BT's response to Ofcom's consultation document

"Business Connectivity Market Review Further consultation"

December 2012

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Contents

Executive Summary

Ofcom's proposals to extend the WECLA market to Slough

- We strongly support Ofcom's proposal to extend the WECLA market to certain postcode sectors in Slough: our response to the first Business Connectivity Market Review (BCMR) consultation published in June included evidence of extensive competing networks in this area. We also urge Ofcom to reconsider other aspects of its approach to, and conclusions on, geographic markets. Our answer to Question 1 in this response highlights additional areas to the west of London which we consider should also be included in the WECLA. Further, we show how most of the criteria on which Ofcom bases its new proposals for Slough also apply to business centres in other UK cities: in our view these centres should also be defined as relevant geographic markets appropriate for deregulation.

Evidence on competition in the MISBO market

- We do not understand the competition issues that Ofcom seeks to address through its proposal to regulate MISBO services outside WECLA. Ofcom's failure to set out these issues clearly is compounded by the fact that the analysis that gave rise to the proposal in the June consultation was, by Ofcom's own admission, based on incomplete information. This is not a proper basis for proposing such a significant extension of regulation.

- We therefore welcome the opportunity to respond to Ofcom's request for "further evidence on the competitive conditions in [the MISBO] market, including intensity of competition and the extent to which some businesses use dark fibre to self-provide MISBO services." Our answer to Question 5 sets out information on recent developments, all of which is publicly available and easy to find on the internet. This supplements the detailed evidence, including reports from Analysys Mason and Ovum, that we provided in our response to the June consultation.

- We believe the evidence demonstrates that the MISBO market is competitive across the whole of the UK. In these circumstances, there is a high risk that regulation would be harmful, chilling investment and innovation in this fast developing market to the detriment of consumers and businesses. If Ofcom, following its further evaluation of evidence, believes there is any doubt over its assessment of market power in MISBO, it should follow its key regulatory principle that it will have a bias against intervention and that a high hurdle must be overcome before regulation is imposed[1].

Ofcom's proposals to retain cost reporting obligations

- We welcome implementation of the deregulatory steps proposed to (i) remove the separate Basis of Charges remedy from BCMR markets given the other SMP remedies in place and (ii) remove the requirement for BT to publish DLRIC and DSAC information. However, as explained in our answer to Question 3, we are disappointed at Ofcom's new proposals to retain the detailed cost reporting obligations. We will still be obliged to produce and publish annually large amounts of revenue, cost and volume information at a granular service level. Given the proposed remedies, reporting at a detailed level greater than the market or even the basket level is disproportionate. We note that Ofcom is conducting a broader review of regulatory reporting overall. If Ofcom does

[1] "Better Policy Making – Ofcom's approach to Impact Assessment", Ofcom, July 2005

not address our concerns with these specific BCMR reporting proposals at this time, they should be considered within the context of that broader review.

Corrections and clarifications to the draft SLG Direction and the circuit routing rules

- The other proposals in this consultation are intended to make a number of corrections and clarifications to the original proposals published in June. As set out in our answer to Question 2, we agree with the proposal to correct the drafting error in the SLG Direction. We also agree with the correction to the TAN definition covered by Question 4, however we have a number of concerns over the detail of the circuit routing rules which are set out in our answer to that question.

Responses to Ofcom’s questions

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

Comments on the definition of WECLA

1. In our response to Ofcom’s first Business Connectivity Market Review (BCMR) consultation in June, we argued that to reflect the presence of extensive competing networks, Ofcom should extend the WECLA geographic market to include neighbouring areas such as Slough, and define as geographic markets and deregulate business centres in other major cities such as Manchester, Edinburgh and Leeds.

2. In relation to Slough specifically, we provided evidence of competitor presence in the area between Slough and WECLA consisting of the SL3 0 postcode sector. We argued that recognising this presence would allow Ofcom to ‘bridge the gap’ between the two areas, which could then be merged to form a larger WECLA.

3. We are pleased that Ofcom now proposes to extend WECLA to 14 postcode sectors in the Slough area. This brings regulation more into line with the reality of competition in business connectivity in the south-east of England. The proposals also involve a relaxation of the requirement for strict geographic contiguity: this is a positive move towards greater flexibility and pragmatism.

4. Nevertheless, we still disagree with a number of aspects of Ofcom’s proposals for geographic markets, not just in the Slough area but across the UK as a whole. These issues are highlighted in our answer to this question set out below.

5. Ofcom’s methodology finds that the SL3 0 postcode sector is a low network reach area, and this is why in the new proposals, there is still a gap between the core WECLA area and the newly designated parts of WECLA in Slough. We would like to re-iterate the comments we made on this postcode sector in our response to the June consultation to support our argument that this area should be considered competitive:

    a. Most of this area is covered by an industrial business park where Virgin Media’s duct network passes virtually all the premises;

    b. Virgin Media chose to serve the whole area from just two cabinets: however all that would be required to enable Virgin Media to serve new customers would be short ‘final drops’ from the existing duct;

    c. This shows that the combination of the 200 metre dig distance assumption and the reliance on data relating to the locations of flex points can lead to true competitive coverage being seriously under-estimated.

