Strategic Review of Telecommunications

Phase 2

Submission by UK Broadband

Dated 3 February 2005

Introduction

UK Broadband Limited ("**UKBB**") welcomes the opportunity to respond to The Office of Communications' ("**Ofcom's**") Strategic Review of Telecoms Phase 2. This is undoubtedly an important consultation that will have a significant impact on the way forward for the UK telecommunications industry.

UKBB also welcomes the review on what aspects of the regulatory framework, if any, need to be revised in order to ensure that the telecommunications market continues to attract investment and provide sustainable benefits to users. The timing of this consultation is appropriate and the scope complements that of the Phase 1 consultation which took place in June 2004.

Key Positions

As a new entrant to the UK market, UKBB[1] is particularly keen to ensure that Ofcom's policies create a regulatory environment which is conducive to investment in telecommunications infrastructure, the development of new products and services and the establishment of a level playing field in the market for telecommunications services. These are all critical to the successful development of the UK telecommunications industry. These are also critical to the creation of a marketplace in which sustainable user benefits can be ensured.

Whilst UKBB agrees that Ofcom's objective should be to reduce the degree of regulation over time. Nonetheless UKBB considers it necessary for the regulator to step in as appropriate, particularly in markets where an entity has significant market power, in order to ensure that effective competition is allowed to develop.

As competition develops, regulation should decrease. This is particularly the case where regulation is imperfect (by definition) and costly.

The key positions that UKBB would like to highlight are as follows :

1. Infrastructure investment and network competition, instead of resale and services competition, is the most significant element of progressive liberalisation of the telecommunications market.

[1] UK Broadband Limited acquired Public Fixed Wireless Access licenses in the UK in 2003, enabling it to provide wireless broadband internet services to residential consumers and small businesses. Initially, the service will be available only in the Thames Valley region. Expansion of service into other areas is likely to commence later in 2004.

Infrastructure investment and network competition will strengthen the UK economy through long term capital commitments, the creation of real and sustainable competition, enhance job levels, and maximise consumer benefits.

2. Light-handed market driven regulatory approach can encourage operators to resolve interconnection and access issues through commercial negotiation. This approach is justified in the UK where the telecommunications market has been liberalised for more than 20 years during which licensees have had sufficient time to build out networks and compete on an infrastructure basis.

3. No mandatory unbundling should be required for this would only encourage inefficient resale market entry, discourage investment, limit market competition superficially at the service level and distort pricing/revenue signals. Government intervention on interconnection and unbundling issues can only be justified when an essential facility is involved. Interconnection beyond essential facilities cannot be justified and prevents sustainable competition from emerging.

4. As technology evolves, even the regulator, with the best of its intentions and wisdom, may not be able to fully foresee the impact of new technologies (such as next generation network and wireless access). Accordingly, regulation must be light-handed, limited, targeted and fully justified on an essential facility basis. It should also be symmetric to give room for different technology to blossom. Next generation network, with its forward looking cost base, allows a green field approach to be adopted in the regulatory regime. Attaching unbundling and other requirements on NGNs will discourage investment, encourage arbitrage and not maximise user benefits.

5. A technology neutral approach should be adopted to address future telecommunications policy issues such as USO and interconnection to pave way for fixed/mobile convergence or telecom/IT/media convergence.

6. In summary: Investment, sustainable competition, job creation, competition and choice, user benefits, and overall economic growth are maximised by facilities based competition with regulatory intervention only occurring when an essential facility is proven to have been unduely withheld from the market.

This paper sets out UKBB's responses to the list of questions posed by Ofcom in its consultation paper.

<u>Questions raised in the consultation paper and the corresponding comments submitted by UKBB</u>

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

   <u>Comments</u>: We generally agree with the seven guiding principles proposed by Ofcom. Certainly principles 3-7 are straight forward and correct. However, principles 1 and 2 appear to go beyond regulatory intervention based on competition law principles (eg. access to essential facilities). As such, principles 1 and 2 appear to justify the re-allocation of a licensee's investment based on neither sound economic nor legal reasoning. The re-allocation of wealth (and investments) in these circumstances should not be the role of Ofcom. Indeed, such an approach threatens NGN rollout by saying that those who invest bear higher risks as compared to those who choose to be resellers and arbitrageurs. UKBB cannot think of any approach which would in the long term harm UK users more.

