

Easynet Global Services

Additional comments:

Easynet Global Services response to Ofcom's Further Consultation on the Business Connectivity Market Review

Easynet Global Services ("Easynet") welcomes the opportunity to respond to Ofcom's further consultation on the Business Connectivity Market Review ("BCMR"). Easynet is a network, hosting and cloud integration business which provides a full portfolio of managed hosting, network and value added integration services and security solutions to a customer base of over 500 international businesses.

Given the scale and complexity of the subject matter and the range of inputs for Ofcom which were generated by the original BCMR consultation in June 2012, it is understandable and indeed sensible that Ofcom should see the need to reconsider some aspects of the original proposals. We welcome the fact that Ofcom is prepared to give further consideration to its proposals. However, we are unable to determine on what basis Ofcom has selected the issues which have been included in the latest consultation and yet has chosen not to enquire further into some of the very serious concerns which were highlighted by industry in the responses submitted to the June consultation.

The proposed revisions seem to be as follows:

- The existing geographic market in the London area to be extended to cover 14 postcodes in the Slough area.
- Service level guarantees - correction of a drafting error in the June consultation, thereby applying limits to the compensation payable by BT.
- Accounting obligations - BT should be subject to cost accounting obligations in each of the product markets in which it has SMP, and secondly, that BT and Kcom should be subject to accounting separation obligations in each of the wholesale product markets in which Ofcom have proposed that they have SMP.
- Circuit routing rules - changes are proposed for the rules that would apply to Openreach's provision of Ethernet services at or below 1Gbit/second.
- MISBO - further stakeholder input is sought to inform the SMP assessment on the MISBO market.

We are aware from industry discussions that many Communications Providers (CPs) expressed concern about some of the proposals in the June consultation. Many of the issues raised by industry are at least as, if not more important than those which Ofcom has selected for re-consideration. For example the proposals to remove cost orientation obligations gave rise to a very significant degree of concern. The levels of concern raised by industry, and the importance of the issues identified make it all the harder to understand why Ofcom has chosen to re-examine four topics which are of lesser importance. We would urge Ofcom to look again at the concerns raised by industry and to consider formally re-consulting on them. At the very least we believe industry ought to be told the reasons why the issues identified by a wide range of CPs do not merit a re-consultation as opposed to those issues which have been selected for reconsideration.

Ofcom should be under no illusions as to the scope for harm to be done to CPs if they adhere to their proposals that there should be no cost orientation obligations imposed on BT. By deferring a decision until the outcome of a cost orientation consultation it means that no firm decision will be reached in time for the final Statement for the

BCMR/LLCC. BT has already been found to have charged excessive prices even where there are currently cost orientation obligations. We therefore see no reason to believe that removing those obligations will in any way deter BT from further cases of excessive pricing by BT, in fact the proposals substantially increase the risk in our view.

Turning to the issues identified by Ofcom in the current re-consultation we would respond as follows:-

Question 1: Do you have any comments on our proposal to include the Slough sectors in the WECLA?:

In the June consultation, Ofcom defined revised geographic markets by first identifying postcode sectors as the appropriate geographic unit, then aggregating the postcode sectors into geographic markets where, according to Ofcom's assessment, the competitive conditions within the area were sufficiently homogeneous and could be distinguished from neighbouring areas where the competitive conditions were appreciably different. To determine this, Ofcom applied a three stage test: i) an assessment of the impact of alternative infrastructure, ii) an analysis of wholesale services shared; and iii) a review of pricing policies.

Ofcom found that there was high network reach (HNR) in certain postcodes including in Slough, where there are four CPs with network flexibility points running through the area. This showed a high degree of connectivity between Slough and WECLA sectors, as well as strong economic links between the two. Despite reaching this conclusion Ofcom at the time did not extend the geographic market to Slough post codes as they were not strictly contiguous to the WECLA. Ofcom is now proposing to include 14 Slough postcode sectors in the WECLA definition by using a more general contiguity requirement, adopting a more 'sensible approach when defining geographic markets'.

Easynet questions why, if Ofcom were aware of this data beforehand, they did not come to this solution before? CPs who responded to the June consultation raised questions regarding how Ofcom concluded that it should extend the CELA. There were suggestions that the methodology was flawed. Ofcom has not responded to the questions raised but have opted to change the conclusion and to extend the WECLA still further. The latest proposals seem to represent a u-turn in policy terms and we believe this calls into question the soundness of the proposals which means that the proposals ought to be reviewed more closely to deal with the concerns raised by CPs. We are also concerned by the suggestion by Ofcom that their previous proposals were not sensible.

Although Ofcom's analysis suggests that there is one CP with end to end network, and two others with good coverage, it seems odd, given the geographic challenges of expanding the network through SL0 3, that Ofcom thinks that competition for both networks is similar. Having three CPs with network reach will not prevent dominance by one. The percentages shown in figure 2.3 and 2.4 presented by Ofcom illustrate the difficulties for CPs in developing extensive and connected networks between the WECLA and Slough.

Given that so many CP responses criticised the proposal to extend the CELA, we are unable to comprehend on what basis Ofcom can have been persuaded to take matters even further by including the additional post codes in Slough. Again we call on Ofcom to give further clarity to industry on their reasoning for these proposals. For example we believe that Ofcom should be more transparent with the approach they

took and the data that they used to legitimise their decision. CPs have not seen the disaggregated data from which they determined that CELA should be extended. CPs remain sceptical as to the conclusions which Ofcom have reached and have concerns as to how Ofcom can have reached these conclusions. As far as we are aware the only response which support the new proposals was that submitted by BT. What methodology has Ofcom used to evaluate the apparently conflicting views of BT and its competitors and on what basis was it felt that the concerns raised by BT undermined Ofcom's June conclusions to such an extent that they have to be so radically amended?

