

RESPONSE TO OFCOM'S REVIEW OF THE WHOLESALE BROADBAND ACCESS MARKETS

JUNE 2010

Cable&Wireless
Worldwide

Executive summary

Cable&Wireless Worldwide welcomes the opportunity to input in the WBA market review 2010.

Since the publication of the consultation document Orange has withdrawn from the LLU market. It is understood that Orange has “returned” its LLU estate to BT and will now purchase WBA services from BTW. This has knock effects for the WBA market review. Orange has been counted as a principal operator for the purposes of geographic market analysis within this review, clearly this is no longer the case. It is our presumption that this change in status (of the exchanges previously unbundled by Orange) will have an impact upon the boundaries of Market 3 that Ofcom will designate in the final statement. BT’s market share of Market 3 is also likely to increase. We calculate that this could be above 35% of the Market 3 area. Until it is clear how Ofcom intends to account for this market change our response to the consultation is predominately focused on the questions posed in the review. Once Ofcom makes clear its revised proposals / proposition to deal with the change we may wish to comment further.

On the surface it appears from the review analysis that retail competition is flourishing in Market 3 and consequently for the majority (circ 70%) of UK residential¹ premises. Orange’s recent commercial decision to leave the WLA market calls into question the stability of downstream WBA competition. Ofcom’s analysis had shown largely static geographic market boundaries since they were identified in the WBA market review 2008. The analysis of this review shows that only a further 90 exchanges have moved from the Market 2 area into the

¹ We discuss later why this may not be the case for certain business users

competitive Market 3 area. On the whole network deployment activity by LLUOs and indeed BT itself is being concentrated in the Market 3 geography. BT's 21CN upgrade of broadband services (from IPStream to Wholesale Broadband Connect) is limited at present to the Market 3 area. In general the extension of LLUOs' networks also remains within the Market 3 area. BT's planned NGA deployment is also focused within the Market 3 area.

The review evidence suggests that the level of competition currently experienced within Markets 1 and 2 will remain unchanged. Therefore Cable&Wireless Worldwide agrees that the time is now appropriate for Ofcom to take action to ensure that end users within these less competitive areas are getting a fair deal. Ofcom has provided evidence that BT's returns for wholesale broadband in aggregate have been well above BT's usual regulated rate of return for the last four financial years. Ofcom has not provided detail of how these returns relate to each of the WBA geographic markets, however given the greater levels of competition within Market 3 it is likely that returns in Market 1 and 2 contribute excessively to these high returns. At the same time BT has failed to invest in the Market 1² and 2 areas relying upon the use of older technology which attracts higher end user rates³. We look forward to Ofcom's forthcoming WBA charge control work in order to delve greater into the detail of what is occurring in these markets.

Introduction

Cable&Wireless Worldwide uses WBA products to supplement its LLU footprint to provide both wholesale services and retail business services. These products,

² 6 of the 3,578 exchanges in Market 1 will be upgraded to WBC as per the current BTW plan
³ IPS Max end user access of £6.72 per month compared with WBC end user access £5.88

the manner in which they are provided, and their prices are therefore important upstream services which we rely upon to provide nationally available wholesale and retail services.

Competition from LLUOs has driven BT to roll its 21CN broadband services to Market 3 areas to match the advanced capability of LLUOs. BT's 21CN capabilities are not currently available outside of Market 3. BT has decided to only upgrade its 21CN services with product developments leaving the 20CN IPStream services with the historic feature and service set. For example the upstream LLU Openreach product now has a 6 hour repair timescale. BT Wholesale has implemented this development on its 21CN WBA products, but 20CN WBA products continue to have repair times of 20 and 40 hours. At present customers outside of the Market 3 area miss out from the benefit from greater competition (in particular lower price) but also lose the benefit of better service functionality.

