

BCMR FURTHER CONSULTATION

DECEMBER 2012

SUMMARY

CWW welcomes Ofcom's calls for further views and evidence. It is important that Ofcom's decision making is transparent and understood.

CWW disagrees with the proposals to extend WECLA to include the Slough postcodes as advocated by BT. We consider that competitive conditions are not homogenous across the extended area and this decision could have a negative impact on existing competition within the area.

CWW continues to believe that BT has SMP in MISBO services. We have provided further comment with respect to our concerns.

OTHER ISSUES

DEPTH OF INTERCONNECTION

CWW considers that Ofcom should have included within this consultation further consideration of our points on "depth of interconnection". We consider that it will be necessary for Ofcom to engage wider stakeholder involvement on the topic. We therefore request that Ofcom follows up our proposals, commencing with a consultation (perhaps lead by the OTA). Ofcom should leave itself with the scope to make a decision on this matter post the BCMR statement. We consider a consultation upon a Direction would be appropriate.

SERVICE CRISIS

The Openreach Service crisis 2012 is under discussion within the WLA call for inputs. Ethernet services have also been hit by the provision and fault repair crisis. We expect the regulated charges for Ethernet to adequately recompense BT for the supply of the service as specified. We consider that Ofcom should investigate BT to fully understand any investment being made to improve Ethernet supply. We wish to see incentives on BT to provide a quality Ethernet service further cemented within the review. With that in mind we consider SLG payments being counted

with the LLCC inappropriate. We consider that Openreach should within the LLCC be encouraged to engage in long term investment.

OFCOM QUESTIONS

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

We do not believe the proposed Slough sectors should be included in the WECLA area. It does not seem possible that there are homogenous conditions of competition across the proposed Slough area let alone across the revised WECLA area (Slough and WECLA). Our analysis of the proposed inclusion of Slough sectors within the WECLA area highlights the serious weaknesses with the geographic market analysis which Ofcom employs within the BCMR.

We accept that Ofcom has an obligation to regulate only where it is appropriate to do so. It has been clear to CWW that some parts of London have a differing degree of alternative network infrastructure compared to the rest of the UK. We also accept that parts of Slough town centre and industrial estates also have significant alternative network infrastructure and that may give rise to different levels of competition. However the proposal does not just cover Slough town centre, it also covers Windsor, Maidenhead and the surrounding villages and there is not the same level of alternative infrastructure in these areas.

It is important that Ofcom also acknowledges the difficulties in terms of time and cost with respect to CPs accessing premises under the ownership of Slough Estates. Slough Estates are notorious for complicating CPs access to customer premises with unnecessarily high wayleaves demands.

In previous responses we have voiced concern with the approach that Ofcom takes within its market analysis whereby a 200m dig distance is presumed as the measure for which CPs will dig to new customer sites. We have demonstrated that in fact the distances we typically dig for a new customer connection are substantially shorter than the 200m distance Ofcom uses. Indeed Ofcom itself provides analysis of similar industry data within the main consultation which shows that for industry overall the distances that CPs are willing to dig for new customer connections are across industry on average much shorter than the 200m that Ofcom adopts.

We now have to call into question further aspects of the analysis criteria.

The purchase of BCMR services is complex. Customers' sites are dispersed around the UK. A successful provider of BCMR services must be able to access all geographies / all of a potential customer's sites or it will be unable to tender for that customer's business.

Compared to the analysis that is required for the finding of geographic markets in the case of broadband supply, geographic market analysis for the BCMR must factor in the requirement for nationwide coverage capabilities.

Ofcom rightly modifies the approach taken to geographic analysis for the WBA to make it relevant to the BCMR market. For example the broadband market looks at exchange areas as its boundary while the BCMR looks at postcode sectors.

The broadband market considers the presence of principal operators within an exchange footprint. We consider that the BCMR geographic analysis requires greater focus upon the role of principal operators.

Ofcom itself identifies network reach as a consideration. Under this category Ofcom considers that the presence of two or more operators (in addition to BT) within reach of the business was a good indicator that an area would be more competitive than areas with limited presence¹.

We do not consider "an" operators' presence sufficient. We consider that a "principal" operator needs to be present across the potential geographic markets on a consistent basis in order to represent a competitive constraint. To compete in BCMR markets significant network investment is required. No operator has network as significant as BT. A smaller number of operators have network coverage of sufficient scale to be able to provide wholesale provision as an alternative to BT. Other service providers rely upon their own network infrastructure together with the availability of wholesale services to fill in where their networks do not reach. We discuss below why this is of particular importance to the definition of principal operators as part of the geographic market analysis, and how the proposed inclusion of Slough within WECLA fails to meet our proposed analysis criteria.

