Andreas Iliopoulos
4th Floor Competition Group
Riverside House
2A Southwark Bridge Road
London
SE1 9HA

17 December 2012

Dear Andreas

Response to Business Connectivity Market Review Further Consultation

Virgin Media welcomes the opportunity to comment on this further consultation in the on going Business Connectivity Market Review.

We note that Ofcom still considering responses to the consultation and undertaking further analysis. Indeed, Question 5 in this further consultation indicates the nature of ongoing work in relation to original proposals made for the MISBO market. Virgin Media would encourage this review process, and considers that there remain significant areas under consultation that would benefit from further analysis. Specifically, Virgin Media notes, the consensus of opinion from industry (aside from BT as the regulated incumbent) in relation to the need for cost orientation to continue to be imposed in various markets.

We have endeavoured to provide comments that do not repeat our position in our substantive response to the consultation, and still maintain our position as set out in that document. In that light we have not made additional submissions in relation to Question 5, but maintain our position that BT does have a dominant position within the market (outside the WECLA), but that the limited price regulation proposed is not an appropriate remedy.

We set our responses to the individual questions below:

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

Ofcom have proposed to expand the geographic area of the WECLA to include an additional 14 post code sectors in the Slough area.

Ofcom's revised proposals do not arise from a modified application of the "network reach test" to determine the level of competitiveness within a postcode sector, thus it is explained that the "additional" sectors added to the WECLA retain the same level of assessed competition as set out in the original analysis that preceded the June consultation. The factor that has changed is Ofcom's application of its own rules governing the definition of geographic areas.

For an area to be defined as a distinct geographic area, Ofcom required there to be a sufficient number of contiguous post code sectors that met their high network reach (HNR) criteria.

This lead, broadly, to a discussion that whilst there were pockets of competition within the country (key metropolitan areas being examined in particular), the only area where a separate geographic market could be said to exist was central, east and west London, with the WECLA area being defined. It is of note that Ofcom maintained that clusters of HNR postcodes were not sufficient to create a discrete geographic area, if they were surrounded by areas without high network reach (paragraphs 5.116 to 5.121 and 5.303 to 5.315 of the June BCMR Consultation). Therefore, although Manchester, for example, had competitive "pockets", they were not sufficient, having regard to the wider area to create a new geographic market. This approach was consistent with the concept that competitive conditions will vary within a market, and account can be taken of this in imposing regulation in a market where SMP is found.

In the June Consultation, Ofcom therefore knew that the Slough area consisted of 14 contiguous HNR post code sectors, but applying its methodology it was not deemed to be a separate geographic market, and as it was distinct from the WECLA, it fell into the "rest of UK" market.

Ofcom have now been persuaded by BT's response that the Slough area should be included within the WECLA as it is only separated from the WECLA by a single post code sector (SL3 0), and that circumstances within this post code mean that the requirement in the original methodology can be overridden, so as to bridge the gap.

The circumstances appear to be that although the SL3 0 sector has high network presence running through the post code, for a variety of reasons (such as the presence of London Heathrow Airport and reservoirs) there are significantly fewer access points, which means it does not meet the HNR test.

Ofcom accept that the post code is not "competitive" in that it does not form part of the WECLA market, so the defined geographic market now has two disconnected areas.

Virgin Media raised concerns with Ofcom's methodology to define sub-national geographic markets in our response to the June Consultation. We noted that these concerns were widely held within industry, and although there was a consistency in approach between the current review and the previous review (which created the CELA area), there remained an unease with the approach, and in particular the potential for "new postcode sectors" to ride on the back of the established (and already regulated) CELA area.

We consider that the revised proposal by Ofcom is, in effect, creating an additional principle to that methodology, such that it could be easier to define sub-national geographic markets, when given the nature of the assumptions applied in the methodology, it may not be appropriate to do so. In short, we do not consider that the methodology should be revised to allow for non-contiguous postcodes to be within the same geographic market, by virtue of the application of this new "bridging" rule.

Even if Ofcom were to proceed to define a WECLA inclusive of the Slough post codes, we consider that at a very minimum it should be made clear that the reliance upon SL3 0 is the exception that proves the rule, and that the requirement for contiguity should otherwise hold. At present, there is no sense of a limit that could be applied to this principle; could 2 non-competitive post codes be allowed to "join"

HNR areas ?; could 3 clusters of HNR areas, that would be insufficient to form a sub-national geographic market, be aggregated to form a market ? There is a real concern that the use of this bridging rule could dilute the adopted methodology and give rise to submissions for additional sub-national geographic markets.