6. It may be that a similar characteristic of Ofcom’s methodology has also led to the surprising result that Heathrow Airport is found to be an area with low network reach in which BT has high market shares in the MISBO, AISBO and TISBO markets, and is therefore excluded from WECLA. This does not align with our understanding of network coverage there, which is that Level 3 and Virgin Media both have infrastructure running across the airport site – see, for example, http://maps.level3.com and www.digdat.co.uk. In addition we understand that the operator of the

airport, BAA, owns communications infrastructure at Heathrow: this may be used by additional CPs to provide services to customers there. Including Heathrow in WECLA would also allow competitive high network reach areas adjoining the airport site, but not contiguous with the currently defined WECLA, to be added.

7. A further apparent anomaly results in certain areas that are contiguous with WECLA being excluded from it, even though Ofcom finds that BT has market shares in them in the ranges 30% - 40% or even 0 - 30%. These are postcode sectors UB10 9, UB4 8, UB4 9, TW14 0, TW14 9, TW14 8, TW 15 3, TW 15 2 and SL9 8. Presumably this is because the methodology does not identify these sectors as areas of high network reach. However this result seems unlikely to be correct given our low shares: it may be that the lack of complete information on CPs' networks that Ofcom referred to in the June consultation (footnote 59 in Section 7) has caused this discrepancy.

8. We would like to raise an issue relating to the definition of the WECLA. In the draft legal instrument, WECLA is not actually defined: instead the text refers to "WECLA (as defined in OFCOM's notification published on [date of publication of final statement])". Clearly the definition in the notification will need to refer to a list of postcode sectors. The issue is that postcode sectors can change over time. In particular, where the number of premises in a postcode sector increases substantially due to commercial or residential development, a new postcode sector may be created to cover part of the area covered by an existing sector or sectors. The definition of WECLA in the final statement therefore needs to be future-proofed. We suggest this should be achieved by defining WECLA as the areas covered by the poscode sectors listed <u>as at the date of the Statement.</u>

9. A relevant example of a recently created postcode sector is 'N1C 4' in the area to the north of Kings Cross and St.Pancras stations in London. This was created during 2009 from parts of five pre-existing secors, four of which were included in CELA in 2008 and all of which now fall within WECLA. N1C 4 is not included in the list of WECLA postcodes sectors in the current consultation document. This appears to be an error which Ofcom will need to correct in the Statement: it also illustrates the need for the definition of WECLA to be future-proofed as discussed above.

Comments on the concept of contiguity and geographic markets outside London

10. In its new proposals, Ofcom is relaxing the requirement for strict physical contiguity, albeit that this is characterised as an isolated exception, made to reflect the particular characteristics of the SL3 0 postcode sector.

11. We still believe the requirement for physical contiguity in defining geographic markets is not justified. Our view on this is captured very well in the following paragraph from the DotEcon report which we provided to Ofcom alongside our response to the June consultation:

    "More generally, CPs are likely to see synergies in targeting business customers in business districts in major urban areas, not just London. Not offering services in the interstitial areas is unlikely to be a significant disadvantage if the target customers are large corporates who are not in these areas. Trunk networks connect these urban centres. There are likely to be economies of scope in marketing services to corporate customers present in these areas; these scope economies do not require geographical contiguity of the service offer, only that service is offered in a sufficient number of locations where target customers are located."

12. We would also note that most of the criteria that Ofcom quotes in support of the extension of WECLA to the non-contiguous Slough area also apply to business centres in other metropolitan areas that are not contiguous with WECLA:

   a. <u>Competing networks running through the interstitial areas</u>. The evidence that we submitted in Annex 1 of our response to the June consultation shows clearly that there are multiple networks linking the major UK business centres. For example C&W, Virgin Media, COLT, KCOM, Geo, Vtesse, SSE Telecoms (Neos Networks) and Next Connex all have infrastructure linking London, Birminham and Manchester.

   b. <u>Economic linkages between WECLA and other business centres</u>. Ofcom measures the economic linkages between Slough and the rest of WECLA in terms of the percentage of circuits with one end in each: 36% of retail Ethernet and optical circuits with at least one end in Slough are connected to WECLA, whereas 7% and 9% are connected to Manchester and Birmingham respectively. However, since Slough and the rest of WECLA are part of the same conurbation, it is not surprising that around a third of circuits with one end in Slough have another end in the rest of WECLA. Alternative measures based on the locations of industries that are major users of business connectivity could be a better indicator of economic linkages between different geographies, for example:

      i. London and Manchester are the two largest creative industry clusters in Europe (source: Northwest Regional Development Agency, quoted in MediaCityUk, October 2011);

      ii. Leeds is the UK's largest centre for business and financial services outside London, and the largest centre for legal services in the UK after London (sources: various, including leedsfinancialservices.org.uk, the Financial Times and Legal Week Magazine).

   In addition, we question whether it is legitimate to require ‘economic linkages’ between areas before they can be considered to form part of the same geographic market. As Ofcom states in the June consultation, at paragraph 5.22, the test is that the areas have ‘sufficiently homogeneous conditions of competition’. We note that Ofcom has not attempted to measure economic linkages between areas when defining WBA geographic markets.

