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### **MBNL's response to Ofcom's consultation on Business Connectivity** **Market Review**

MBNL welcomes the opportunity to respond to Ofcom's consultation *Business Connectivity Market Review*, released on 17 January 2008.

MBNL is a joint venture between T-Mobile (UK) Limited and Hutchison 3G UK Limited, which is responsible for the integration of T-Mobile (UK) Limited's 3G radio access network with that of Hutchison 3G UK Limited. The comments represent our mutually agreed position of T-Mobile UK and H3G and represent the best interests of MBNL. It should be noted that the views of the individual organisations and those of the holding companies and ultimate parent companies may vary from these views.

In our response, we will highlight information which we feel Ofcom needs to take into account when assessing the market and determining any remedies that needs to be put in place. We will only comment on the specific markets where we purchase leased lines. The frame of reference of our response is therefore only commenting on leased lines relevant to the radio access network. The individual holding companies also purchase leased lines for their core networks and different considerations may apply there.

It should be noted that the radio access market has a very different geographic make-up to the core networks of either operator. Whilst the core networks are based solely in urban areas, where often there is a greater degree of choice of leased line providers, the radio access network is based throughout the country, both in urban and rural areas. [Confidential information removed.]

#### **Executive Summary**

- MBNL does not support Ofcom's market definition for the very high bandwidth TISBO market. We do not feel that microwave links should be included in this market as they are not an effective substitute for end to end fibre lines and the costs of switching between the types of links is uneconomical [Confidential information removed.].
- MBNL does not support Ofcom's geographic definition for the very high bandwidth TISBO market. We do not feel that a national market exists and BT faces limited competition in some areas of the country. MBNL suggests that Ofcom should do a more thorough geographic analysis and if Ofcom is not able to conduct this, Ofcom needs to be conservative about withdrawing regulation from the market.
- MBNL believes that BT continues to have SMP in the very high bandwidth TISBO market. Self-supply of fibre lines is not something we feel is economically viable in the access market. [Confidential information removed.]

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- [Confidential information removed.]
- MBNL welcomes Ofcom's proposals to include saw-tooth discounts within the requirement not to unduly discriminate. [Confidential information removed.]
- [Confidential information removed.] We welcome the new charge controls put in place by Ofcom in the AISBOs market.
- We welcome the new charge controls for the trunk segment market. [Confidential information removed.]
- MBNL feels that wholesale access to BT exchanges is vital to stimulate competition and should be used in conjunction with charge controls.
- The only way to stimulate competition in the access market is to allow access to dark fibre. MBNL believes strongly that Ofcom should carry out a market review and consider the benefits of access to dark fibre.

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### Responses to consultation questions

**Question 1: Do stakeholders agree with our proposed retail market definition? In particular, do you agree that separate markets continue to exist for traditional interface and alternative interface retail leased lines?**

[Confidential information removed.]

**Question 2: Do stakeholders believe that there is evidence that might support an alternative view?**

See the answer to question 1 above.

**Question 3: Do stakeholders agree with our proposed approach to geographic market definition?**

See the answer to question 1 above.

**Question 4: Do stakeholders agree with our proposed retail geographic market definitions?**

See the answer to question 1 above.

**Question 5: Do stakeholders agree with our proposed wholesale product market definitions? In particular, do you agree with Ofcom that: i) a separate market now exists for high bandwidth AISBOs, and ii) the very high bandwidth TISBO market now includes circuits at bandwidths above 140/155 Mbit/s?**

[Confidential information removed.]

MBNL disagrees with Ofcom's proposals to include microwave links in the very high bandwidth TISBO market. Ofcom states 'While switching costs still apply in the very high bandwidth market, they are relatively small in the context of the value of the products being used and so are less likely to impede microwave and fibre being substitutes.' MBNL disagrees with this and does not think that these microwave links are an effective substitute for fibre. We feel that there are a number of arguments where the transfer between fibre to microwave and indeed, vice versa, does not make economic or engineering sense:

(a) To migrate from leased line to microwave links might be positive in terms of the operational expenditure ("opex"), but this would require a significant additional capital expenditure ("capex") to make the transition. In the high bandwidth sector we expect the capex for microwave links to be around [Confidential information removed.] per link (excluding the potential cost of civil works and site acquisition).

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This is a concern when seen in the context of the engineering limitations of microwave links.

(b) In contrast with fibre leased lines, microwave links require a line of sight. This means that not all existing sites can be connected via microwave links, due to the geography of the surroundings. [Confidential information removed.]

