

BCMR & PIMR Team
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8th February 2019

By e-mail

Reference: Business Connectivity Market Review (“BCMR”) and Physical Infrastructure Market Review (“PIMR”) (the “Consultation(s)”)

NON CONFIDENTIAL

Dear BCMR and PIMR Teams,

Gamma Telecom Holdings Limited (“**Gamma**”) welcomes the opportunity to respond to the Consultations published on 2nd November 2018; our non-confidential response is appended.

Introduction

Gamma is a Public Electronic Communications Network that provides wholesale fixed and mobile telephony and data services, to some 1,100 resellers. Two of these resellers are wholly owned subsidiaries and represent themselves over 20% of our business. In all cases, our partners and subsidiaries sell almost exclusively to businesses throughout the UK and increasingly to various European Union member states. Gamma has a turnover c£245m per annum and is ultimately owned by Gamma Communications plc, a company listed on the Alternative Investment Market with a market capitalisation of *three-quarters of a billion* pounds.

This consultation response relates to Gamma Telecom Holdings Limited and its subsidiaries.

Any conflict between the implied position of Gamma in any UK Competitive Telecommunications Association (UKCTA), Internet Telephony Services Providers Association (ITSPA) or Federation of Communication Services

(FCS) responses or that of any other association in which Gamma is involved, is accidental and we consider that our views in this response should prevail.

Gamma trusts that this response addresses the questions posed by the Office of Communications (“Ofcom”) and would welcome the opportunity to elaborate on any points in more detail if required.

Executive Summary

Gamma views the BCMR and the PIMR as intertwined, therefore this response covers both Consultations.

Whilst we recognise and, in principle at least, support Ofcom’s intention to align the related market reviews to a common date of 2021 for the next round, we believe that subjecting the current BCMR and PIMR reviews to a 2 year review period is in effect going to render them mostly ineffective. Given the complexity of implementing some of the proposals within the Consultations and the very real likelihood of a Call for Inputs as early as next year for the 2021 market reviews, we believe this round lacks the time they will need to be successfully implemented prior to the next review, and hence risk creating a further two years of regulatory uncertainty.

We broadly agree with the revised market definitions, but do have some serious reservations around the practical implementation of such definitions. Leased line circuits can traverse geographically defined boundaries, and whilst this issue has already been addressed within the Central London Area (“CLA”), the relaxation of regulation in areas such as Quality of Service (“QoS”) and the potential for differentiated compensation for poor service introduces a level of complexity in implementation of the proposals that must be considered by Ofcom. We give further detail in our response in an effort to aid Ofcom’s decision making in this area.

We welcome Ofcom’s proposals to increase the usage scope for duct and pole infrastructure. The challenge will be to incentivise investment by infrastructure providers in alternative network infrastructure in the mid to long term, and this will only be achieved with balanced regulation and charge control. Without a mid to long term regulatory plan, the imposition of regulation to address competition concerns and indeed promote infrastructure competition could ironically entrench British Telecommunications plc’s (“BT’s”) position as a monopolistic provider of infrastructure. As we will address in detail within our response, if a Communications Provider (“CP”) can deploy networks more rapidly and cost effectively using BT’s infrastructure then this may reduce the incentives to invest in alternative network infrastructure. As BT not only holds a monopoly on the

infrastructure and fixed assets, but also the service and maintenance of such assets, then the industry's ability to innovate and differentiate will be constrained by BT's contractual service level assurances and payment guarantees.

In terms of the proposals on Service Level Guarantees ("SLG"), we broadly welcome Ofcom's guidance on both negotiation principles and costs. We do however disagree with Ofcom's view on the reputational damage associated with BT's failures. Whilst hard to quantify on a general basis, i.e. across industry, we believe that the issue of reputational damage is significant and requires further investigation and analysis by Ofcom. The complexity of Ethernet provisioning is such that the propensity of users switching services should not be taken as the sole measure of such a consumer's dissatisfaction, for reasons we discuss below. In anticipation of BT's increased dominance as a network provider, we also urge Ofcom to take a more proactive role in any SLG negotiations from the start, rather than leave it to the Office of the Telecommunications Adjudicator ("OTA2") which is no more than a facilitator.

Market Definitions

We note that Ofcom has taken heed of the judgment of the Competition Appeal Tribunal ("CAT") in the recent BCMR Appeals¹ in its approach to both geographic and product market definitions. Gamma remained relatively silent on the latter point during the litigation, but can see that the differentiation between the Rest of the UK and the urban areas with a high (but not as high as Central London) network density has been incorporated into the analysis.

Given the extensive submissions Gamma made during the BCMR Appeals and the hefty judgment, we do not consider it necessary to repeat them at length here. We only have one substantive point to make in relation to Ofcom's approach.