   In any event, end-to-end retail Ethernet circuits are unlikely to be a reliable indicator of economic linkages between areas given the high bias towards shorter circuits, with longer circuits often being supplied using VPN-type solutions with short access tails.

   c. <u>Lack of intrinsic economic significance that the postcode boundary per se has for the provison of business connectivity</u>. This applies universally since postcode boundaries have no intrinsic economic significance in any circumstance.

   d. <u>High network reach observed in the Slough sectors</u>. High network reach is observed in many parts of the country. Figures 28, 74, 75 and 76 and Table 40 in the June consultation document show that there are high network reach areas in cities including Manchester, Birmingham, Bristol, Leeds, Glasgow, Edinburgh and Liverpool. In our view, all such areas should be considered to potentially form a single geographic market or a number of separate regional metro area markets.

e. Scale of leased line provision in the non-contiguous areas. Similarly, Slough is far from the only business centre outside the original WECLA proposed in June where there is large scale provision of leased line services. A comparison of the data in Table 40 in the June consultation and Figure 2.6 in the current document shows that Slough has fewer AISBO circuits than the identified high network reach areas within Leeds, Manchester, Liverpool, Bristol and Glasgow, and has comparable numbers to the high network reach areas in Birmingham.

Business centre	Number of AISBO circuits counted by Ofcom
Leeds	4,500
Manchester	3,900
Bristol	3,900
Liverpool	3,900
Glasgow	3,600
Birmingham	2,800
Slough	2,837

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

BT agrees with Ofcom's proposal to rectify formally the drafting error in the proposed SLG Direction in the June consultation document. This will ensure that the proposed Direction will provide for the same caps as set out in the original Direction published on 20 March 2008.

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

Overview of BT's position

1. We broadly agree with Ofcom that the aims of cost accounting obligations are as set out at paragraph 4.15 of this consultation. The ability to produce cost information in a consistent and transparent manner from allocation systems is clearly important. Cost accounting obligations can support Ofcom in carrying out its duties, which – in this context – include conducting market reviews, setting charge controls, monitoring compliance and carrying out investigations. However, to ensure a proportionate set of reporting obligations are imposed, Ofcom should separately consider:

   a. what level of information BT should be able to produce; and

   b. to whom and by when that information needs to be provided, including if, and when, it should be published to all stakeholders.

2. As a point of principle, in considering these issues and framing the set of specific accounting separation and cost accounting obligations to be placed upon BT in any market where SMP is found, Ofcom should take full account of the specific problems identified in conducting the relevant market review and, in turn, the specific set of regulatory remedies that have been imposed upon BT in that market.

3. In this regard, we are disappointed that Ofcom's proposals fail to significantly reduce the regulatory reporting burdens placed on BT. As such, BT will still be required to produce and, with the exception of DLRIC/DSAC information, publish on an annual basis a large amount of revenue, cost and volume information at the same high degree of component/service granularity within the defined BCMR markets. We have a number of concerns with Ofcom's rationale for maintaining these obligations at this level of detail and set these out below.

4. We welcome the proposed implementation of the deregulatory steps proposed to (i) remove the separate Basis of Charges remedy from BCMR markets given the other SMP remedies in place and (ii) remove the requirement for BT to publish DLRIC and DSAC information. We also note that Ofcom is conducting a broader review of regulatory reporting overall. This review provides an opportunity to consider more fundamentally the role that regulatory reporting requirements play in supporting Ofcom in carrying out its duties. We have already submitted our views in response to Ofcom's September consultation on this issue and called for Ofcom to ensure a more proportionate and relevant set of requirements around what is produced, provided and published. As such, should Ofcom not address our concerns with the cost reporting obligations retained within these specific BCMR proposals, we would expect that further deregulation of reporting requirements across markets would take place when that separate project concludes.

Ofcom's rationale for imposing specific cost accounting remedies

5. Our main concern with Ofcom's proposal is that while it has set out the high level aims of cost accounting obligations overall, there is extremely limited rationale put forward for maintaining the specific level of granularity of reporting in BCMR markets. Ofcom highlights at paragraph 4.16 the identified "risks of excessive pricing and discrimination and... [the] proposal to apply charge controls" as reasons to impose cost accounting obligations generally. Ofcom then states at

paragraph 4.23 that the specific level of information that BT is required to produce and publish (which is simply the same level currently provided) is “appropriate in markets where there is a risk of pricing distortions or non-discrimination” as transparency of that information “would enable CPs to:

a. assess the accuracy of product/service level data;

b. monitor the effectiveness of charge controls, in particular to monitor actual costs against those forecast in setting the controls; and

c. monitor compliance with other SMP obligations, including non-discrimination”.

6. Taking the identified aims of cost accounting and the specific justifications put forward for the level of detail to be published, we set out our views on what a more proportionate set of requirements would look like.

Information required to monitor compliance

7. We recognise the principle that reporting and publication obligations can have a role to play in ensuring compliance with other obligations, but to assess whether they are fulfilling that role appropriately and proportionately (i.e. the obligations are no more than is required in the circumstances) it is necessary to review what exactly is needed to ensure compliance with the relevant obligations.

8. In terms of monitoring compliance with **charge controls**, the only relevant issues for consideration are year on year movements in prices and volumes across the relevant charge control baskets. This enables weights to be applied to different prices and the overall level of achieved X to be revealed, providing the necessary transparency on compliance. For sub-baskets and constraints on individual prices, similar information is required. As no “Basis of Charges” remedies are proposed, there is evidently no need to publish DLRIC and DSAC information. Overall, therefore, it is clear that publication of cost information is not relevant to any assessment of compliance in this area as it does not help with identifying year on year movements in prices and volumes.