(c) Another contrast with leased lines is that microwave links are limited by distance and depend on the kind of microwave frequency employed. While a leased line can cover a distance of 75km, a microwave link is usually used to cover a distance of around 10km (this can be extended up to 20 km but this brings with it a degradation of quality). This is normally resolved by introducing additional repeater sites, or engineering existing sites as 'hops'. The additional hops lead to additional capital investment.

(d) Another factor that operators have to consider when deciding whether to employ microwave links is that, as the network evolves in complexity there is an increased risk of capacity bottlenecks, and a reduction in end-to-end availability. In such cases, leased lines are often used to bypass the bottlenecks and the distances required might not be conducive to the use of microwave.

(e) Although new technology has meant that some microwave links can cope with the very high bandwidth requirement, they are not comparable to the very high bandwidth leased line offerings in place for bandwidths beyond 155MBit/s.

(f) [Confidential information removed.]

[Confidential information removed.]

### **Question 6: Do stakeholders agree with our proposed wholesale geographic market definitions? In particular, do you agree with Ofcom that a separate market now exists in the UK for high bandwidth TISBOs in the Central and East London Area (CELA)?**

MBNL does not agree with the proposed wholesale definition of the specific geographic markets.

[Confidential information removed.], we disagree with the robustness of the 'postcode' analysis carried out by Ofcom and feel the CELA area set by Ofcom is too large a region. It appears to us, from reading the consultation document, that this region now includes areas which may not actually have effective competition.

If Ofcom feels that separate geographic markets exist, then it needs to conduct a robust analysis to determine the exact boundaries of the markets. If the analysis is not precise and uses too broad a region, then a product will either be regulated or left unregulated erroneously. This is certainly not a result that Ofcom would welcome. If Ofcom is not able to conduct the necessary robust geographic analysis, then MBNL feels that separate regions should not be identified and the whole country should be considered one market. If this approach is taken, the result would be that regulation will be kept in place unless it is shown that it needs to be removed in a particular

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market. We suggest that Ofcom should be conservative about withdrawing regulation from the market.

MBNL disagrees with Ofcom's conclusion that a national market exists for very high bandwidth TISBOs. We believe that Ofcom is correct in stating that prices for very high bandwidth products are lower in the CELA region than in other areas in the country. [Confidential information removed.]

In Ofcom's SMP assessment, Ofcom has used MNOs self-supply as an indicator that there is competition in this market. We deal with this in detail in our response to Question 15. However, it can be noted that it would only be economical for an MNO to self-supply these lines in specific situations. This would not be on a national basis, since there will be large areas of the country where this self-supply would not occur. MBNL is of the view that Ofcom's geographic analysis for this product market was not robust and a single, national market is an incorrect conclusion to reach.

Since the current BT prices are regulated and given the requirement for equivalence, there should be no difference in real term pricing. [Confidential information removed.]

MBNL suggests that Ofcom should do a more thorough geographic analysis for the very high bandwidth TISBO products. If Ofcom is not able to conduct the necessary analysis, then MBNL suggests that separate regions should not be identified and the whole country could be considered one market. MBNL is of the view that Ofcom needs to be conservative about withdrawing regulation from the market. If Ofcom withdraws the regulation, there could be significant market failures, in terms of excessive pricing, in geographic regions where there is limited competition.

### **Question 7: Do stakeholders agree with our proposed approach to SMP assessment?**

MBNL does agree with Ofcom's general approach in assessing whether a firm has SMP. This general approach is in line with the previous SMP assessment in this market and other Ofcom assessments.

However, MBNL notes that Ofcom has not been consistent in its SMP assessment. While we appreciate that often specific circumstances need to be taken into account, we are concerned that Ofcom has often not followed through with its own criteria. We note that Ofcom has decided not to place emphasis on either the low levels of ROCE in the low and high TISBO product markets, or the high levels for the very high bandwidth products. This seems nonsensical and it is imperative that Ofcom follows through with its methodology for assessing SMP when conducting a market review as opposed to choosing which pieces of information to use when it suits their proposals. If ignoring the implied conclusions of a piece of information becomes the rule rather than the exception, then Ofcom needs to consider whether that piece of information is the correct indicator to use in future assessments.

One area that Ofcom noted they took into account was the existence of cost-based unbundled local loops. Whilst this has a large impact in the retail market, the impact

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on the leased lines that MBNL purchases has been minimal. We hope that Ofcom appreciates that the best way to promote competition through access is by similar wholesale methods, as we discuss later in our responses to Questions 17 and 22.

**Question 8: Do stakeholders agree with our assessment of SMP in the retail low bandwidth market in the UK excluding the Hull area? In particular, do you agree with our assessment that regulation in this market is still required for the time being?**

See the answer to question 1 above.