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

   <u>Comments</u> : Recognising that the telecommunications sector is increasingly converging with the media and IT sector, and that the network has declined in importance in this wider value chain while competitors elsewhere will emerge as an additional source of competitive pressure, Ofcom should adopt a light-handed regulatory role unless there are proven enduring economic bottlenecks. Competition and the decline of any actual essential facilities means that Ofcom's role should contract substantially.

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

   <u>Comments</u> : On a case-by-case basis Ofcom will need to consider whether one or more geographic markets exist for the relevant product or products.

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

   <u>Comments</u> : Ofcom will need to analyse various factors, which have been previously identified by both UK and EU competition law entities. Critically, any analysis should be forward looking. This is particularly true in a dynamic and fast changing industry. At the very least any demand-side and supply-side substitutability set of analyses need to consider fixed mobile convergence, NGN, VoIP, broadband, etc.

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?*

Comments : see 1a , 1b and 1c replies.

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?*

Comments : Such a filing requirement would be burdensome and costly, and should not be imposed. UKBB would suggest that if a competition law issue arises, Ofcom may at that point request relevant data. The data should not be made public. If the information is made public, the reporting data on a disaggregated or geographic basis would encourage "cherry picking" by non infrastructure based licensees. This would reduce the incentive for operators to roll out their service with wide coverage or investing in large scale infrastructure.

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

Comments : In general, regulation should be scaled back as market competition becomes more effective. In addition, the level of regulation should be reduced in step with technological and market developments. Therefore, the lifting of the *ex ante* regulation and replacing it by *ex post* regulation is consistent with this principle. Ex ante regulation can be justified in the early days of competition, when essential facilities are widespread, when a carrier (eg. BT) has significant market power ("SMP") and when competition is most fragile.

If there are bottlenecks (i.e. essential facilities), Ofcom should not step back from regulation (of BT). Changes should occur when Ofcom is satisfied that there is adequate competition in the various sectors of the telecommunications market or more specifically the fixed line market .

Absent the presence of essential facilities and SMP, any regulatory intervention should carry a heavy burden of proof. When the telecommunications industry has developed and matured any regulatory tilt in favour of the new entrants will only hamstring the pace of market competition.

In the European Union ("EU"), the relevant EU framework Directive requires that the National Regulatory Authorities ("NRAs") not to impose ex-ante obligations where there is effective competition[2] :

" Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in paragraph 2 of this Article. In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that relevant market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations. "

UKBB would make a distinction between tariff regulation (ex ante Vs ex post) and market power. It is not at all impossible to move to ex post regulation while still having market power and while still being subject to strict conduct regulation.

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

Comments : Section 131 of the Enterprise Act includes powers for regulators to make referrals to the Competition Commission who would be able to impose structural remedies. The option of structural or operational separation of BT should be adopted only when market power is abused, such abuse is both substantial and repeated, and when other remedies may be inadequate. As far as UKBB is aware, mandatory structural separation has not successfully taken place in any of the telecommunications regimes (including the USA). In other industries where this type of approach has been adopted e.g. Railtrack in the railway industry, this kind of separation has also proven to be unsuccessful.

The rationale supporting structural or operational separation of BT is that, it will reduce the incumbency advantage enjoyed by BT and hence enable the other service operators to compete with it on a level playing field. This may be true. But this approach will be costly, likely ignores wireless substitutability and discourages facility based competition.

In addition, the process of separating BT into two legal entities is likely to be administratively cumbersome, involving a complicated division of assets and liabilities, re-assignment of staff and responsibilities, shareholders' consent, legal procedures etc. There is also the danger that separating out BT's network will result in BT becoming the sole infrastructure provider in the UK, since other service providers will be encouraged to purchase wholesale services from the new BT network entity, effectively killing off any facilities-based competition which is the best approach for sustainable market competition in the long term. The promotion of resale competition should not be the competition model.

[2] Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L108, 24.4.2002, page 33 Article 16.3

Indeed, what is needed to curb the dominant powers of BT in the market place is not so much a structural reorganisation of BT, but more promoting facilities based competition and rigorous monitoring of BT's behaviour in the markets in which it holds SMP. By facilities based competition and more careful application of appropriate regulations, Ofcom should be in a position to correct any market distortions resulting from BT's abuse of dominance and ensure that the correct conditions exist to enable the other service providers to compete effectively with BT.

Meanwhile, BT, as the incumbent, should be given a fair opportunity to make its representation on how to achieve the real equality of access.