Cable&Wireless Worldwide has a keen interest in the service levels attached to broadband access services. We have been actively engaged with both BTW and Openreach over the last years in order to achieve both LLU and WBA services that have service levels that match that of Partial Private Circuits (PPC). Business grade service levels for broadband access services are of real benefit to business users who are then able to switch from the use of (high cost) PPCs to (lower cost) broadband access, in situations where their applications / VPNs networks do not require symmetrical service characteristics. Prior to the availability of broadband access services business users primary access product was PPCs. It now appears that in many situations PPCs over provided the service functionality that business users actually require. Cable&Wireless Worldwide has seen the migration of many

thousands of connections from PPCs to broadband access connections⁴ where the user has been able to live with the reduction in service level that accompanies 20CN broadband access products. As the service levels and bandwidth capability improve we expect more users that do not require full symmetry of service to use asymmetric broadband access as the primary means of permanent VPN access connection. Ofcom notes this in para 3.80. The introduction of WBA NGA services should ensure that service levels and service wrap meet the needs to business users from the outset. Clearly we will have to wait and see how prevalent NGA services are within the Market 1 and 2 areas.

Responses to questions

Question 3.1 Do you agree with Ofcom's proposed product market definitions?

Yes, as we understand it the market definitions remain the same as the last market review. The only difference is the inclusion of fibre based access as a result of NGA rollout.

Cable&Wireless Worldwide believes that it is important to acknowledge, perhaps more explicitly, that whilst the wholesale product feeds predominately into the retail broadband internet access market, the wholesale asymmetric broadband access product is also used to create other retail products. This replicates the situation in other markets for example for the leased lines market where it is acknowledged that PPCs are used to serve more than the retail leased lines market. This acknowledgement is essential for a number of reasons. Firstly for regulatory

⁴ As Ofcom notes in 3.81 the evidence Ofcom collected for the BCMR also suggests migration.

certainty. Companies using asymmetric broadband access services need the certainty that their use of the product for other services will not be undermined by later regulatory decisions / analysis. Secondly acknowledgement is important when considering the requirements for service wrap to accompany the wholesale product. In the context of the overall number of wholesale products used the proportion is very small, nevertheless asymmetric broadband access is a key input into providing non-internet VPN services.

At present it is not entirely clear that Ofcom has in mind the use of asymmetric broadband access services for non-internet VPN services when it discusses the needs of higher quality business broadband products for example at paragraphs 3.152 to 3.159.

Question 3.2 Do you agree with Ofcom's view of the relevant criteria for assessing the geographic market boundaries?

Yes, the criteria that Ofcom has used is consistent with that of the 2008 review. Ofcom identifies the Principal Operators: TalkTalk, Sky, Orange⁵, 02, Cable&Wireless Worldwide and Virgin Media (where they have 65% exchange coverage) as relevant competing network suppliers.

Ofcom has made some small changes to the analysis process which we agree with:

- Ofcom has removed from its analysis niche market suppliers and slightly tweaked the nominal criteria of the 2008 review to remove Updata

⁵ Now that Orange no longer operates a LLU network we would expect Orange to be removed for the analysis

Infrastructure (now having 10.6% coverage). Cable&Wireless Worldwide agrees that this is a logical modification.

- Ofcom has removed the exchange size criteria. Cable&Wireless Worldwide agrees that the relevance of exchange size has reduced.
- Ofcom has used the available LLU rollout plans which run up until June 2010. It is our understanding that Ofcom will be conducting a further LLU information request after the consultation has closed to finalise its data collection on LLU build and forecast build.

BT in the run up to the consultation has argued that it is economical for LLUOs to rollout to up to 2000 exchanges on the basis that this is economically viable using SMPF. Cable&Wireless Worldwide disagrees with the BT assertion and strongly agrees with Ofcom's analysis process. BT's assertion is based on the economics of SMPF. SMPF costings are not an appropriate basis. Whilst some LLUOs had initially used SMPF to launch their LLU services, bundled service offerings have led to a migration to MPF⁶. Ofcom's approach follows the ERG Common Position of identifying homogenous areas of competition. Ofcom's analysis has identified three relevant groups of homogeneity: exchanges where just BT is present (Market 1), exchanges where there are 2 or 3 principal operators (Market 2) and finally Ofcom concludes a separate group where there are four principal operators present. In areas where there are two and three principal operators only one principal operator other than BT has significant coverage with other operators having fairly fragmented coverage. Therefore in these areas much of the competitive constraint faced by BT is likely to arise from just one other principal operator. In areas where there are four principal operators there is a wider range of

⁶ As Ofcom notes in Para 7.20 of the WLA market review 2010

principal operators with more significant coverage and the potential to impose a constraint on BT. Ofcom therefore rightly concludes that the competitive conditions in those exchanges with three principal operators are not sufficiently similar to where there are a greater number of principal operators therefore exchanges with just 3 principal operators should not be included in Market 3.