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

Virgin Media agrees with Ofcom that caps have to be considered in light of the potential to reduce their incentive to perform to an acceptable level, and consider that generally, this should mean that the introduction of liability limiting caps should be approached with caution.

However, given that the proposed amendment is designed to reflect the current practice by Openreach of capping their liability in relation to the provision of Ethernet Services (see Contract for Connectivity Services Schedule 4 – Service Level Agreement - paragraph 4.1 and 4.2), we do not have any specific comments to make, save that our position should not be taken as an acceptance of the appropriateness of liability caps in general or in any other context.

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?

Virgin Media welcomes Ofcom's proposal to ensure that cost accounting obligations should continue to be maintained for relevant services, however, we consider that this fails to address the fundamental concerns regarding the appropriate level of price regulation and transparency we identified in our June Consultation response.

In particular, the further consultation repeats the fact that Ofcom's view is that cost orientation can be effectively replaced by sub-caps in an RPI-X charge control. For the reasons we described in detail in our response to the June Consultation, we consider that the proposed control does not effectively replace cost orientation, and in particular, there is no control over excessively low pricing. This comment was echoed by a number of respondents, indicting an industry wide concern over the proposals. That this supplementary consultation repeats Ofcom's assertion as the appropriateness of sub-caps as a replacement for cost orientation is of concern. It would appear that, although Ofcom have noted concerns in relation to a lack of cost accounting, there is no acknowledgement over the more substantive lack of cost orientation obligation.

Virgin Media would also suggest, without prejudice to our position on cost orientation, that Ofcom has potentially unnecessarily fettered its discretion in determining how the cost accounting obligation should be imposed. Having made the provisional determination to impose relevant cost accounting SMP conditions (the "OA" series of SMP conditions deriving from the 2004 financial reporting statement), it is unnecessary to then go on to consider what reporting obligation may be imposed under those conditions. The specific reporting obligations are set under a direction made under SMP condition OA2. As Ofcom notes, amendments to this direction are consulted on annually, in a separate process, which seeks to implement decisions of market reviews. Stakeholders are therefore able to comment on any proposals made in the draft direction before it is finalised. In this further consultation, Ofcom is not proposing to make any direction under OA2, but purports to limit the basis upon which cost accounting should be imposed (by requiring production of LRIC data to Ofcom, but not publication of the same). This is a matter that should be undertaken as part of a direction, and it is inappropriate to make comment as to how any future direction will operate. If Ofcom had wanted to make this decision as part of this review, it ought to have consulted on a draft direction. In not doing so, it is premature to mandate the manner in which a cost accounting obligation should operate.

We set this position out in our response to the June Consultation, and consider that, as discussed there, it is entirely appropriate, given the current financial reporting SMP framework, for Ofcom to set a generic obligation in the market review and consult on the specifics of how it applies in the financial reporting review which sets the direction under OA2. A key advantage (aside from the legal propriety of the approach), as we discussed in our response, is that the direction can be proposed on the basis of the final decision in any market review rather than the proposals made during its course.

In this case, we consider that Ofcom's suggestion that cost accounting should be limited to the delivery of information to Ofcom, rather than its wider publication is wrong in any event. We described in our response to the June Consultation how cost accounting, even in the absence of a cost orientation condition would be beneficial to industry by allowing industry to see charge control compliance (and raise an issue with Ofcom where necessary), and to ensure that investment decisions are made on an appropriate basis (which would ensure that competition at the appropriate level of the market was maintained).

We consider that there would be no additional impact on BT in being obliged to publish relevant data, rather than just deliver the same to Ofcom. It is hard to see how this additional step, which is clearly beneficial to the functioning of the market, would be disproportionate on BT who would be required to produce the information in any event, and already have obligations in other markets to publish the RFS. In light of the above Virgin Media would submit that Ofcom should reconsider this matter in proposing any amendment to the financial reporting direction, rather than purporting to decide on how the direction should be amended as part of this consultation.

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

Virgin Media does not have any comment in relation to the proposed modification of the "Trunk Aggregation Node" table set out at paragraph 5.14 of the supplementary consultation.

Virgin Media considers that the amendments to the wording of Condition 2 proposed in the supplementary consultation are appropriate given the lack of agreed or defined catchment areas, as discussed in the consultation.

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

Virgin Media would reiterate its position as set out in our response to the BCMR consultation, but does not have additional comment to make at this stage.

Yours sincerely

David Christie
Counsel : Competition and Regulatory Affairs