9. In terms of monitoring compliance with **non-discrimination** obligations[2], we believe that regulatory reporting can only really focus on price discrimination and, here, compliance is shown by simply confirming that internal and external customers face the same prices for the same regulated services. It is not clear to us that this requires publication of cost information at a particular level of granularity within defined markets.

10. We note the suggestion by some CPs (summarised at paragraph 4.10) that publication of cost accounting information “enables CPs to monitor discriminatory conduct by BT such as loading costs into services that CPs consume more than BT.” However, it is simply not spelled out what parameters are being applied in this regard and, therefore, what information is considered relevant in conducting such monitoring.

11. For instance, volume information can reveal which services are purchased in different proportions internally and externally (in aggregate), but it is far from clear why any evidence of different proportions of sales would cause any concern. BCMR markets include a broad portfolio of

[2] We include within this any EOI obligations – but this is as a matter of principle and without prejudice to BT’s submissions that EOI is not a necessary, appropriate or proportionate remedy in the AISBO and MISBO markets.

different services – different bandwidths, etc – which are available to all downstream players. It is unsurprising that some services may be purchased in higher proportions by some of those players compared to others, but that would not indicate discrimination issues in itself or suggest how BT could seek to "load costs" onto some of those services to distort pricing. As such, we are concerned at the suggestion that non-discrimination compliance generally requires transparency of cost information at the service level. At the very least, greater analysis of specific concerns is required to support requirements to publish specific cost information for specific services and the proposal to maintain the current level of reporting of FAC data at the granular level seems completely unjustified. The specific issue of what is required to monitor discrimination warrants further detailed consideration in the broader regulatory reporting review.

12. We do not consider there are any other SMP obligations in relation to which reporting and publication can be an aide to monitoring compliance.

Information required to support Ofcom in conducting investigations

13. We recognise that compliance investigations may potentially be triggered by specific concerns about behaviour. In those circumstances, Ofcom has specific information gathering powers which it can rely on to request the information it requires for that purpose. The reasonableness of such requests would need to be assessed on a case by case basis depending on the nature of the compliance issued raised. We also accept that the types of information required to deal with some investigations of non-compliance could be broadly similar to the information set out above. However, the fact that Ofcom may require such information if it has to conduct a compliance investigation is not of itself a valid reason for requiring the routine provision to Ofcom or the publication more broadly of a wider range of financial information such as that now proposed. Indeed, the fact that there are formal information gathering powers to be used in such circumstances suggests exactly the opposite.

14. To the extent that concerns have been raised about the need to ensure that any information is available on request and produced in a consistent way to, for instance, avoid "double counting" of costs, this need simply require that systems with the capability to produce information are maintained rather than specific information is published.

Information required to conduct market reviews, including setting charge controls

15. We understand that in conducting market reviews, Ofcom will want to assess – among other things – evidence on profitability within certain defined markets. Furthermore, in markets such as BCMR markets with a wide range of different services, Ofcom may want to understand how costs are recovered from sub-sets of services within the market. Such information will help Ofcom decide – along with other information on the market – what its role should be, if any, in constraining BT's prices either at the aggregate market level or for baskets (and sub-baskets) of services within the market. However, we do not consider that such granular data needs to be published on an annual basis to meet Ofcom's requirements. It is clear that, in fact, such data would only be required during the market review process conducted once every three years – and Ofcom has the powers it needs to request that information at that time. We consider that it would be wholly inappropriate for Ofcom to base an obligation to report and publish information during the course of one market review "because it needs that information to decide what obligations should be imposed in the next market review".

16. As Ofcom notes, where charge controls are set, it has more recently used DLRIC and DSAC information as a reference point for considering whether start charge adjustments for individual services may be necessary. We do not believe that DLRIC and DSAC data can be used in a deterministic way to assess whether individual prices may need to be increased or decreased. A broader range of factors should be considered particularly in relation to the balance of upfront and recurring charges for individual services. Nevertheless, to the extent that Ofcom considers them a useful reference point, we would again note that Ofcom can request such information when required for the purposes of setting controls. It is clear that such data does not need to be published. We are therefore in total agreement with Ofcom on this point. However, we would also question whether such information needs to be routinely provided to Ofcom or whether it can be requested when Ofcom considers specific price controls.

Information required to support monitoring of effectiveness of remedies

17. Our main concern here is that it is not clear what level of detail this requirement justifies especially given that remedies are reviewed every three years. For instance, even if it were appropriate to monitor the "effectiveness" of a charge control – as distinct from simply monitoring compliance with the control – during the charge control period, publishing costs and revenues at the level of the basket would seem sufficient to this end. Again, this issue needs further consideration as part of the broader reporting consultation.

Information required to provide general transparency and assurance to stakeholders about BT's cost information

18. We would question whether CPs are better able to "assess accuracy" of BT's cost information and the extent to which the need for transparency of detail can solely be justified by reference to the benefits of such transparency in providing general assurance to stakeholders around consistency and accuracy. However, even if there is benefit in providing some level of transparency through annual publication of data, it is by no means clear what level of information and granularity of service reporting is justified. We would argue that this cannot be a justification in itself to publish a high level of detail and publication should be justified by other requirements.