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

<u>Comments</u> :

First and foremost, it is important for Ofcom to continue with policies which encourage facilities-based entry and facilitate the infrastructure roll-outs of these operators. Ofcom must ensure that there are no structural or non-structural barriers to new entrants' network construction. Ofcom should design policies which actively encourage infrastructure investment and network rollout. All of this will bring the maximum benefits to consumers and businesses at large.

A case in point is the operation of UKBB. UKBB's entrance into the market is timely and much needed. It recognises that telecommunications is a capital intensive industry and is fully committed to investing in the infrastructure by establishing its own network via innovative technology. As UKBB uses wireless technology to provide high speed broadband internet access to residential consumers and small businesses, it does not need to rely on BT's access network to reach homes and offices. UKBB's service utilises a competing platform to that of the existing internet service providers, and this should be actively encouraged by the regulator. Only with facilities-based competition will the UK broadband market be able to produce the greatest variety of services and generate the greatest benefits in service innovation.

UKBB provides users with an additional choice of service provider, albeit only in selected areas of the UK for the time being. With more and more facilities based competition being generated in the broadband market, this will exert a downward pressure on market prices for broadband internet access which, in turn, should drive up the rate for broadband take-up. As Ofcom admits in the Phase 1 consultation paper annex H, the low penetration rates for broadband in the UK might be due to the high prices and the limited availability of exchanges capable of providing a broadband service.

UKBB would submit that the wrong approach would be to artificially drive down BT's wholesale prices to promote broadband take up. While that may have a short term 'political appeal', it comes at a price: harming all infrastructure investors, discouraging the rollout of new technologies, increasing the reliance on 'old/dirty' copper networks and delaying the time when broadband means high speed and broad bandwidth availability.

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

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

<u>Comments</u> : A heavy-handed and mandatory approach should be avoided except where there exists a proven and enduring bottleneck. Equivalence of input (same product, same price and same processes) may be applied to all new wholesale products when the cost is proportionate in order to solve the problem of inequality of access. However wholesale products should be provided subject to the commercial arrangement between the incumbent and other operators.

A more significant issue, rather than the definitions of the forms of equivalence, is when should such measures be adopted by the regulator. UKBB is conscious of the adverse impact of unbundling on the industry and the economy at large. International best practice indicates that unbundling is ONLY the short term or provisional measure to accelerate introduction of competition at the local customer access network level. It is a "second best" solution (as compared to facilities based competition) and should be removed as soon as there is no competition law basis for its continuance.

In the United States, Section 251 of the Telecommunications Act of 1996 is clear that unbundling is required only when it is 'necessary' and where without it local competition would be 'impaired'. This is akin to the EU essential facilities doctrine. Further, the FCC in its 1999 Triennial Review developed 5 factors to be considered when determining unbundling :

1. The rapid introduction of competition in all markets ;
2. Promotion of Facilities-based competition, investment and innovation ;
3. Reduced regulation ;
4. Market certainty ; and
5. Administrative practicality

Clearly the significance of promoting facilities based competition is well recognised. Justice Breyer makes it abundantly clear that long term harm to consumer welfare from reduced investment and innovation may vastly exceed the short term benefits of unbundling [3]

This view is not only advocated in the legal field but in the economics circle. The eminent economist Alfred E Kahn has succinctly captured the necessity for facilities based competition in the following manner :

> *" And yet I can think of no basis And yet I can think of no basis for questioning the general assumption, particularly in [the telecommunications industry] with so dynamic a technology, that* ***the most creative kind of competition is one in which rivals construct their own facilities rather than lease them from incumbents****.* [4] [Emphasis added]
>
> *There are strong reasons in unregulated industries for not requiring competitors to share with their rivals inputs that do not satisfy the criteria of essentiality, thus strictly defined.* ***The essence of competition is the attempt to develop just such advantages; to require their sharing in instances in which that quest has been successful would therefore discourage competition itself"*** [5] [Emphasis added]

In a series of more recent FCC (and court) decisions it is clear that mandatory unbundling is not a preferred policy option and should only be used when a bottleneck clearly exists.

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

Comments : The approach using equivalence of inputs enables the BT's wholesale customers to use the same wholesale products at the same price and same processes as BT's own retail activities. This is a heavy-handed approach more suitable for markets at the infant stage of market liberalisation. All of these measures are artificial and unnecessary in a mature market. None of these measures are necessary if there is or could be sufficient infrastructure-based competition. In short, the threshold question should remain one of essential facilities. The EU case law on this would place a high burden of proof on those seeking to intervene in the market. See the case of Oscar Bronner GmbH vs Mediaprint Zeitungs [1998][6]

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[3] Innovation, investment and Unbundling , by Thomas M Jorde, J Gregory Sidak , and David J Teece - page 12 Yale Journal on Regulation Vol 17 : 1, 2000

[4] Page 7 of Chapter 2 : Telecommunications Deregulation: The Abominable TELRIC-BS of Whom the Gods Would Destroy, or How Not to Deregulate - by Alfred E. Kahn.