Ofcom have seemingly used the identity, in PIMR at least, of two CPs as defining a geographic boundary. As an exercise in expedience and simplicity, this is rational. However, if we were to take two hypothetical postcode sectors where BT and Virgin were the only operators present in one, and Vodafone and Gamma were the only two operators present in the other, there would be a distinctly different competitive dynamic. By way of

¹ Competition Appeal Tribunal, 2017, CAT 25.

http://www.catribunal.org.uk/files/1260_BT_Judgment_CAT_25B_101117.pdf

example, both Gamma and Vodafone have demonstrated a willingness to allow access to duct in the past, and indeed, have had contracts with each other and other parties. BT and Virgin, historically, have not been so willing. This exercise could be repeated by an almost infinite composition of physical infrastructure owners with a wide spectrum of results.

It may be wise to adjust the analysis accordingly.

We note that this would not alter the conclusion on remedies as the more competitive High Network Reach areas were still deemed as requiring them, but as a point of principle it is a somewhat over simplification of the reality on the ground and presents a “chink in the armour” Ofcom should be aware of.

Lack of Regulatory Certainty

Gamma welcomes the underlying intent of Ofcom to create regulatory certainty in a market characterised by high capital investment. This form of certainty is one of the key ways in which Ofcom can create an environment which will attract such investment.

However, there are three reasons why we do not consider that this review will achieve its objectives in that regard – in essence, a 2 year market review period is going to create a 2 year wilderness in which industry will likely be unwilling to invest for fear of subsequent litigation, and long lead times in the event of dispute and due to uncertainty regarding Ofcom’s powers in the regulatory lacuna starting 1st April 2019.

This is especially pertinent given that Ofcom started on the path of duct and pole access in early 2010² and the previous BCMR commenced in 2014³. There is a very real risk of a “lost decade” in business connectivity unless decisive action is taken at this juncture.

1. Risk of Litigation

We know from the previous BCMR that there are entities whom have previously invested in physical infrastructure that have concerns with Ofcom interventions in this area; this resulted in a lengthy litigation and the quashing of Ofcom’s original decision.

² Review of the wholesale local access market- Consultation published 23rd March 2010

³ Business Connectivity Market Review - Timetable and initial call for inputs – published 1st April 2014

We do not say this as a criticism of BT and Virgin Media – they are, after all, economically rational profit maximisers that wish to ensure the best return for their shareholders from an investment in physical infrastructure. We also note this time that the others involved in the BCMR Appeals⁴ may take less offence at these proposals, however, the risk is very real.

TABLE 1 - BT AND VIRGIN MEDIA PARENT FINANCIALS

£ GBP	BT ⁵	Liberty Global ⁶
Turnover	23.72bn	11.67bn
Net Profit	2.03bn	(2.15)bn
Market Capitalisation	25.44bn	14.12bn
Shareholder Funds	(4.54)bn	(10.61)bn

Both companies have a negative shareholder funds position, however, it should be clear that incurring litigation costs of £2.66m⁷ is hardly a deterrent for BT, and nor would it be for Virgin.

The average time from a challenge of an Ofcom statement being registered at the CAT through to judgment is 11 months⁸, therefore half the period anticipated for Ofcom to be subject to this review could be marred with the uncertainty of the litigation.

Additionally, since the passing of the Digital Economy Act 2017 (the “**DE2017**”), there hasn’t been a substantive appeal to the CAT and the issue on whether Parliament has interfered with the Article 4 right of appeal on the

⁴ We note that Gamma’s concern was limited to the Central Business Districts and otherwise Gamma’s intervention in the BCMR Appeals was supportive of Ofcom’s work. CityFibre’s position was multi-faceted, although could be summarised as one of concern about being squeezed out of the market by the active minus charge control. The other interveners; Colt Technology Services, Talktalk Telecom Group plc, Hutchison 3G UK Limited and Vodafone Limited were broadly supportive of the intervention.

⁵ Financial Statements as at 31st March 2018, Market Capitalisation as at close on 23rd November 2018

⁶ 1 USD to 1 GBP taken as 30 day average mid market rate as at 25th November 2018 (\$1 : £0.77543). Financial Statements as at 31st December 2017, Market Capitalisation as at close on 23rd November 2018

⁷ §62 of [2018] CAT 1 *British Telecommunications plc v Office of Communications & CityFibre Infrastructure Holdings plc v Office of Communications*

⁸ Lecture by Sarah Love of Brick Court Chambers given on 7th March 2018 entitled “Telecommunications: Some Changes in the Pipeline” summarising a Business, Innovation and Skills consultation that examined cases from 2008-2012. This means that the maximum period, including the time allowed to file at the CAT, is 11+2 = 13 months.

merits⁹ with Section 84(4) of the DE2017¹⁰ has yet to be dealt with. This would add considerable time to the case (either to resolve directly or to await a stay whilst another case resolved the issue), and may even require being heard at a higher court, including potential for a reference to the European Court of Justice, for resolution.

On top of all of this is whether or not an allegation could be made that Ofcom's independence, as required by Article 3(3a) of the Framework Directive, has been interfered with¹¹ by the proposed Statement of Strategic Priorities¹² from Government in these remedies.