Question 3.3 Do you agree with Ofcom's geographic market definitions?

Yes

Question 4.1 Do you agree with Ofcom's proposal that BT holds SMP in Market 1?

Yes, with 98.5% market share BT clearly holds SMP in Market 1.

Question 4.2 Do you agree with Ofcom's proposal that BT holds SMP in Market 2?

Yes, with 69% market share BT clearly holds SMP in Market 2.

Question 4.3 Do you agree with Ofcom's proposal that no operator has SMP in Market 3?

Cable&Wireless Worldwide expects Ofcom to reconsider its findings within Market 3 in light of the withdrawal of Orange from the WLA market. Ofcom's figures as presented need to be adjusted to remove Orange's LLU business and Orange as a principle operator. Based on publicly available numbers regarding the extent of

Orange's LLU rollout and making a number of assumptions Cable&Wireless Worldwide recalculates BT's market share, when removing Orange LLU exchange sites, for Market 3 to be in the region of 35%⁷. This is clearly an increase from the consultation figures of 28.5% but still below the market share that BT held at the point of the 2008 market review of 38%. Ofcom expects that for the period of this review that the general pattern of market shares will remain. BT is therefore expected to hold the 35% market share. Decline of this amount is not expected.

Question 4.4 Do you agree with Ofcom's proposal that KCOM hold SMP in the Hull area?

Yes

Question 5.1 Do you agree with the general access and non-discrimination remedies Ofcom proposes to impose on BT in relation to the market for wholesale broadband access in Market 1?

Yes.

Question 5.2 Do you agree with Ofcom's proposal to impose basis of charges obligations and a charge control on BT in relation to the market for wholesale broadband access in Market 1?

Yes. Ofcom needs to provide clarity to BT/industry as to the position on cost orientation when the obligation comes into place in Autumn 2010 given that

⁷ our rough figures do not account for any reduction in the boundary of Market 3, which may further increase BT's market share

Ofcom's charge control is not intended to come into effect until April 2011. BT's pricing history has demonstrated that BT's own calculation of a cost orientated charge will differ to one calculated by Ofcom.

Question 5.3 Do you agree with the general access and non-discrimination remedies Ofcom proposes to impose on BT in relation to the market for wholesale broadband access in Market 2?

Yes. As BT extends its 21CN rollout into Market 2 areas the rules around non-discrimination must apply to the manner in which OCPs are consulted and involved in choosing the exchanges that are upgraded.

Question 5.4 Do you agree with Ofcom's proposal to impose a basis of charges obligation on BT in relation to the market for wholesale broadband access in Market 2?

Yes

Question 5.5 Do you agree that Ofcom should allow a period of notice in the exchanges that move from Market 2 to Market 3 in which the above conditions should apply? Do you think that 12 months is an appropriate period of notice?

Yes, experience from the last market review has demonstrated to Cable&Wireless Worldwide the significant time period required to accommodate such changes. 12 months is a relevant and appropriate notice period.

Question 5.6 Do you agree with the general access and non-discrimination remedies Ofcom proposes to impose on KCOM in relation to the market for wholesale broadband access in the Hull area?

Ofcom identifies that third party organisations state that it is the high fixed costs a third party would incur establishing the networks and systems to take interconnection to KCOM in order to purchase SMP services together with the low returns likely in Hull due the relatively small market size that appear to act as the deterrent to market entry 5.336. Cable&Wireless Worldwide agrees.

Question 5.7 Do you agree with Ofcom's approach to price remedies in the Hull area?

Yes.

Question 5.8 Are there other remedies that, if imposed by Ofcom, would promote entry into the market in the Hull area by other providers?

KCOM has no incentive to attract alternative service providers into Hull. Whereas other localised broadband / NGA developments need to attract service providers in order to provide service over new broadband / NGA networks, KCOM has its own vertically integrated ISP. Ofcom could consider whether developments in network aggregation being proposed for new NGA deployments (beyond BT) could extend to include KCOM CGA.