Reporting on retail leased lines

19. In paragraph 10b of the draft legal instrument, Ofcom sets out the regulatory financial reporting SMP conditions that it proposes to impose on BT in the retail market for low bandwidth traditional interface leased lines in the UK excluding the Hull area, at bandwidths up to and including 8Mbit/s. These conditions include OA29-31 relating to the provision and maintenance of a retail catalogue.

20. The inclusion of conditions OA29-31 contradicts Ofcom's explanatory statement and notification, "Changes to BT and KCOM's regulatory and financial reporting 2009/10 update", published on 4 June 2010, which stated that the SMP conditions for this market specifically excluded conditions OA29-31 and that BT should "no longer report any specific retail markets and no longer prepare and maintain a retail catalogue."

21. There is no reason to reintroduce the requirement to provide and maintain a retail catalogue, and we suspect the inclusion of these conditions was simply a drafting oversight. We urge Ofcom to correct the draft legal instrument by removing conditions OA29-31 from the list of those which it intends to impose in this market.

Summary

22. The above analysis supports a much lower level of publication of cost accounting information than proposed by Ofcom. Publication of data at the market or, at most, basket level can address the aims and requirements of cost accounting information set out by Ofcom. Further information to inform policy decisions in market reviews can be provided on request at the time such decisions are being made and systems can be maintained to provide assurance around the overall consistency of cost treatments across markets and, where appropriate, services.

23. However, we propose that many of our concerns with the BCMR proposals are taken forward as part of the general review of regulatory reporting and these proposals are essentially viewed as interim arrangements that can be assessed in light of the conclusion of that review. This will allow a full consideration of the points discussed above in relation to non-discrimination, the need to monitor the effectiveness of as well as compliance with SMP remedies and the need to provide assurance and general transparency to stakeholders.

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

Proposed TAN definition

1. We understand that this change is simply intended to correct an oversight in the definition set out in the June consultation and we therefore support it.

Proposed circuit routing rules

2. We welcome Ofcom's recognition that:
    a. the scope and extent of BT’s SMP obligations to provide certain services should be limited, in light of the need to maintain incentives to invest in networks and reflect the interests of operators who have already invested in extensive "core network" assets, and
    b. the practical definition of "TAN catchment areas" has not yet been finalised.

3. We also welcome Ofcom’s clear statement that circuits running from a node in one TAN to a node in a different TAN constitute trunk circuits and are therefore outside the AISBO market and the scope of the associated SMP obligations.

4. However, we consider that Ofcom has not addressed a material issue in its proposal. Specifically, we are concerned that the proposal does not provide a complete regulatory definition. By not identifying suitable limitations on the obligation to provide circuits across multiple areas of more densely populated areas (within the 25km/35km limits) Ofcom is effectively sending a signal to "infrastructure light" CPs that they can rely on regulated access circuits from Openreach to enable them to provide coverage across large areas from one or two Points of Presence (PoPs). This would by-pass and undermine investments by other CPs who have relied on Ofcom’s stated policy that presence in at least the 56 TANs should be required to enable full national coverage using regulated access from Openreach. At a minimum, we consider that Ofcom should clearly restate its objective that any CP intending to rely on regulated AISBO services would need presence at each of the TAN areas in order to give full national coverage.

5. One method that Ofcom had proposed in its previous BCMR consultation to preserve the objective of not undermining the existing competitive core assets was based on limiting the extent of the obligation with reference to "TAN catchment areas". As Ofcom has correctly identified, and as we stated in our response to the June consultation, the AI TAN catchment areas have not currently been defined. Indeed, as we pointed out previously, the definition of the specific boundaries would likely impact different CPs differently, and would therefore be difficult to set by industry consensus. However, we would encourage Ofcom to re-consider its approach, as the consequences of an Ofcom-imposed set of TAN catchment area definitions, with accompanying rules to make absolutely clear the extent of the regulatory obligation, may be less harmful to the continued encouragement of competitive core network infrastructure than the current proposals.

6. If Ofcom were to define an access serving node to TAN mapping, then this would ensure that circuits containing trunk functionality would be outside the AISBO market and the scope of the associated SMP obligations. At the very least, Ofcom could then clarify that “terminating segment” circuits (i.e. circuits from a TAN or a CP PoP to a business customer site) would only be

mandated if they did not cross a “TAN catchment area boundary”. A similar restriction might be applied to mandated end to end circuits (i.e. business customer to business customer).

7. A further potential solution for Ofcom to consider here is to recognise that there are additional trunk nodes where several other players have presence, and to extend the list of TAN areas. This may have additional benefits in terms of ensuring that full national coverage can be obtained by CPs present at the full TAN list.

8. Without prejudice to our position that regulation of MISBO services is inappropriate and unjustified, we observe that the principles raised in this consideration of AISBO definitions could also apply where Ofcom proposes to regulate MISBO markets. In the MISBO market place, it is perhaps even more evident that competitive network build is widespread – and therefore even more critical that Ofcom considers the potential impact on competitive investments already in place or in prospect.

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

1. We do not understand the competition issues that Ofcom seeks to address through its proposal to regulate MISBO services outside WECLA. Ofcom's failure to set out these issues clearly is compounded by the fact that the analysis that gave rise to the proposal in the June consultation was, by Ofcom's own admission, based on incomplete information. This is not a proper basis for proposing such a significant extension of regulation.