All of this comes together to create an environment where, at best, industry will wait for 2 months to lapse to see if an appeal is filed, through to the potential for litigation that could last the duration of the market review. Therefore, we say that this review should be the substantive instrument and not be a glorified Call for Inputs for a later review; instead Ofcom should use its imminently forthcoming power¹³ to set this review for the maximum 5 years to maximise the potential (eventual) surety.

We note that the ECCC does not appear, *prima facie*, to change the point we have made in reference to the Framework Directive above – in fact, it would appear at Article 8(1) to go even further than the Framework Directive; and regardless of the perceived merit, or lack thereof, in our views of the DE2017, it should be clear that if you were an undertaking wanting to resist the proposed measures, the arguments could be run credibly.

In addition to all of these risks is the new concept of co-investment, but this appears to have been given only one paragraph in the PIMR. We note that the concept was floated during the Strategic Review¹⁴ and we note that it is also the focus of Article 76 of the ECCC. Gamma cannot give support or object to this concept without a fuller understanding of how Ofcom would intend to give exceptions under either the SMP conditions it has proposed or under the ECCC power.

⁹ Article 4(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (as amended) (the “**Framework Directive**”)

¹⁰ This inserts 194A(2) into the Competition Act 2003 (the “**CA2003**”) which restricts the right of appeal to a judicial review.

¹¹ The independence of Ofcom is required by Article 3(3a) of the Framework Directive; Section 2B(2)(a) of the CA2003 inserted by Section 98 of the DE2017 is the instrument that *prima facie* interferes with this.

¹² <https://www.gov.uk/government/news/forging-a-full-fibre-broadband-and-5g-future-for-all> [accessed 25th November 2018]

¹³ Article 67(5)(a) of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast).” (the “**ECCC**”)

¹⁴ [Making communications work for everyone](#) – Published 25 Feb 2016

Our understanding is that Ofcom appear to be proposing to give a power to make exceptions without consultation; such unilateral decision making is not transparent as required in Ofcom's statutory objectives (or indeed in various parts of the ECCC and Framework Directive alike). There must be a consultation, even a short form, similar to when BT used to apply for an exemption from the Undertakings.

These points regarding the ECCC cannot be ignored given the transposition deadline is during the life of this forward-looking market review.

2. Requirement for Clarity Later

Ofcom will be acutely aware that any requirement for industry to negotiate with BT rarely results in a mutually agreed and acceptable position. The one month¹⁵ BT has in the PIMR essentially to fix a contractual arrangement is likely to result in a reference offer biased towards their wishes and will require the intervention of Ofcom through dispute resolution thereafter. This gives insufficient time for Ofcom to nominate the Office of the Telecommunications Adjudicator to oversee negotiations under agreed terms of reference to attempt to "head off at the pass" some the eventual areas of disagreement.

Whilst Ofcom's remedies are clear in many respects, as can be seen elsewhere herein, there are significant gaps for BT to engage in a constructive refusal to supply.

We also note that the same situation arises in the BCMR. BT has already made it clear¹⁶ it wishes to renegotiate the Service Level Agreements ("SLAs") and SLGs and will be emboldened by Ofcom's position in the consultation. Gamma's position has always been to welcome SLGs where the SLA is breached, but as an entity that services exclusively business clients, we would much rather things be "right first time". Businesses place a greater value on certainty of delivery than they do on a chance of a quick delivery.

One of the great opportunities afforded by the PIMR is for undertakings to fashion their own Ethernet Access Direct ("EAD") product. Pulling one's own fibre through ducts and using one's own electronics affords far more

¹⁵ §4.119 of the PIMR Consultation

¹⁶ §15.181 of the BCMR Consultation

substantial opportunity for innovation and differentiation than using the vanilla EAD product¹⁷. However, any such deployment can only be made with full visibility of capacity limitations or other constraints that would likely delay or change an investment decision. For example, we are unclear of the remedies available in the event that a key strategic duct is full – which party/parties pay(s) for it to be extended, how quickly must an upgrade be completed, etc.?

One of the critical variables in a build with Physical Infrastructure Access (“PIA”) or buy with EAD decisions will be the relative SLA and SLG regime between them and the outcome of any Statement of Requirements (“SoR”) process to enhance the products to be truly fit for purpose. We know that SoRs can take 2 years¹⁸ or more; whilst there is a diverse range of times, priorities, products and costs, the common theme appears to be the willingness or otherwise of BT to perform the work – in a case such as PIA, where it has historically been unwilling, it is easy to see why we are sceptical of our chances of consuming a viable product.

By the time there is an “*absence of agreement between undertakings*”¹⁹ on any or all of these points, and a case prepared and filed and resolved by Ofcom, we could be 14²⁰ further months after the statement date, let alone any subsequent litigation thereof. Taking the aforementioned average of 11-13 months (which itself excludes the complexity of the independence of Ofcom and the nature of the appeal), it should be tolerably clear this exceeds the market review period and provides a compelling argument for a longer duration.