Question 2: Do you have any comments about the proposed amendments to the Proposed SLG Direction?:

Ofcom cites the need to correct an error in the original consultation which omitted caps of 60 working days for compensation payments for late provision of orders and 200 hours for compensation for late repairs. Easynet has no objection to the correction of errors but would make the more general point that we would like to see Ofcom devote some effort to investigating the operation of SLGs and whether they have achieved the desired result in terms of improving performance by Openreach. We have recently seen (though admittedly in relation to LLU and WLR) that Openreach service performance has consistently failed to meet targets, and yet Openreach is able to mitigate the effect of SLGs by using strategies such as a unilateral declaration of "MBORC" or measures beyond our reasonable control. These declarations are regularly issued by Openreach for large parts of the country using a non-contractual, uncontrolled process, against which CPs have no right of appeal nor any ability to challenge the declarations. In addition BT recently proposed dramatically cutting the level of SLGs in relation to LLU provisioning and repair. We would strongly encourage Ofcom to look again at the SLG regime and consider whether it remains fit for purpose or could be improved upon.

Question 3: Do you have any comments about our proposal that BT should be subject to cost accounting obligations and not required to publish DLRIC & DSAC figures?:

Easynet has very real concerns about Ofcom's proposals in this area. We have no concerns about the imposition of cost accounting obligations per se, but rather we are very concerned about the removal of cost orientation obligations. The accounting obligations will show BT's costs to CPs, but without cost orientation, CPs will have little recourse when they encounter excessive over pricing by BT. BT has been found in the recent past to have engaged in excessive pricing in a number of markets. We therefore believe there is a need to maintain an effective deterrent against this sort of behaviour. We are therefore frankly astonished by the proposal to relax rather than strengthen the controls. With respect we do not believe that the proposals will provide sufficient deterrent. In the past BT was not deterred by charge controls backed up with cost orientation obligations, failed to deter excessive pricing so we have no confidence that a weaker system will provide any improvement. Furthermore the proposal to remove obligation to publish BT's DLRIC and DSAC figures for wholesale services in the Regulatory Financial Statements and instead to require that BT provide DSAC and DLRIC information privately to Ofcom

reinforces our concerns. In the past Ofcom has relied on CPs alerting them to excessive pricing by means of bringing disputes. If CPs no longer have sight of the sort of detailed accounting information which they require in order to detect excessive pricing, we question whether Ofcom really will have the ability to monitor BT to the same extent which CPs have been able to using current arrangements. The loss of transparency inherent in this approach seems to us to be completely unacceptable and ill advised. We would urge Ofcom to seriously re-consider this aspect of the proposals. Given that CPs have long complained about the lack of transparency and inadequacy of financial information available from BT, this is unlikely to be regarded by anyone other than BT as a positive step.

Question 4: Do you have any comments about the proposed TAN definition or the proposed circuit routing rules?:

These proposals do appear to simplify the regulation in this area to the benefit of CPs and Easynet therefore welcomes them.

Question 5: Do you have further evidence on competition in the MISBO market outside the WECLA, including the use and impact of dark fibre?:

Easynet is deeply uncomfortable with this proposal, especially since it appears to be a response to BT's submission following the June consultation in which BT stated that the supply of MISBO services is a national market and is competitive throughout the UK. BT also claimed that some important users of very high-bandwidth services choose to locate in areas where competing networks are already present and generally have the option to self-supply using dark fibre.

These comments were unsupported by other industry respondents and we are not aware that the accuracy of the suggestions has been verified by Ofcom (for example by means of Information Requests issued under s.135). Easynet finds the BT arguments to be deeply implausible. For example, it might be true that large business customers cluster in areas with multiple networks in order to meet their need for high speed data services but as far as we can determine this has not been tested by Ofcom. Even if this were true, on its own it means nothing in terms of market definition and market power. We are sceptical that there is effective competition to business premises right across the UK, and also for BCMR purposes a business customer operating across multiple sites is unlikely to be willing to use a patchwork of different alternative suppliers because this would make the service extremely difficult to manage. Business customers want to source a supply from one source and we are sceptical that there exists throughout the UK the degree of competition in this market which Ofcom seems to suggest.

The re-consultation begs a number of questions, for example we have suggested that the sort of competition described by BT is far from nationwide, so what are businesses supposed to do if they are nowhere near a site where competition exists? What if they are unable to move in the way BT has described? Indeed why should they? If there is truth in BT's suggestion that clusters exist then why define the market as being UK wide rather than dealing with it in the same way as the WECLA?

The entire approach adopted here by Ofcom seems deeply flawed and there is no explanation why clusters of MISBO competitiveness should require a completely

different remedy than that which Ofcom proposes to apply in the WECLA area.

Conclusion

Easynet is surprised by the issues on which Ofcom has chosen to re-consult, and even more surprised by the issues on which there is to be no re-consultation. The issues around cost orientation and of the provision of accounting information are the only safeguards which CPs have against excessive pricing by BT. And even those limited safeguards have on occasion been found wanting. Set against this background we question Ofcom's reasoning in seeking to remove them. We urge Ofcom to reconsider the use of cost orientation as a remedy in the BCMR markets.

We struggle to understand the basis on which Ofcom has reached its conclusions on the MISBO market and again would urge Ofcom to reconsider its proposals in this area.