¹ Para 5.99 BCMR consultation

Ofcom's earlier defined WECLA (not including Slough) suggested the existence within - that - WECLA two principal operators additional to BT. It is likely today that CPs requiring wholesale services already have relations with these principal operators for the provision of wholesale services within WECLA.

Ofcom now proposes to extend the WECLA area into a number of Slough postcodes. Ofcom's Figure 2.3 sets out OCP coverage of WECLA and Slough areas. Figure 2.3 illustrates that Operator 1 can "reach" 90% of businesses within the original WECLA, whereas across the Slough sectors Operator 1 reaches just 80% of businesses. It is of serious concern to us that Ofcom consider it reasonable that 20% of businesses are unreachable by the principal competitor in the area.

CWW is concerned with its own network coverage in the wider Slough area. We submit a confidential annex which illustrates this. . The nature of BCMR services make it a requirement for CWW (and other BCMR service suppliers), to have the ability serve the UK nationwide.

The second principal operator (Ofcom's Operator 2) has in the original WECLA market 80% potential area coverage. However the proposed extension of WECLA to incorporate Slough removes the second principal operator's capability to offer contiguous (self or wholesale) supply across the extended WECLA as they have minimal connectivity in Slough.

The competitive view is as follows:

- BT has 100% coverage of network across the extended WECLA.
- Principal operator one has 90% reach of the original WECLA and 80% reach of the Slough extension
- Principal operator two has 80% reach of the original WECLA and 1% reach of the Slough extension.

By extending WECLA the observation is that:

BT is the only provider with total coverage.

The lack of the other two principal operators reach within Slough makes it likely that a wholesale proposition from BT would be more attractive to other CPs (even if costing slightly more) than services from principal operator 1 and 2 due to the additional costs and service issues of managing multiple wholesale providers.

We consider the limitation of reach across the newly defined WECLA has a high likelihood to undermine credibility Operator 1 and 2 as a wholesale supplier across the entire WECLA area. Going forward these operators are likely to lose wholesale business in the original WECLA due to their lack of coverage in the wider Slough area. We have seen evidence of the impact of insufficient wholesale coverage in the WBA markets where wholesale providers with coverage lower than BTW are unable to compete effectively in the provision of wholesale services. The wholesale prospects of principal operator 2 are entirely undermined, with any CPs purchasing from it limited to purchases in the original WECLA and needing to onboard and accept the costs of an additional wholesale supplier for the Slough extension. If it is true that Slough represents an important part of service provision for BCMR service (which we understand to be the case), principal operator two will not provide current levels of competitive constraint to BT.

CWW (a large company) seeks to minimise the number of suppliers it uses for wholesale inputs due to the high costs and complexity of on-going management to have no more than a very small number of suppliers. It is also important (these are business critical mission important services we are supplying) that our inputs have consistent and compatible service parameters. We are not willing (and neither would our customers accept) to deploy inputs from a multitude of smaller network providers. Management of services in such a manner would not be tenable. We would be at significant overhead cost disadvantage to BT in the supply of these services and we consider we would be unlikely to manage or guarantee service as required by the customer contract / tender.

Looking at network presence within the incremental Slough postcodes it may be tempting to regard Operator 5 who has 97% coverage within the Slough postcodes as a principal operator. We consider that this not the correct approach. Operator 5 has a very poor original WECLA coverage but very high Slough postcode coverage. Operator 5 clearly will not have been considered a principal operator under the original WECLA definition. Despite the very high reach Operator 5 has

within the Slough postcodes we do not consider that it is a qualification of Principal Operator for the WECLA area.

We consider the inclusion of Slough postcodes is most likely to mute competition within WECLA rather rightly deregulate in response to evidence of greater competition. Competition in Slough is clearly disparate in comparison to the rest of WECLA. Operators with network in Slough differ to the operators in the rest of WECLA. Operators who have good network coverage in the rest of WECLA have far lower network coverage in Slough.

Within the rest of WECLA “non-infrastructure or low infrastructure” providers of BCMR services have three principal operators (including BT) they can approach to fill in their coverage of WECLA. In order to serve the Slough proportion of WECLA “non-infrastructure or low infrastructure” providers need to seek out a different set of wholesale suppliers.

We consider the difference in alternative supplier presence in Slough risks that BT will be able to re-exert its ubiquity across the old WECLA.

We consider the presence of principal operators (BT plus two more) across WECLA needs to ensure that the same principal operators are capable of meeting the demands for wholesale services across the entirety of WECLA. This test is clearly not met by the extension of WECLA to include Slough as presently proposed.

In conclusion we consider that Ofcom needs to place higher importance within its geographic market analysis for Business Connectivity to the requirement for nationwide network coverage for providers of these services. In the same manner in which Ofcom excludes niche LLUOs from its WBA market analysis we consider the same should be applied to localised network suppliers who in our view do not provide a credible wholesale network alternative. Such a constraint only comes from a Principal Operator.