All of this risks being repeated in 2021. There is a very real prospect that any meaningful investment will be curtailed until there is proper certainty, which, absent a 5 year review now, is not going to deliver Ofcom’s policy objectives.

¹⁷ Ofcom may recall these arguments in relation to the dark fibre remedy from §42-48 of the Second Witness Statement of Peter Farmer (PJF2) dated 1st December 2016, adduced in support of Ofcom in case numbers 1260/3/3/16 and 1261/3/3/16 (the “**BCMR Witness Statement**”) t

¹⁸ *Ibid*

¹⁹ The threshold for dispute referral as set by the CAT in *Orange v Office of Communications* [2007] CAT 36

²⁰ Dispute brought by Gamma against BT in relation to BT’s average porting conveyance charges was opened on 23rd July 2015 and closed on 11th November 2016, relating to guidance published by Ofcom on 29th September 2014.

3. Unprecedented Regulatory Lacuna

We are concerned that given Ofcom ‘expects’ to publish the next BCMR Decision and charge controls in “spring 2019”²¹ while the current conditions imposed by way of Ofcom’s emergency powers expire on 31st March 2019²², there will be an unprecedented regulatory lacuna whereby no Significant Market Power (“SMP”) regulation at all applies to BT for a period of many months.

While we have experienced regulatory lacunae before, we see this as a unique situation. Previous lacunae have only materially affected charge controls whereas in this case there will be no SMP obligations whatsoever. This means the entire regulatory environment of active circuits will fall away, *“affect[ing] a significant part of the telecommunications sector. There are more than 300,000 CISBO circuits across the UK, which support a range of downstream services and applications and play a significant role in delivering fixed and mobile services to consumers.”*²³.

In addition to a lack of a price control there will also be no obligations on BT to provide access, no fair and reasonable obligations, no equivalence, no rules on QoS, nor regulatory accounting requirements.

It is wrong for Ofcom to consider that the contractual 90-day notice for price changes will provide sufficient protection for BT’s customers and the competitive environment more generally until the new charge control is published because:

- it would not prevent BT from favouring its downstream businesses;
- it would be entirely open for BT to issue a notice to vary prices at any date prior to 31st March so that the effective date falls into the lacuna period, giving it free rein to engage in shenanigans during the lacuna;
- in our experience the threshold for interim relief using Ofcom’s Competition Act 1998 powers is very high and, in any event, we consider Ofcom would hesitate to use them, regardless of the perceived harm being perpetrated;

²¹ “About this Document” in Volume 1 of the Consultation

²² §11 of Section 1 of Annex 1 of Business Connectivity Markets - Temporary SMP conditions in relation to business connectivity services published 23rd November 2017 (the “**Temporary Conditions Statement**”).

²³ Temporary Conditions Statement, §1.21.

- an absence of conditions set under Section 45 of the Act means that the industry would be beholden to Ofcom’s “administrative priorities” if wanting to challenge any behaviour by BT it considers to be problematic under Section 185 of the Act.

Given the extent of the market power BT is described by Ofcom as having in this BCMR (and indeed when Ofcom chose to exercise its emergency powers²⁴), we would respectfully submit that there is no alternative course of action other than formally extending the temporary conditions until such time as a new formal framework is enacted.

Finally, we note that for the Traditional Interface market, Ofcom is willing to accept BT’s “commitment” that it will not raise prices above Consumer Price Index + 8%²⁵. Ofcom will no doubt recall a complaint made by Gamma to both the Competition and Markets Authority (“CMA”)²⁶ and to Ofcom²⁷ regarding BT’s honouring of its “undertaking” regarding the Payphone Access Charge. It will therefore not surprise Ofcom that Gamma is deeply suspicious of the value any such commitment by BT and urge Ofcom to use its powers to impose a specific obligation; if BT is willing to accept it voluntarily, then there should be no argument against there being an explicit *ex-ante* condition.

Short term gains at what long term cost?

As stated above, Gamma welcomes the proposals by Ofcom to widen the usage scope for access to BT’s duct and poles. Undoubtedly, access to BT’s infrastructure provides a considerable reduction to the cost of laying fibre and building next generation networks. The majority of the cost of building a network is the digging and laying of ducts²⁸, and using existing infrastructure reduces this markedly.

By being able to use existing routes, then, for the same connection and rental revenue, an operators’ propensity to dig can be increased. In other words, it is logical that the length of a dig to connect a premise will increase if a part of the route can be provided through existing ducts.

²⁴ “Ofcom found in the BCMR 2016 that the industry relied heavily on active leased line remedies, in particular access to [Contemporary Interface] services of 1Gbit/s and below on regulated terms including price. We consider that this continues to be the case” - §1.21 Temporary Conditions Statement.

²⁵ §8.67 of Volume 1 of the BCMR Consultation.

²⁶ Ofcom were copied on the response by the CMA on 8th February 2017.