2. We therefore welcome the opportunity to respond to Ofcom's request for "further evidence on the competitive conditions in [the MISBO] market, including intensity of competition and the extent to which some businesses use dark fibre to self-provide MISBO services." Our answer to this question sets out information on recent developments, all of which is publicly available and easy to find on the internet. This supplements the detailed evidence, including reports from Analysys Mason and Ovum, that we provided in our response to the June consultation.

3. We believe the evidence demonstrates that the MISBO market is competitive across the whole of the UK. In these circumstances, there is a high risk that regulation would be harmful, chilling investment and innovation in this fast developing market to the detriment of consumers and businesses. If Ofcom, following its further evaluation of evidence, believes there is any doubt over its assessment of market power in MISBO, it should follow its key regulatory principle that it will have a bias against intervention and that a high hurdle must be overcome before regulation is imposed[3].

BT's experience in competing to provide optical backhaul services

4. Since we responded to the June consultation, we have gained more experience of the competitive nature of backhaul services supplied using optical transmission and the way in which CPs commission such services.

5. This is in essence a bidding market for future capacity where the purchaser is largely able to dictate the location and requirements from BT against alternatives. BT's CP customers have considerable technical and financial expertise in these negotiations, and we do not believe there would be any benefit to regulating these services: rather, regulation would impede commercial outcomes in an environment where all parties are more than capable of coming to satisfactory solutions by themselves. Verizon recognised this in their response to the BCMR call for Inputs, saying:

   "...with the increasing importance of WDM products, it is appropriate for them to be included in this review. However, Verizon holds the view that the current conditions for the provision of WDM products are working satisfactorily and that regulatory intervention is not necessary."

[3] "Better Policy Making – Ofcom's approach to Impact Assessment", Ofcom, July 2005

Evidence of new network operators or network reach of existing operators

6. The following networks were not covered in our response to the June consultation:

   Sea Fibre Networks

   In October 2012, Ofcom published a consultation on a proposal to apply Code Powers to Sea Fibre Networks. The summary to the consultation[4] stated that:

   "The Applicant intends to lease dark fibre in both major urban centres and in rural areas to other telecommunications operators and to large corporate customers in the United Kingdom. To this effect, it has installed two sections of terrestrial duct and fibre network to interconnect with other network connections in Wales and Staffordshire. The CeltixConnect cable is also capable of providing bandwidth services along the route."

   Gamma

   On 19 October 2012, ISPreview carried the story reproduced below[5]:

   "A vast network of cabling, stretching for 48 miles (77 km), will supply ultrafast connectivity with speeds reaching 1 GB/s and beyond to Greater Manchester. It circles the city centre and stretches out to Eccles in the West, towards Oldham in the North, Stretford in the South and Gorton in the East.

   Called The Loop, the fibre optic cables are buried under the region's roads and have lain largely dormant for over a decade. The cabling was installed by Atlantic Telecom who went into administration in 2002, at the time when Manchester hosted the Commonwealth Games. It was purchased from the administrators by Gamma, now one of the largest communications businesses in the UK, and the company is now making it available to support Manchester's ambitions to be one of the world's top 20 digital cities by 2020.

   Gamma has its UK operational and network management centre in Manchester's Trafford Park where it currently employs more than 85 people.

   Bob Falconer, Gamma's CEO said: "The Loop gives us significant network capacity and coverage in the Manchester area, in some cases, where no other fibre network capacity or capability exists. We can provide high capacity internet and voice services to specific locations at a competitive price as the cabling is already installed. We recognise that Manchester aspires to be the UK's tech city and needs the very best in connectivity to achieve this, and we want to help the city realise this ambition. Today it would cost tens of millions to install this level of cabling from scratch and cause massive disruption by digging up the roads. This is a fantastic asset which we want to share with businesses in the city."

[4] http://stakeholders.ofcom.org.uk/consultations/sea-fibre/summary

[5] http://www.ispreview.co.uk/index.php/2012/10/revived-fibre-optic-network-brings-10gbps-broadband-to-greater-manchester-uk.html

NetworkFlow

The following company profile appeared on the Bloomberg Businessweek website[6] in early December 2012:

"Internet Technology Products Limited, doing business as NetworkFlow, provides and manages Internet and multi-site managed connectivity services to businesses and organizations. It offers high-bandwidth connectivity solutions ranging from 2Mb leased lines to 10Gbps fiber Ethernet. The company also provides multi protocol label switching IPVN site-to-site and multi-site managed Ethernet services designed for companies that need single point-to-point connections or managed multi-site solutions; and Internet access products. In addition, it offers encrypted multi protocol label switching, which is designed to provide security wide area networks; and SIP (session Internet protocol) for maintaining multi-party and mixed media sessions over converged networks."

Evidence of CPs logically and physically linking together distinct geographic areas

7. We have emphasised that the only geographic distinction that CPs make is between areas where they are 'on-net' and 'off-net' rather than between recognisable geographic areas of the UK. On-net areas will encompass metropolitan areas and specific locations such as data centres that act as core nodes, and they can extend way beyond the WECLA. This is illustrated by the following press release published on 20 November 2012 by Infinera, a supplier of optical products to Colt[7]:

"Sunnyvale, CA. and London – Nov. 20, 2012 – Infinera (NASDAQ: INFN), a leading provider of Digital Optical Networks, today announced that Colt Technology Services has made available 100 Gigabit Ethernet (GbE) services to their customers, using the Infinera DTN platform over Colt's long distance network. Colt can now offer 100GbE services across its unique infrastructure combining 20 Colt carrier neutral data centers and a highly scalable long distance network that brings together Europe's major business areas with 39 metropolitan area networks and 18,000 directly connected buildings.