[5] Page 18 of Chapter 3 : To Share or Not to Share: "Schumpeter and Deregulation Revisited" from "Whom the Gods Would Destroy, or How Not to Deregulate" - by Alfred E. Kahn.

[6] Case C-7/97, [1998] ECR I-7791.

Regulation may reduce the incumbent's revenues and market share, but will not necessarily make the market more efficient. Artificial regulation only distorts the market and entices more regulation. The regulator may be inclined to micro manage the operation of the incumbent to facilitate market competition such as by way for imposing regulations, transaction requirements etc. However, a better alternative would be to promote infrastructure based competition which is both effective and sustainable.

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

Comments : Infrastructure based competition should be encouraged for this will incentify capital investment, create job opportunities, stimulate service innovation and maximise user benefits. Indeed, it is the only form of competition that provides sustainable economic growth. With increasing infrastructure development as in the rollout of cable network and FWA, the level of reliance on BT's wholesale products should be reduced and there should be less on-going intervention by Ofcom. Although applying equivalency to BT's wholesale products such as Local Loop Unbundling ("LLU") and Wholesale Line Rental will increase the transparency and facilitate monitoring of the offer of the wholesale products, it will increase the costs for the vertically-integrated firm. A balance should be struck so that BT's wholesale customers will not rely heavily on BT's products in a prolonged manner foregoing the long term social and economic benefits brought about by infrastructure competition. This can be done by limiting and tying regulation to situations of essential facilities.

Wholesale products such as LLU do not promote the same investment and innovation levels or incentives as facilities-based competition. The adoption of LLU may penalise existing operators who have taken the economic risk to build. This forces the existing operator to compete against new entrants who can "free ride" on "below cost" LLU. Mandatory unbundling discourages network investment.

LLU may indeed be a useful policy tool in the early years of competition to assist new entrants in reaching customers within a short time, but it is not the long term or the best solution. Given that fixed telecom competition in the UK started when BT was privatised in 1984, after more than 20 years of liberalization, a market driven approach is long overdue.

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

Comments : For products that BT does not use itself, neither equivalence of outcome nor equivalence of input can be applied to achieve the equality of access. We view that commercial negotiation should be encouraged before

Ofcom's mediation or introduction of other regulatory measures. Again, the issue of essential facilities must be initially addressed.

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

Comments : In the long run, effective infrastructure competition eliminates the need for the regulator /industry to micro manage the incumbent's operation. As Professors Areeda and Hovenkamp have made comments in respect of the U.S. Telecommunications Act that have a strong resonance in the context of this proceeding:

> *The principal purpose of the 1996 Telecommunications Act is to deregulate, and deregulation can be accomplished only by minimizing the occasions for regulatory supervision.* ***Competition requires that inputs economically capable of being supplied competitively – that is, by numerous independent sources – be supplied in that manner. Forced sharing of such inputs acts as a disincentive to producing them competitively*** *in the first place and exacerbates and prolongs agency supervision.*[7] [Emphasis added]

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?*

Comments : Importantly, no regulation should discourage infrastructure investment. On a forward looking basis, even for next generation access network which does not even exist on any scale today, we view that the regulation should not disincentives or delay investment. Policies that promote investment and facilities based competition will best protect and benefit consumers.

In the longer term, without the incentives to invest, users will be left with old technology, little innovation and declining comparative advantages. The country cannot afford to take such risks.

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

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

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[7] Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law; an analysis of antitrust principles and their application, 787'c, at 247 (Supp. 1999).

Comments : UKBB would not assume without more evidence and analysis that BT's naked DSL service is an essential facility which requires regulation. However, if it is assumed that some or all DSL lines are essential facilities, then UKBB recognises that cost recovery may be in general based on current costs, historical costs, scorched node, scorched network etc. To encourage facilities based competition, UKBB would support a 'higher of' two or more selected costing methodologies for providers who wish to provide voice over broadband using access lines from BT, BT should be allowed to recover its costs, including common costs previously covered by the PSTN revenues.

In addition, the naked DSL should be used by such providers to provide broadband services only.