²⁷ Dispute under Section 185 of the CA2003 was submitted to Ofcom on 18th February 2015

²⁸ According to Gamma’s own internal modelling c87% of the cost is the digging and laying of duct.

However, this is a double-edged sword. We may see a self-fulfilling prophecy of an infrastructure monopolist in BT. If one can deploy a network more rapidly and more cost effectively using BT's duct, then the incentives to build alternative infrastructure are lowered.

This is a key point, for two reasons.

Firstly, BT is not only a monopolist in the infrastructure and assets, but also in the maintenance and the servicing of those assets. These points have been made to Ofcom before²⁹ in relation to provisioning WLR and Ethernet, but equally hold true for duct and pole access. The industry essentially becomes subservient to BT's SLAs and SLGs on the infrastructure because it is not likely to be economically viable to build a competing infrastructure – such SLAs and SLGs, we note, are currently under review.

Secondly, Ofcom will be well aware of Gamma's views that Ofcom materially erred³⁰ in the structural separation of Openreach within BT Group ownership. The assets remain owned by BT Group and there remains a considerable moral hazard in that arrangement, which becomes more acute where the downstream competition (BT Enterprise) is not firewalled from the owner of the assets which are required to be equivalent. We are acutely aware that this is an emotive subject, but proper engagement between Ofcom, BT and Liberty Global to pre-empt issues may be the only course of action to inject any form of regulatory certainty into this market review if Ofcom are resolute in it being a 2 year period.

We see that in the short term the advantages of using BT's duct and pole infrastructure will be attractive to network providers, due to the rapidity and cost effectiveness of deployment. However, Ofcom must drive regulation that will encourage these network providers to invest in alternative infrastructure. Making BT infrastructure the cheapest and easiest to consume and deploy will not drive alternative investment in the mid to long term.

The potential for a BT infrastructure monopoly is even more likely for carrier diversity. Such carrier diversity is in high demand from larger enterprise customers, critical national infrastructure providers and some public-sector entities. The real risk is that alternative infrastructure providers could end up with thinner or less deep networks

²⁹ Gamma consultation response – QoS for WLR, MPF and GEA – 9 June 2017

³⁰ Gamma consultation response – Delivering a more independent Openreach – 8 April 2018

if they consume BT's physical infrastructure products, especially if this continues in the mid to long term. The consequences are that BT could effectively become the de facto monopoly provider for diverse network access to significant parts of the United Kingdom, and the cost of providing essential diverse network services could rise.

BT is an unwilling landlord

Ofcom will no doubt recall submissions made by Gamma in previous market reviews about BT's constructive refusal to supply PIA in relation to unworkable parent company guarantees or bonds. This evidence was also given to the CAT by our former Head of Regulatory Affairs, Mr. Farmer, in the last BCMR Appeal. Specifically, he said, in relation to minor duct requirements in Manchester³¹:

“Second, even if the terms on which PIA is granted could be adjusted in the light of my observations above, the access to BT's physical infrastructure can be obtained only with very substantial holding company guarantees or bonds, which constitute a heavy burden (particularly for smaller CPs). By way of example, when Gamma explored the possibility of PIA in Manchester only, we were told that we would require a £10 million bond in case of damage to BT's infrastructure. By way of comparison, the bond that Gamma is required to pay when it wishes to dig up a street (pursuant to the Electronics Communication Code) is [CONFIDENTIAL]. Needless to say, a bond of as large as £10m constitutes a very significant barrier to market entry: it would be beyond the reach of many new market entrants”.

[Original Emphasis]

Whilst it is clear from the remedies that Ofcom's intent is for BT to play fair in this regard, BT's behaviour has not met these expectations in the past.

Of course, it is reasonable for BT, as the landlord with multiple tenants in its infrastructure, to have a fair means by which to mitigate any potential liabilities arising. However, unless Ofcom make explicit reference to these issues with appropriate guidance in the Statement, then it is likely that BT will leverage this as means to engage in a constructive refusal to supply.

³¹ §36 of the BCMR Witness Statement

Additionally, any such bonds required by BT on its clients should be scaled up and Openreach should be required to purchase such an instrument on the open market to cover the entire infrastructure owned by BT too; anything else cannot be equivalent by definition and risks raising the relative cost of capital of BT's competitors without a corresponding penalty experienced by the monopolist. At the very least, given BT's size and scale, it should self-insure in this regard and have the appropriate equivalent amount of cash provided for.

Potential Land Grab

Despite our belief that industry expansion is likely to be muted considering the regulatory uncertainty, there is a potential, and indeed perhaps an incentive, for a provider to fill key ducts to capacity in an attempt to see off the expansion potential of its competitors – a game of PIA 'Risk', if you will. Seeking to incur negligible costs in order to preserve its dominance in an area and thus reduce price competition would be a rational behaviour of a provider, in the event it believed the risks of price pressure were material should a competitor enter the local market.