As Colt strategically expands its data centre and network infrastructure, investing where customers need its services, Infinera's DTN platform enables Colt to efficiently expand its network capabilities. With Infinera's DTN platform capability embedded in Colt's long distance network, the company can continue to respond to the increasing demand for high bandwidth scalable Ethernet services from wholesale carriers and enterprise customers in the finance and media sectors."

[6] http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=137098090

[7] http://www.infinera.com/j7/servlet/NewsItem?newsItemID=329

The FierceTelecom website[8] reported Colt's launch of 100G Ethernet services as follows:

"November 21, 2012

European service provider Colt (LSE: COLT.L) on Tuesday began offering a new 100 Gigabit Ethernet (GbE) service to its business customer base, leveraging Infinera's (Nasdaq: INFN) DTN platform on its long-distance network.

This service follows a trial that the provider completed in September of 100 GbE client interfaces on Infinera systems over an 861 km route from London to Frankfurt.

Colt has plenty of network options to deliver 100 GbE service. In addition to 20 carrier-neutral data centers, Colt's long distance network combines Europe's main business markets with 39 metro networks and 18,000 on-net buildings.

Colt said that by deploying the DTN platform it will gain a number of operational benefits, including reduced costs due to the platform's smaller size and lower

The service provider would also be able to better respond to the demand it's seeing for higher bandwidth Ethernet services like 100 GbE, particularly from wholesale carrier customers and enterprise customers in the finance and media vertical segments.

While providing more scalable Ethernet options to its demanding customer base is a top priority for the company, higher bandwidth Ethernet services like 100 GbE will also serve as a sound foundation to deliver an enhanced set of IT services, including cloud. Proof of that trend came in August when Colt purchased ThinkGrid, a cloud platform provider focused on the channel partner segment.

"As the company continues to transform from a traditional B2B telecoms operator to a provider of integrated IT and network services, enhancing our Ethernet services capabilities is key to delivering an end to end service experience that matches our customer's agenda," said Luke Broome, CTO at Colt, in a release announcing its agreement with Infinera.

In the global Ethernet market, Colt continues to be a dominant player, consistently ranking in the top five players on Vertical Systems Group's global provider Ethernet Leaderboard. Colt and others that have a dominant presence in Europe will likely face challenges due to the region's economic state."

Evidence of growth in data centres

8. The growth in data centres continues to be a driver for increasing competition in business connectivity markets, particularly in very high bandwidth services. Some of the evidence of new data centres and related activity is set out below.

[8] http://www.fiercetelecom.com/story/colt-gets-100-gbe-market/2012-11-21?utm_medium=nl&utm_source=internal

New Cable & Wireless data centre in Uxbridge[9]

"London, 20 November 2012: Cable&Wireless Worldwide (CWW) today announced the opening of a new highly efficient data centre facility. The data centre, in Uxbridge, Middlesex, has a Power Usage Efficiency (PUE) rating of 1.25, leading edge technology and a secure, resilient network infrastructure, ensuring it meets the efficiency and security concerns of enterprises in a cost-effective way.

Michelle Senecal de Fonseca, managing director, hosting at Cable&Wireless Worldwide, comments: "CIOs are now under constant pressure to respond to business demands for more agile IT. With limited skills and set against the need to reduce costs, many organisations are looking to outsource their data centre operations and make greater use of cloud services. I believe that the range of options available to our clients, through this new facility, from co-location to managed hosting, private cloud to secure storage, combined with the technical knowledge and experience of our team, will create a compelling proposition for the UK hosting market."

Cable&Wireless Worldwide has 15+ years' experience in managing the data of some of the world's largest organisations from its eight data centres across the UK and Ireland. All data centres are directly connected to the secure and resilient Multi-Service Platform network, forming a core component of the secure CWW Wide Area Network.

Features of the new Uxbridge data centre include:

- *Seven data halls across 30,000 square feet, including free air cooling, IL2 & IL3 status and additional data halls for further growth*
- *Fully audited security to ISO 27001*
- *PUE 1.25 (at 25%, 50%, 100% Load)*
- *Tier III Uptime Institute accredited design*
- *Good access to the M25*
- *Flexible Computing: Multi-tenant IaaS for the enterprise*
- *Diverse Internet Breakout"*

New aql data centre in Leeds[10]

aql say their fourth and biggest data centre will have 2440 server racks in 120,000 square feet over two six-storey buildings, and will be the UK's largest independent datacentre outside London.

aql are a founder member of the Leeds internet exchange, IXLeeds, which was set up in 2010. Te IXLeeds website at http://www.ixleeds.net/content/join.html shows that it has BT, Geo, Thus, Gamma, Virgin Media, SSE Telecoms and Level3 on-site and that it only takes Gigabit Ethernet connections.