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

Comments : Assuming the existence of essential facilities, the regulatory approach should be uniform. In principle regulation would become much too intrusive and complex if geographically based. If taken to its logical conclusions this would result in “cherry picking” by operators. We believe that there are already a number of alternative access infrastructures that could compete with DSL and cable. Where demand for broadband is high and there is equality of access to wholesale products, a competitive environment will be facilitated.

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

Comments : UKBB would suggest the starting point be a competition law analyses: are the ULLs an essential facility? If not, then the issue evaporates unless the degree of discrimination raises separate competition law concerns. If yes i.e. the ULLs are an essential facility, then some level of equality of access at “the last mile” to enable LLU operators to operate within a competitive environment would be appropriate. At the same time it should not be incumbent on BT to invest in its 21CN only to be required to share “the spoils” with other operators who have not undertaken the same financial risks and expense. Otherwise there would be no incentive to invest and innovate. Where BT has made such capital investments it will naturally seek a return on its investment – and one of the ways in which this may be sought is through sharing core network assets by commercial agreement or through determined rates that fully reflect investment levels, overheads and risks. This approach would not reflect a LRAIC costing result.

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

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

<u>Comments</u> : We do not oppose such a review on the retail voice markets in 2005.

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

<u>Comments</u> : We have no objection to deregulating wholesale IDD as the market is increasingly competitive.

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

<u>Comments</u> : Indirect access allows customers of one operator to access the services of another operator. With still around 20% of fixed call volumes generated by indirect access, this requirement on BT should not be removed unless the product is superceded by Carrier Pre Selection.

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

<u>Comments</u> : We believe that NGN will eliminate the market opportunity for CPS and other services which will become redundant. VoIP services will be independent of line/access medium. Having said that, to the extent that there is a need for regulation for CPS and WLR, such regulations should mimic those for current CPS and WLR.

Building a replica PSTN network was the hurdle for many new entrants at the start of market liberalisation. LLU was justified on an essential facility and/or speed to market rationale. However the situation is now materially different for both incumbents and newer entrants both new to employ new technologies and networks. The economic "build Vs buy" decision has evolved. For the incumbent, it must upgrade its POTS PSTN into NGN, involving substantial new, instead of sunk, investment. The same essentially applies to the new entrant: utilize a NGN. The cost base for both the incumbent and the new entrants is the same, both being forward looking. In this respect, even the incumbent now becomes a new entrant. A green field approach should be adopted in view of the level playing field absent any legacy advantage. In this NGN environment it is therefore difficult to justify LLU.

9e) *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?*

Comments : Prospects for competition are quite high. Multiple network technologies of differing service quality levels, coupled with copper, fibre, co-axial, wireless, VOIP, etc. delivery systems ensures competitive market. UKBB sees little need for compulsory LLU in this emerging environment.

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

Comments : Mobile services are substitutes for fixed line services generally - in terms of geographical coverage, quality and customer perception. The two markets will converge to a much greater degree when the price of voice calls on the fixed and mobile networks are more comparable, with low transaction /switching costs and more value added services linked in. In some markets, like Hong Kong, this has already occurred. In other markets it is very likely just a matter of time unless underlying origination and termination charges are not market driven.

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?*

Comments : This requires an analysis of relevant markets and market power. However, we generally support the view that regulation should be withdrawn rapidly as the narrowband internet product is substitutable by the broadband access products, and will become redundant due to market and technological developments. In the future, low bandwidth internet access will be provided by low speed DSL or wireless services.

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

Comments : As previously emphasised, UKBB does not assume that such services will represent essential facilities or bottlenecks justifying regulation. Certainly, all market participants can equally roll out NGN and any compulsory share use will deter new investment. Thus any regulation which increases risk and invites arbitrage cannot be imposed without clear and necessary evidence.

If there is an essential facility, then for access to BT's 21CN, we agree that general equality of access could be achieved by including equivalent (although not necessarily identical) systems and processes in the new generation network. In addition, there should be clear technical, preferably international, standards that can be tested and approved in a third party test house. No type-approval testing by BT should be required to ensure impartiality and objectivity.

For interconnection, the above approach would also reply.

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

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

<u>Comments</u> : Each operator should be encouraged to invest in its own infrastructure and any access arrangement should be subject to commercial negotiation. The investment in NGN is forward looking and all market players have equal and comparable of success in the NGN environment if they so choose to invest and develop in that market. The regulation of NGN access should therefore be light-handed and only where bottlenecks are proven to exist. Gratuitous regulation and regulatory creep must be rejected.