Whilst the ducts at underserved locations are more likely to be available, and as such, the 'land grab' is less likely here, if the route to those ducts is unavailable, then the network expansion of any provider trying to service those locations will be greatly hindered.

We respectfully ask that Ofcom considers the remedies available in the event that a duct is full so that industry can better understand the practicalities of network expansion and better model any financial implications thereof. We fear the lack of such detail will add to the uncertainties already identified and may reduce the appetite of industry to undertake such expansion. Additionally, we would welcome Ofcom signalling what it would do in the event of being presented evidence of such "game playing" or indeed confirming the remedies available in the event that key ducts are full or unavailable for expansion.

Quality of Service Remedies

We broadly agree that the Quality of Service remedies set out in the 2016 BCMR and the Temporary Conditions have resulted in noticeable improvements in Ethernet provisioning service quality. We therefore welcome the proposals to retain these measures and, in some cases, refine them further.

The reduction in the overall Mean Time to Provide (“MTTP”) requirement from 40 days to 38 days³² sets, in our view, an achievable target in light of the current Ethernet provisioning performance.

We also agree with Ofcom’s proposal that the upper percentile standard be reduced to 130 days by 2020/21.

Whilst it is recognised that both wayleave and traffic management issues can be problematic, there are industry wide initiatives underway to both simplify and standardise the processes of obtaining permissions³³, albeit aimed primarily at residential consumer connectivity. We would argue that in the past Openreach has not been particularly effective in the management of either wayleaves or traffic management as they have been able to apply Deemed Consent delays to the circuit provision, thereby moving out the contractual delivery date. The introduction of the QoS remedies, and the removal of the ability for Openreach to mitigate wayleave and traffic management delays against the MTTP standard has caused them to instigate process improvements.

All CPs with physical infrastructure have encountered problematic landlords in the past; we have sympathy with BT in such extreme cases. However, these cases are best reviewed *ex-post* by a regulator contemplating enforcement or resolving a dispute, rather than an *ex-ante* allowance and it is right that absolute time limits are applied now. This approach is in keeping with Ofcom’s previous stance on MBORC in the local access market³⁴.

We admit to a feeling of *deja vu* regarding the Openreach initiative ‘Re-imagining Ethernet Provision’ as referred to in the Consultation³⁵. In the 2016 BCMR, Ofcom referenced the Openreach ‘Differentiated Order Journey’³⁶ (“DoJ”) initiative. DoJ evolved from the initial SLG discussions held between Openreach and industry in 2014. A significant amount of effort and resource was put into the DoJ program by industry, culminating in very successful trials which resulted in a marked improvement in the delivery of all categories of Ethernet delivery. Despite this success, and industry urging Openreach to adopt the process, Openreach declined to implement the program nationally. The only outcome of the DoJ workstream was a contractual change to the lead times for Category 2.1 Ethernet orders, with Openreach being the sole beneficiary of this unilateral change. The timing of

³² §15.60 of the BCMR Consultation

³³ [Department of Culture, Media and Sport Consultation – Ensuring Tenants Access to Gigabit-capable Connections Published 29 October 2018](#)

³⁴ §8.9 [Wholesale Local Access Market Review Volume 1 Published 28 March 2018](#).

³⁵ §15.43 and §15.82 of the BCMR Consultation

³⁶ §13.60 2016 BCMR



this latest initiative, coinciding once again with the issuing of a market review consultation, does lead us to question how much of the program will ultimately be implemented.

In other words, it should be understandable that Gamma is concerned that this a calculated attempt by BT to avoid the intervention of the regulator by promising something it will not deliver. We would respectfully ask that Ofcom outline the alternative to a failure to reach a negotiated conclusion and make it clear the basis upon which it will intervene.

Certainty of initial Contractual Delivery Date (“CDD”)

The CDD is simply a contractual milestone that indicates a calculated lead time and sets the point at which compensation will be paid for late delivery past that date. In terms of actual customer experience, the more important date is the Customer Required Date (“CRD”). The successful delivery of several circuits as part of a major project relies on co-ordination of the delivery schedule and reliable provisioning processes. Openreach is now starting to acknowledge the need to deliver to the CRD, i.e. the date the customer requires the circuit, rather than some arbitrarily defined lead time that is derived to mitigate contractual penalties. We do recognise that the delivery of circuits to CRD rather than CDD, and the potential of each circuit provision having a bespoke lead time, has the possibility to introduce further complexity in the provisioning journey, but this must be balanced against a much-improved customer experience.

It is very important to note that businesses place a much greater weight on the certainty of a date than an absolute lead time. This runs contrary to the established logic in the residential sector where the opposite tends to be true.

1. Certainty Cross-link and MBORC

We agree that the Certainty Cross Link standard is retained. However, as stated above, industry and Openreach will be discussing the possibility of removing the standard lead times for EAD provisioning, and treating each order as having a bespoke lead time. This could have an impact on the proposed Certainty Cross Link standard of 53 working days³⁷.