[9] http://www.cw.com/news-and-views/press-releases/latest/cable-and-wireless-worldwide-open-state-of-the-art-data-centre-in-uxbridge/

[10] http://aql.com/news/235/

The impact of this new data centre on the local economy in Leeds is shown in the article below from the Press Association Newswire[11] on 2 November 2012:

“LEEDS, England, November 22, 2012 /PRNewswire/ -- The Leeds digital sector is forging ahead with a new GBP 43 million data centre from telecoms firm aql, to be built on the city's South Bank.

aql are working with Leeds and Partners to drive forward the region's digital strategy and the new centre - the UK's largest independent data centre outside London - could attract more major players in the industry to join existing names such as Cogent, SSE Telecom, Level (3), Janet and Fujitsu.

Already aql is working closely with these operators to connect the city - and current projects include a 100 Gigabit connection to e-health operator EMIS.

Plans to roll out high speed broadband are also underway in Leeds and the facility, known as DC4, will act as a hub of international networks. It will allow local companies to rent secure IT storage space that minimises the chance of disruption to their business and will be used to house computer systems and associated components such as telecommunications and storage systems for aql's public and private sector clients.

Dr Adam Beaumont, chief executive of aql, said that until the last couple of years, internet service providers have had to direct Leeds internet traffic via London.

But this has now changed - due to operators plugging into a hub in one of aql's three existing city sites DC1, 2 and 3; Leeds can now be independent of technical problems in the capital, creating a base that would keep traffic local, faster and more reliable.

"aql's city centre DC2 facility is the home of IXLeeds - the only mutual not-for-profit internet exchange outside of London whose aim is to improve connectivity between operators for the good of the region," he said.

"This exchange, formed 2 years ago, provides a hub which allows regional operators to exchange traffic via the most optimum routes - this not only allows faster access speeds, but also increases the quality of the connectivity, which is important for services such as video conferencing and webinars - an important part of e-learning.

"We're on track to fill our existing sites by mid-2013, so the new DC4 site will allow expansion room to support the data growth from the IT, media and mobile sectors - including the huge demands which 4G mobile will place on the regions infrastructure."

Lurene Joseph, Leeds and Partners chief executive, said: "The data centre anchors the region's digital sector, sending the strong message to national and international investors that they can have confidence in our infrastructure.

"Businesses in Leeds across a wide variety of sectors, from retail and fashion to medical technology and bio informatics, can utilise faster more reliable connections that are independent and protected of any problems in London."

The planning for the major development on part of the former Yorkshire Chemicals land in Hunslet was approved today by Leeds City Council.

[11] http://www.prnewswire.co.uk/news-releases/data-centre-boost-for-citys-growing-digital-sector-180517861.html

The facility is designed in collaboration with local architects, Garnett Netherwood, to sit within a larger scheme by Yorkshire Design Group where the datacentre will share not only connectivity, but also heat with surrounding businesses and residences.

The centre comprises two six storey buildings totalling 120,000 square feet of space, and further allows aql to support huge data rates which will catalyse the growth of digital businesses in Leeds and supports the city's long term vision to be a world leader in the sector.

It will be connected to aql's existing city sites (DC1, 2 and 3) by a private fibre loop.

The surrounding area is a mixture of uses including residential, offices and retail, at Brewery Wharf, Indigo Blu, New Dock, Leeds City Office Park and Crown Point Retail Park. "

<u>New data centres outside WECLA reported in the CBRE Viewpoint newsletter</u>

The Q3 2012 'Viewpoint – European Data Centres publication by CBRE[12] includes (on page 3) the following news on data centre developments outside the WECLA area defined by Ofcom (emphasis added):

*"Pulsant has completed the first phase of its £14 million investment programme to create a new 8,400 m² South London Data Centre Campus at its existing site in **Croydon**. Also in London, Virtus announced the expansion of its **Enfield** data centre to provide a further 2,100 m² of net technical space with 3MW of power.*

*Outside of the Capital, Vtesse Cirrus added a further 280 m² of colocation space at its **Hoddesdon** site, CentriLogic launched its European expansion program with the opening of the first 500m² at its new data centre in **Bracknell**, whilst in South Wales, Next Generation Data launched a dedicated colocation data hall at its **Newport** facility.*

*Further north, ScoLocate completed a 1MW upgrade of its **Edinburgh** facility, whilst the city also saw Onyx launch the latest build-out phase of its facility.*

*Evidence of development activity, especially construction activity of a speculative nature, remains limited. However, the third quarter of the year saw the announcement of a number of key projects in the UK. Probably the most notable was Infinity's confirmation as preferred bidder by the London Legacy Development Corporation for the legacy uses of the Press and Broadcast Centres on the **Olympic Park**. Through its subsidiary, iCITY, the company announced it has plans for a data centre of up to 32,500 m², with total power capacity of up to 90MW.*

*Outside of London, Lasercharm announced the launch of the first 3,750 m² of net technical space at its Camro data centre near **Cambridge**, whilst ANS revealed plans to build a 1,900 m² facility in the digital media hub based in **Newton Heath, east Manchester** with an option to take a further 1,900 m². In **Leeds**, The Yorkshire Design Group announced plans for a £16 million development to create a data centre on former Yorkshire Chemicals land in **Hunslet**. A detailed planning application is expected before the year end."*

12 http://portal.cbre.eu/portal/page/portal/RRP/ResearchReportPublicFiles/EMEA_FPR_EUROPEAN_DATACENTRES_Q3_2012.pdf