We consider that Ofcom should reduce the dig distance it uses in its analysis.

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

No

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?

We continue to believe a properly functioning cost orientation obligation is the best way to promote efficient competition.

If Ofcom decides not to impose cost orientation for charge controlled services then we consider Ofcom must:

1. Change the 'fair and reasonable' obligation to explicitly include charges
2. Continue to require that BT maintains and publishes cost accounting information
3. Undertake to review individual charges every three years and either reset or otherwise address where required
4. Take further steps to constrain high bandwidth services, particularly when used as an input to other communications networks (e.g. for backhaul)

Therefore we believe Ofcom's revised proposal to retain BT's cost accounting obligations is a sensible one. However, we do not support the proposal not to require BT to publish DLRIC and DSAC information.

In our response to the main BCMR consultation we set out at length the importance of accurate and transparent regulatory financial information and the crucial role that stakeholders have in maintaining the quality of that information. If Ofcom plan to make any use of DLRIC and DSAC information then it is important that it is accurate and that stakeholders have confidence in it. Recent history shows us that this simply will not be the case if it is not regularly published.

We do not consider that there are any particular confidentiality concerns associated with this data that would outweigh the need to maintain the transparency and allow stakeholders to question its quality. BT enjoys SMP in this market and the DLRIC and DSAC data is no more confidential than the FAC data.

If Ofcom decides that the information is useful and it is proportionate for it to require BT to maintain it then we are firmly of the opinion that it should be published along with the FAC data every year. Alternatively, if the accuracy and transparency of the information is not important then Ofcom should not require BT to maintain it.

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

BCMR 1 left operators with uncertainty to how the TAN proposals would be adopted by BT. It is important that this uncertainty is closed off by BCMR 2. It is clear that Openreach has an obligation to provide AISBO services from TAN locations that are:

- end to end
- terminate at a BT LE
- terminate at a CP POP

These services are to be provided with the distance limitations of the product which now includes Extended Reach.

We consider that Ofcom should provide comparable clarity for MISBO services. MISBO services must also have the options:

- end to end
- terminate at a BT LE
- terminate at a CP POP

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

We definitely consider that BT has SMP in MISBO.

We consider that the level of network infrastructure is variable outside of WECLA but any analysis would conclude that BT has SMP within this market.

“Backhaul”

Our greatest concerns at present relate to the access of MISBO services from BT exchange buildings and mobile base stations. It is clear that a large number of these locations only have BT network present. It is clear that a further large number of these locations have only one alternative supplier with insufficient network to offer diverse routing. Even in the locations that have two alternative infrastructure operators present we consider competition is muted. We suggest that the limited amount of competition is reflected by the practise of price following between the suppliers that are present at the location. This is evident in the quotes we have recently received in response to a tender for wholesale services at such locations.

When considering the extent of alternative network supply for MISBO services, availability of diversity for services is an important factor. For an operator to represent a competitive constraint to BT it must have two fully separate routes into a location for the supply of MISBO services. This is because above 1G services are likely to be the life blood link into a customer data centre or the backhaul component of a CPs network carrying multiple services and being relied upon by countless end customers. The risk of one of these services going down without adequate fall back would bring to a stand-still high streets and corporations.

It may be the case that some retail customers will be able to choose to locate their premises in locations where network competition for MISBO services may be higher. This is not true for access to BT exchanges or mobile sites with these locations being fixed.

Were Ofcom to identify such locations where genuine network competition existed we would not object to deregulation of such specific locations. With respect to backhaul analysis of a competitive location would need to prove:

- a network provider was a principal operator (exclusion of niche providers who would not provide a competitive constraint – ie smaller providers to prevent overly complex procurement arrangements)

- the location would have multiple network providers (3 or more) each offering fully diverse access

We do not consider that any of the evidence that BT has provided Ofcom demonstrates the existence of any such locations.

“Local Access”

We accept that the distances we would dig to provide MISBO services will be in excess of our average dig distances for TISBO or AISBO services. However we caution Ofcom in regarding the economics that prevail today as fully appropriate as we believe today’s pricing signals incorrectly incentivise CPs to undertake certain digs to self- provide MISBO services. We consider that often today’s wholesale MISBO charges are substantially above an efficient price and were BT to charge on a more cost reflective basis CPs would find less self-supply of MISBO economic in the same way that AISBO self supply is largely uneconomic.

We consider that an analysis of network competition ought to consider the following with respect to a single customer site;

- is there existing fibre connectivity
- does the current access have diversity
- is there fibre connectivity nearby which could be extended to that site for MISBO provision
- do alternative suppliers faced wayleave prohibitions/complications to enter that site
- is the network provider a principal operator (exclusion of niche providers who would not provide a competitive constraint because it is too complex to buy from too many different suppliers)

We do not consider that any of the evidence that BT has provided Ofcom answers these key questions with respect to competitive supply.