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

<u>Comments</u> : Before securing open access to the civil structure, principally BT's ducts and external plant, the regulator should consider carefully the adverse impact of regulating these assets in the context of whether such an approach is conducive to facilitating sustainable infrastructure investment and market competition.

It is well accepted by policy makers around the world that benefits to users and the overall economy will be maximised by increasing investment and promoting facilities-based competition amongst alternative networks. This spurs the introduction of new technologies, both wireline and wireless, to meet the growing and diverse demands of users for new solutions, applications and bandwidth. Increased investment is also linked to increased innovation, enhanced competition, economic growth and the general well-being of the industry. Accordingly, the regulator must not be tempted to regulate absent clear and convincing evidence of a market failure.

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

<u>Comments</u> : A greenfield approach to market regulation is appropriate. All operators have comparable opportunities to invest in NGN and there should be no presumption as to SMP justifying heavy-handed regulation.

If an operator obtains SMP, then Ofcom may re-act to that. But even in this case any regulatory action should be tied to anti-competitive conduct, and must recognise that market power in dynamic markets may be temporal and not warrant actual intervention.

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

<u>Comments</u> : Incentifying investment, new technologies and competition can better address this issue then resorting to structural relief which will be both difficult and contentious. New access technologies (eg. cellular, wireless fixed access, VoIP, etc.) all make the structural separation option unnecessary and indeed irrelevant.

Our view is that existing network can be regulated and shared under very precise and limited circumstances but new networks should not be regulated. Everyone has an opportunity to build. Whoever builds gets to own and negotiate commercial terms. Whoever opts not to build assumes the risks of the business model.

For example, if one builds in one area and the other builds in another area, then they can share access to each other in different areas. However, one cannot unilaterally piggyback as a matter of right. Otherwise, it will be unfair to those the operators who have invested the most, built out the most and built out the fastest in the rollout of the infrastructure.

In fact, introducing compulsory unbundling or divesting BT's ducts and fibres is extremely dangerous as it discourages investment at a time when investment incentives are needed most, is inconsistent with the government policy objectives, directly injures investing operators, distorts competition, harms the interests of consumers, and directly contradicts global best practices.

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

Comments : We do not see that there are other appropriate alternative structures for call termination. Because of the Calling Party Pays structure, terminating mobile operators effectively have a monopoly over call termination. Without appropriate regulation on interconnection, termination rates may be set very high. Our view is that regulation may still be required under evolution to IP interconnection.

Besides, we need to distinguish between "pure" call termination using IP interconnection and peering/IP transit (where there is no call origination and termination as such). With traditional call termination, customer pays and operators charge each other for the terminating service. Where call termination is provided using IP interconnection, operators should still be able to charge for call termination. There is no need to change the status quo, because in the first case they are similar and in the second case they are irrelevant.

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

Comments : For reducing search costs, we support the development of guidelines. We would suggest that independent third parties, instead of Ofcom, should be used to carry out research on comparable price information. This is because it would be very resource-intensive. UKBB does not support restricting the range of tariff packages and structures as this will severely stifle service innovation, hinder market competition and harm customers. Market forces will lead providers to promote their services in ways they consider commercially justifiable.

For reducing switching costs, we support the continuation of the current approach. Consumers from being charged excessively when switching supplier. Ofcom could educate consumers regarding choice. But this effort must be educational and neutrally implemented. However, suppliers should not be required to proactively inform their consumers of cheaper tariffs. Market forces can address this issue. Suppliers can decide what and when to tell their customers and the customers of their competitors . Absent misleading, deceptive or anti-competitive sales practices Ofcom should have no role in this area.

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

Comments : We agree that a direct or in-direct levy on consumers for funding the USO could create distortionary arbitrage at the margins of a communications service. Therefore, if funding the USO is necessary and required in future, we support direct government funding as this is the most simple and straight-forward arrangement.

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

Comments : Auction for an alternative universal service provider is a possibility, and BT would be freed from the Carrier of Last Resort (COLR) responsibility in those areas where there is an alternative universal service provider. At the end of the franchise period, these areas will be open to tender again unless the new universal service provider agrees to continue to be the COLR without the need for compensation. Should there be no competing bids for an area, the existing universal service provider would continue to provide service.

However, this is a complex area for which a separate consultation should be undertaken.

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

Comments : Yes. Mobile may be a cheaper technology to deliver services to some remote locations and unlike fixed technologies, there is no need to spend a large amount in the civil works for mobile. We therefore agree that the USO should be service-specific rather than technology-specific.

- The End -