Do you think that equivalence can be effectively policed by Ofcom in the era of the 21CN? Mark boxes 1-5, with 1-policing cannot possibly be effective; 5-Ofcom will make a success out of policing - there will be full and fair competition at the retail level.	1	4	13	7	

16. The views expressed show a wide appreciation of the importance of the Strategic Review to the business user (and hence to UK plc), and a strong belief that Ofcom has adequately addressed the business user's needs, but reflect a disappointing level of scepticism about BT's ability to make equivalence work. The challenge is obvious.

17. Apart from the issues surrounding equivalence referred to in TSR2 we are concerned on three levels: governance, process and leadership:
    h. BT Group directors have a fiduciary duty towards shareholders in a vertically integrated enterprise that would appear to militate against any action that threatens revenues and profits in any part of the structure, especially in BT Retail. It is not clear how that situation can be resolved short of a de facto structural separation of Boards and companies;
    i. Underpinning any solution based on equivalence is the matter of cost allocation. CMA has heard no reference to this at any Ofcom briefing, nor has it seen the cost issue addressed in any detail in any document. If equivalence is to work BT's cost allocations must be comprehensible, transparent, and susceptible to regulatory challenge.
    j. Any enterprise relies for its success on the loyalty and esprit de corps at all levels of its workforce. It is doubtful that employees at all levels in BT Wholesale can be effectively persuaded that BT Retail must be treated in exactly the same way as BT Retail's competitors without damaging that sense of teamwork and corporate loyalty. This is not a management issue; it will demand first-class leadership at shop-floor level and upwards.

18. These uncertainties extend beyond BT to Ofcom and to BT's competitors. The challenge of policing BT's efforts will be both demanding and exciting. The risk of recidivism is surely considerable, even given unremitting goodwill at Board level. And there do not seem to be many swift and effective

remedies available under the relevant pieces of legislation, notably the Communications Act and the Competition Act. CMA would like to see these uncertainties removed before Ofcom and BT enter into any regulatory settlement.

Withdrawal of Regulation

19. Ofcom's unequivocal commitment to the withdrawal of regulation once certain conditions have been met has caused some alarm among CMA members. It is important to emphasise that regulation for fair competition and regulation for consumer protection are qualitatively different, and that withdrawal of the first does not always imply withdrawal of the second - in fact the reverse may be true. Not enough 'ex ante' rules will delay the benefits of competition, foreclose markets and deter competitors, while too much regulation might falsely direct investment, constrain market activities of players and distort the market unnecessarily.

20. That leads to a strong recommendation that any withdrawal of regulation should be reversible. In particular, it must be made clear that any forbearance by Ofcom is to be conditional upon BT's continuing to apply equivalence in practice and that Ofcom will not hesitate to re-apply 'ex-ante' regulation and to apply appropriate sanctions if BT's behaviour in practice falls short of genuine equivalence.

21. CMA therefore asks that the 'triggers' and procedures for forbearance should be laid down explicitly and applied in a transparent and judicious way by Ofcom.

BT Retail Behaviour

22. Some CMA members have suggested that behavioural change is also necessary between BT Retail and its customers in relation to provision of "SMP services". This assumes that even after equivalence becomes effective BT Retail will still be the biggest, and probably the dominant, provider of services to all market segments at the retail level. They have proposed better transparency over charging structures, which are often confusing and subject to regular change. This makes it difficult for the customer to be sure he is getting the best available pricing package from BT Retail and to compare BT Retail's service with competing services. It is proposed that BT Retail be required to advise its business customers annually or biannually, on a specific not general basis, drawing attention to how much would be saved by moving to the latest pricing package, assuming the call profiles of the previous 1 or 2 years. Such proposals have some similarities with those used in the financial services sector eg: endowment policy pay outs, and with those used by some mobile providers.

Converged NGNs

23. Although this subject is not mentioned in the consultation document CMA members are concerned about the potential emergence of joint SMP when any major players from the traditional fixed and mobile markets form a strategic alliance. Such an alliance could adversely affect the achievement of sustainable competition in the NGN. On the other hand, such a strategic alliance raises the interesting possibility of a shared USO, incorporating elements of national roaming to extend broadband service over mobile throughout the country.

Footnote - CMA's Internal Consultation Process on Regulatory Issues

Any consultation document (condoc) received by or notified to CMA is analysed initially by the appropriate Forum Leader for its relevance to business users based in the UK. (The majority of CMA's members are based in this country, with a third of them having responsibility for their employers' international networks and systems).

If the document is considered to be relevant to CMA, it is passed, with initial comments, to members of both the appropriate Forum and the 20 or so members of CMA's "Regulatory College" – ie: those members who have experience in regulatory issues, either with their current employer, or previously with a supplier. The CMA Chairman and CEO are also members of the College. The detailed comments from the College are collated by the Forum Leader in the form of a draft response to the condoc. Note: if the condoc has significant international import, the views of the international user community are likely to be sought. This is done through the International Telecoms User Group (INTUG).

The draft response is sent to all 1500+ user members of the Association, with a request for comment. Comments received are used to modify the initial draft. The final version is cleared with members of the appropriate Forum and Regulatory College (and, if the subject of the consultation is sufficiently weighty, with the CMA Board).

The cleared response is sent by the CMA Secretariat to the originating authority. It might be signed off by the Leader of CMA's Regulatory Forum, and/or by the CMA Chief Executive and Chairman.