³⁷ §15.85 of the BCMR Consultation

We agree with Ofcom's stated position that MBORC continues to be included in the QoS standard metrics, and with no identified allowance which stated above in consistent with other markets and is indeed the only approach that makes sense

2. Geographic Scope of the QoS remedies

We cannot agree with removal of the QoS remedies from both the Metro and HNR areas.

As stated in the Consultation, BT has SMP in both the Metro and High Network Reach ("HNR") areas³⁸. BT's high service share of over 50% in these markets³⁹ is not just driven by infrastructure availability, but also by systems and process standardisation. Gamma systems and processes for Ethernet provision are designed around the Openreach order journey, a journey that is replicated by a number of wholesalers that purchase from Openreach and supply to Gamma. The onboarding of a new supplier who is not consuming Openreach access products as an input product typically entails the development of new systems and processes. It is therefore reasonable to expect that industry will build this overhead into their decision making when deciding on whether to onboard non-Openreach derived Ethernet services and that, as such, any increase in availability of Ethernet services provided to consumers and businesses in areas outside of Openreach's footprint is likely to be stifled as a result.

The removal of the QoS remedies for the Metro and HNR areas will put more, rather than less, pressure on Openreach to meet the QoS standards proposed by Ofcom. Many of the quick win potential Category 1 and Category 1.1 EAD orders reside within the Metro areas. Conversely many of the more complex provisioning challenges are encountered within the rural areas to which the QoS standards will apply. There is the real danger of Openreach allocating significant resource outside of the Metro and HNR areas to meet the Ofcom QoS standards. The impact of resource re-allocation could be significant, and we understand that such effects have been witnessed before in the local access market.

In addition, Openreach have already tabled proposals for differentiated SLG payments for Metro and non-Metro areas⁴⁰. Such reduced SLG penalties could further remove the incentive for Openreach to perform to its

³⁸ §6.100 of the BCMR Consultation

³⁹ *Ibid*, §6.101

⁴⁰ OTA Ethernet Product and Commercial Group meeting



capabilities within these non-regulated areas. It would also expose an additional level of complexity if one end of the circuit was outside of a non-regulated area.

We agree that BT has SMP in these areas; the question is one of the right remedies to mitigate the level of SMP that they have. If there is deemed to be sufficient competition to constrain BT's dominance such that some remedies are not thought to be required versus rural areas, then why, at the first opportunity, is BT essentially proposing to increase the price by way of reducing the SLA and SLG?

Of course, this could be seen as the introduction of an incentive for a new entrant to compete on this basis, however, this point is missing from Ofcom's analysis and the debate and we respectfully suggest that it is recast with such a consideration.

We would urge Ofcom to consider its proposals, and to maintain the QoS remedies on all SMP areas for the relatively short life of this market review.

SLAs and SLGs

As referenced in the Consultation, the proposal to remove the 2008 SLG Direction⁴¹ will bring the BCMR into line with the 2017 Narrowband Market Review ("**NMR**") and 2018 Wholesale Local Access ("**WLA**") market review statements. With this in mind we would also expect Ofcom to clarify the position in respect to linking SLG payments with CP forecasting accuracy, a clarification made in both the 2017 NMR⁴² and 2018 WLA statements. Openreach has made several attempts over the years to link Ethernet SLG payments to forecasting accuracy, and we expect a resumption of this effort based on proposals within the 'Re-imagining Ethernet Provision' consultation. We wholeheartedly support Ofcom's statement on the ability of Openreach to proactively match resource levels to CP forecasts⁴³. Indeed, industry has questioned Openreach many times on their use of

⁴¹ [Service Level Guarantees - incentivising performance](#) - published 20 March 2008

⁴² §10.7 – "While we recognise the importance of accurate forecasting, we do not believe that linking SLGs to forecasting would be appropriate for any other situation for SLGs for WLR, MPF or GEA, apart from in relation to Appointment Availability " - [Narrowband Market Review Statement](#) – 30 November 2017

⁴³ §6.146 – "we do not believe that linking SLGs to forecasting would be appropriate for any other situation for SLGs for WLR, MPF or GEA, since in relation to areas such as repairs or the contract delivery date, forecasting bears little relevance to BT's ability to respond to changes in demand. " - [Wholesale Line Access Market Review](#) – 28 March 2018



forecasts. The provision of Ethernet services is complex and requires skilled resource throughout the provisioning journey. If, for example, a major CP were to forecast a doubling of their order volume within a six-month forecasting period, we believe Openreach would not be able to find resource to meet the increased demand within that period. In other words, we consider that it is nothing more than an attempt by BT to avoid its SLA/SLG obligations.

We would question the statement that Openreach is currently engaged in discussions with CPs about changes to SLAs and SLGs⁴⁴. As stated above, Openreach presented to industry their thoughts on a differentiated SLG regime, but such changes were not accepted by industry and there have been no further discussions on the subject since this exchange. Indeed, the Gamma position is quite clear and in agreement with Ofcom's position⁴⁵. In the absence of any regulatory remedies, the contractual position becomes binding. The Connectivity Services Agreement details the SLA and SLG conditions⁴⁶ and until industry and Openreach agree any replacement SLA/SLG regime then the contractual position is maintained.