**Question 9: Do stakeholders agree with our assessment of SMP in wholesale TISBO markets in the UK excluding the Hull area?**

From the results of our own analysis, we agree with Ofcom's assessment that BT has SMP in the low bandwidth wholesale TISBO markets in the UK, excluding the Hull area. [Confidential information removed.]

[Confidential information removed.]

[Confidential information removed.]

[Confidential information removed.]

**Question 10: Do stakeholders agree with our assessment of SMP in wholesale AISBO markets in the UK excluding the Hull area?**

[Confidential information removed.]

**Question 11: Do stakeholders agree with our assessment of SMP in the wholesale trunk segments market?**

We agree with Ofcom's assessment of SMP in the wholesale trunk segment market on the assumption [Confidential information removed.]

[Confidential information removed.]

**Question 12: Do stakeholders agree with our assessment of SMP in the retail low bandwidth market in the Hull area?**

See the answer to question 1 above.

**Question 13: Do stakeholders agree with our assessment of SMP in wholesale TISBO markets in the Hull area?**

We agree with Ofcom's assessment of SMP in the wholesale TISBO market in the Hull area. [Confidential information removed.]

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[Confidential information removed.]

### **Question 14: Do stakeholders agree with our assessment of SMP in wholesale AISBO markets in the Hull area?**

[Confidential information removed.]

### **Question 15: For those markets where we have found no SMP and propose to deregulate, do you agree with Ofcom that the available evidence supports the finding of no SMP?**

In contrast to Ofcom's assessment, [Confidential information removed.] The initial analysis only considers the very high bandwidth fibre lines and does not include any microwave links which we do not consider part of the same product market. As we noted in our response to Question 5, we do not consider microwave links to be within the same market as leased lines and our analysis is based on this understanding.

[Confidential information removed.]

Ofcom's conclusion about the competitiveness of this market is dependant on the MNOs' self-supply of the product. Ofcom have noted that 'Information provided to Ofcom by MNOs indicates that all but one MNO choose to self-supply substantial quantities of very high bandwidth TISBO services.' [Confidential information removed.]

Self-supply of fibre would only begin to be economical and cost effective for MNOs if there was a need for high volumes of very high bandwidth capacity. On the majority of sites where only one 155MBit/s circuit is required, it would be highly uneconomical for MNOs to self supply these lines. Ofcom has mischaracterised the demand for this product and its assessment would lead to a situation where the majority of leased lines would be unregulated and yet BT would face no competitive pressure, either from self-supply or other operators. Ofcom needs to revisit this analysis based on our information.

[Confidential information removed.]

[Confidential information removed.]

[Confidential information removed.], we disagree with the analysis carried out to reach this conclusion. As noted in our response to Question 6, we disagree with the robustness of the 'postcode' analysis and feel the CELA area is too large a region. If Ofcom is not able to conduct the necessary thorough geographic analysis, then MBNL suggests that separate regions should not be identified and the whole country should be considered one market. We are of the view that Ofcom should be conservative about withdrawing regulation from the market.

### **Question 16: Do stakeholders agree with our assessment of the appropriate regulatory option and our proposed remedies for the wholesale TISBO markets in the UK excluding the Hull area?**

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[Confidential information removed.]

[Confidential information removed.]

[Confidential information removed.]

We welcome Ofcom's proposals to include saw-tooth discounts within the requirement not to unduly discriminate, which is imposed on companies with SMP.  
[Confidential information removed.]

We believe that charge controls in isolation can be counter-productive in maintaining a competitive cost base for BT's wholesale and upstream retail customers and will not necessarily improve the competitive landscape in the long term. Allowing access to BT exchanges for wholesale competitors will drive competition in this area. We are of the view that regulation needs to include the requirement to grant access to allow BT's competitors to gain a geographic footprint.

MBNL fully agrees with Ofcom's assessment on the condition that 'An obligation to provide network access' means allowing a third party CP to install equipment to support any bandwidth in any BT exchange. This is a key requirement since allowing access to BT exchanges for wholesale competitors will drive competition in this area. In particular, we are aware that barriers to access to exchange space for WES local access continue to be a problem for some companies. The exchange space problem is preventing the emergence of fibre-based services in the local exchanges. Ofcom has to ensure that this exchange space access is available to BT's competitors.

### **Question 17: Do stakeholders agree with our assessment of the appropriate regulatory option and our proposed remedies for the wholesale low bandwidth AISBO market in the UK excluding the Hull area?**

MBNL welcomes the new charge controls that will be brought in to the AISBO market. These prices need to be based on the costs of producing these AISBO products and not set in relation to the existing TISBO products, so the correct incentives are in place for innovation in this area. It is imperative that Ofcom avoids stifling the development of this new technology.

[Confidential information removed.] It is essential that the cost benefits of these AISBOs products are passed on to the customers through a lower regulated charge control than the charge control on the TISBO products.

We believe that charge controls in isolation can be counter-productive in maintaining a competitive cost base for BT's wholesale and upstream retail customers and will not necessarily improve the competitive landscape. Allowing, access to BT exchanges for wholesale competitors will drive competition in this area. This should include the appropriate rack space required to support their requirements. This space should be provided by BT in accordance with the SMP conditions.

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### **Question 18: Do stakeholders agree with our assessment of the appropriate regulatory option and our proposed remedies for the wholesale trunk market?**

We welcome the new charge controls that will be brought in to the trunk segment market. [Confidential information removed.]

[Confidential information removed.]

### **Question 19: Do stakeholders agree with Ofcom's assessment about the appropriate regulatory option and our proposed remedies for the retail low bandwidth traditional interface market in the UK? In particular, do you think that Ofcom should accept BT's proposed voluntary undertakings that it will continue to supply new analogue and sub-2Mbit/s retail circuits until 2011 or earlier if, subject to industry agreement and consent by Ofcom, the underlying platform is closed at an earlier date, that it will not increase its prices for analogue services more quickly than the rate of inflation (RPI-0%) for a period two years following the publication of the LLMR statement i.e. from 2008 to 2010, and that it will commit to a further two-year cap, the level of which would be agreed with Ofcom prior to 2011?**

See the answer to question 1 above.

### **Question 20: Do stakeholders agree with our assessment of the appropriate regulatory option and our proposed remedies for the wholesale TISBO markets in the Hull area? In particular, do you think Ofcom should accept Kingston's proposed voluntary undertaking not to increase the prices of its wholesale TISBO services by more than RPI+0% over the next four years?**

We are of the opinion that the voluntary obligation is sufficient in this area and at this stage. [Confidential information removed.]

[Confidential information removed.]

### **Question 21: Do stakeholders agree with our assessment of the appropriate regulatory option and our proposed remedies for the wholesale AISBO markets in the Hull area?**

MBNL agrees with the proposed remedies for KCOM in the AISBO markets. [Confidential information removed.] Ofcom would need to ensure that regulation in the AISBO markets does not stifle KCOM's development of this product.

### **Question 22: Should Ofcom investigate further the case for introducing a dark fibre remedy by undertaking a market review of the relevant market? If such a review were to be undertaken, is it likely that BT or any other CP would be found to have SMP in that market? And if SMP were to be found, what would be the pros and cons of requiring the dominant provider to make dark fibre in the access network available to third parties?**

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MBNL believes strongly that Ofcom should investigate the case for the introduction of dark fibre. [Confidential information removed.]

[Confidential information removed.] Although dark fibre is very expensive up front, it allows for almost unlimited bandwidth into the future, and we can increase the scale of bandwidth provided easily and cost-effectively. This avoids the need for buying high bandwidth leased line capacity on regular basis.

MBNL is of the view that the potential benefits of access to dark fibre outweigh the time-consuming nature of a market review. Access to dark fibre would allow BT's competitors to compete in the market and therefore MBNL is of the view that this market review would be of great potential benefit to industry. There may be other ways to rectify the possible SMP of BT (e.g. charge controls or allowing access to BT exchanges for wholesale competitors). These remedies, however, will not provide true competition, since purchasers could not simply change the bandwidth capacity they require. With dark fibre access, the arrangement with BT's competitors can be more flexible and the purchasers of the fibre will not be dependent on the specific services that BT offers.

MBNL believes that any business should be able to get dark fibre, if they can afford the capital investment. It should not only be given to business with fibre capacity. The provision to all would stop the potentially inefficient build of competing fibre lines.

One downside of getting access to dark fibre is a degree of inflexibility regarding the end points. If the purchaser of dark fibre wanted to close a site, they would need to re-provide the fibre and incur another large capital investment. With a leased line, one can ask the provider to re-provide the fibre, although in most cases a new capital charge will be levied.

We feel that it is important that the original provider of the fibre is appropriately rewarded for its investment by any third party users of the fibre. Perhaps in this case, a charge control would be the most appropriate way to regulate. The charge control should be proportionate, and if it is not, BT can always appeal against the level of the particular charge control.

Ofcom would need to look at how any regulatory remedies with regards to dark fibre would relate to the other remedies that are in place in the business connectivity market. Our recommendation is that this review should be performed in conjunction with a wider review of site access competition, since we see both of these as critical to future competitiveness in the market place.