1. SLA and SLG negotiation principles

We would like to bring to Ofcom's attention the fact that Gamma, in addition to the parties named⁴⁷, were actively involved in the last round of SLA/SLG negotiations.

Whilst we acknowledge the role that the OTA2 played in the last round of negotiations and its proposed role in the next round of negotiations, we would question the efficacy of such an arrangement. The OTA2 can only act as a facilitator, with no powers to make decisions or even adjudicate as its name implies. Whilst we appreciate Ofcom's position that regulatory intervention should be a last resort⁴⁸, we do not foresee a successful outcome to any negotiations given the proposed structure.

Ofcom refers to the previous attempt to reach agreement on SLA/SLGs which ran from 2016 to 2018⁴⁹. During that time Ofcom was noticeable by both its absence at the numerous meetings, and lack of input when negotiations reached an impasse. Unless Ofcom takes a proactive role in any future negotiations, the chances of

⁴⁴ §15.144 of the BCMR Consultation

⁴⁵ Principle 4, Table 15.21 of the BCMR Consultation

⁴⁶ [Contract for Connectivity Services – Schedule 4 Service Level Agreement](#)

⁴⁷ §15.168 of the BCMR Consultation

⁴⁸ *Ibid*, §15.155

⁴⁹ *Ibid* §15.168



success are limited. Ofcom cannot delegate to industry to resolve itself, if it is not prepared to intervene when, after a good-faith attempt, such negotiations fail. Any “Management 101” book would define that as ‘dumping’ and not ‘delegation’ and it only serves to play into BT’s hands; they know that they can ‘agree to disagree’ knowing that either a resource intensive formal action would have to be brought by industry or they’ll get their way.

Whilst we do welcome the guidance on the types of costs which should be included in the SLG calculation, with respect to brand and reputational damage, we disagree with the statement that losses arising from brand/reputational damage are ‘likely to be the exception than the rule’⁵⁰.

Whilst Ofcom’s research indicates that only 38% of leased line users have ever switched suppliers⁵¹, this ignores some key points. The concept of switching does not apply to leased lines in the traditional sense. A leased line switch requires the provision of a new service, with the existing service being ceased. There is the real danger of disruption to business continuity, duplication of equipment and concurrent charges. Gamma has customers with estates of several hundred leased lines. The complexity of switching suppliers is daunting, as we discover every time we tender for such an estate.

We would also question the statement that telecoms providers should be able to mitigate reputational damage by handling delays professionally⁵². One of the most common complaints levelled at Openreach, and one that is still relevant today, is the lack of information provided to CPs when a delay occurs. This lack of detail commonly leads to questions from our customers as to our ability to manage our supplier, which could be viewed as reputational damage.

We do agree that the estimates of brand/reputational damage warrant further examination⁵³, although we suspect that the wide variances as to the value of such damage will remain.

Whilst we agree that SLGs are a matter of negotiation between industry and Openreach, it must be borne in mind that the 2008 SLG Direction linked SLG compensation to the rental value. In January 2010 the annual

⁵⁰ §15.191 of the BCMR Consultation

⁵¹ *Ibid*, §15.191

⁵² *Ibid*, §15.190

⁵³ *Ibid* §15.192

rental price for an EAD 100Mbit/s service was £4400, today it sits at £1698⁵⁴, which breaks down to a daily SLG rate of £367 per day in 2010 compare to £141.50 per day in 2018. This figure is substantially lower than the OTA2's consolidated view of CPs SLG costs, before the cost neutral adjustment⁵⁵. As EAD prices will continue to fall we would suggest that any replacement SLG quantum be a fixed daily rate, rather than linked to a variable factor such as rental.

Regardless of the debate on brand/reputational damage, we say that the costs of BT failure have remained a near constant, but the offsetting SLG has been squeezed significantly.

As stated above, we disagree with the statement that Openreach has notified the OTA2 and CPs that it wishes to negotiate changes to the Connectivity Services Agreement (“**CSA**”) to support changes to the provisioning process⁵⁶. Industry has, over the past three years, repeatedly asked Openreach for a review of the CSA without success. The provisioning process as defined in the CSA does not accurately reflect the provisioning process used today for legacy Ethernet provisioning. The contracts for Openreach copper and fibre products have undergone a consolidation exercise, named Project Pack, that removed contractually impacting clauses from ancillary documents such as price lists, and incorporated the text into the contract. This exercise has still not commenced for the CSA, despite numerous requests from industry.

Please do not hesitate to contact me if you wish to discuss anything further.

⁵⁴ [Ethernet services – EAD price list](#)

⁵⁵ 15.174 of the BCMR Consultation

⁵⁶ *Ibid* §15.181