

**Consultation on the Wholesale Local Access Market Review
SFT Response, June 2017**

Introduction

The following paper seeks to capture the response of Scottish Futures Trust ('SFT') to the Ofcom Wholesale Market Access consultation published on 31st March 2017. SFT is working with Scottish Government ('SG') to develop an implementation strategy to deliver Scotland's world class digital vision as described in SG's "Realising Scotland's full potential in a digital world: A Digital Strategy for Scotland"¹. For this vision to be delivered, it is imperative that both consumers and enterprises in Scotland have access to digital services and mobile connectivity to enable connection and content. This requires both infrastructure and devices to achieve:

- Seamless delivery across fixed and wireless platforms;
- A quality of service and experience commensurate with other leading and modern digital economies; and
- Investment into Scotland's digital infrastructure that will guarantee the country's future competitiveness, as well as its ability to provide enhanced public services and opportunity to its citizens.

A key aspect of this work is to assess the wide range of potential interventions that could be considered to enhance the opportunity for investment in digital infrastructure across Scotland. This includes UK and Scottish Government policy and regulation, as well as establishing the drivers that will stimulate efficient and effective private and public sector investment.

In Scotland the demand for data has increased significantly in recent years and with it the demand for seamless broadband and mobile connectivity. Anecdotal evidence, together with Ofcom and other studies, indicates however that the customer quality of experience is a mixed one. For some, there has been significant improvement in terms of superfast broadband and 4G coverage, alongside growth in the number and types of connected devices; it is this experience that needs to be replicated across the country not just in largely urban and economic centres. For many however, regardless of geography, the experience is still one of unreliable, slow broadband and mobile connectivity services; this experience is replicated in both the consumer and business connectivity markets. There is therefore a strong case to establish how adequate investment and innovation can be delivered into those, primarily regional markets. Convergence has also changed how people access services, and indeed OTT content has grown exponentially over the last few years for some, but far from for all.

As we highlighted in our response to Ofcom's Strategic Review of Digital Communications², it is recognised that Ofcom has applied certain remedies, however based upon consumer outcomes we suggest that there is significant scope for both Ofcom and the wider public sector to be increasingly proactive as regards driving market change and performance. We believe such approaches should be part of an overarching UK regime, but should also address the needs and requirements of regional businesses and consumers.

¹ <http://www.gov.scot/Resource/0051/00515583.pdf>

² http://stakeholders.ofcom.org.uk/binaries/consultations/dcr_discussion/responses/Scottish_Futures_Trust.pdf

The ability to deliver an efficient, competitive telecommunications market for all will deliver significant benefit. To assess these potential benefits, SFT commissioned Deloitte³ to consider the impact of Scotland achieving its world class digital vision (the “SFT Impact Report”). The findings of the report captured the potential of such a vision in fiscal, economic and social terms. The report identified that the potential benefits arising from achieving such a vision could deliver an estimated annual GDP uplift of £13bn in Scotland by 2030. The report also highlighted the potential to improve a number of social dimensions such as access to public services (including healthcare and education) greater social cohesion and inclusion and a reduced cost of living, amongst others.

As highlighted, the ‘prize’ of enhanced digital communications offers significant benefit, and indeed has the potential to significantly improve competitiveness, productivity and innovation across all user groups; it is within this context that we have considered this response to selected aspects of this Consultation as set out below.

Response to questions

V1, Question 3.1: Do you agree with our proposed product and geographic market definition? Please provide reasons and evidence in support of your views.

Ofcom has sought to:

- Define WLA as a single product market for the supply of copper loop, cable- and fibre-based wholesale local access at a fixed location;
- Define two distinct geographic markets for the WLA product market identified above, namely (i) the UK excluding the Hull Area, and (ii) the Hull Area; and
- Conclude that BT will continue to have Significant Market Power (SMP) in the supply of WLA within the UK (excluding the Hull Area) over the review period

We are in broad agreement with regards to the product market for WLA at present, which has focussed on fixed wholesale infrastructure. However, as the consultation document highlights, as convergence of telecommunications infrastructure increases, and wireless technologies (including mobile) are capable of matching fixed services and pricing, then the definition and basis of SMP will need to evolve. This will include, for example, how mobile and wireless services from EE interact with both Openreach (“OR”) and the wider BT Group and the impact of this. Ofcom will also need to consider how the WLA market will need to evolve to support the growth and roll-out of emerging 5G technology. This could include understanding whether the basis of OR’s SMP would increase as wholesale infrastructure becomes more concentrated in fewer entities, with a greater level of service provision and providers.

In terms of the geographic markets we broadly support the definitions, however as SFT has highlighted in response to previous consultation exercises, we believe there is a need to consider the regional workings of the telecoms market, and how this translates into infrastructure provision (and associated regulation) and services competition for remote and rural areas of Scotland and the wider UK. At present, there is limited (if any) wholesale infrastructure competition in most of Scotland, with remedies such as DPA unlikely to materially change this resulting in variable availability and quality of

³ http://www.scottishfuturestrust.org.uk/files/publications/Impact_of_digitalisation_in_Scotland.pdf

service and experience across different geographies. Further thought should therefore be given as to how these geographic markets break down and how change can be delivered whether by regulatory, governmental or industry intervention. This.

In those (relatively few) towns and cities of Scotland where there are competing wholesale networks, - which may be enhanced by the upcoming Reaching 100% Superfast Broadband programme - thought should be given as to when the competition and de-regulation 'tipping point' is reached. This is compounded by new market entrants emerging in some of the bigger cities – for example, CityFibre in Aberdeen and Edinburgh and Hyperoptic in Glasgow. These suppliers are looking to deploy new fibre-based business and consumer services but there is still no commercial driver to deploy outside core urban areas.

The above serves to demonstrate that the market does not operate in the same way across the whole of the UK and therefore we still consider that going forward Ofcom seeks to ensure that markets are assessed at a more granular, regional, level so as to identify these differences and consider regulatory remedies that take account of, and address, market failure in areas where there is little or no competition at both the infrastructure and services layer.

Where data exists, Ofcom's disposal could be used to produce more robust regional market analysis, both in terms of the infrastructure deficit and quality of experience and service issues in areas that would tend to be considered competitive or commercial. This would help determine whether locational remedies might have a part to play in addressing more localised market failures.

In terms of the geographic markets of the UK another distinction may be in the role that the OR/BT Group plays. This potential classification breaks down as follows:

- Areas of the Country where there is competition: this is primarily within towns and cities and economic centres, where competition exists in the form of competing infrastructure, as well as service providers;
- Areas where Openreach has significant SMP and where they are willing to invest, as there is a commercial rationale for doing so. This builds upon their legacy infrastructure which others would now find challenging to duplicate and compete effectively. This builds upon the WLA; and
- Areas whereby Openreach has significant SMP but chooses not to invest as there is no commercial driver to do so. Here, remedies such as the WLA make little difference as the infrastructure deficit means that there may be negligible benefit from changing service provider. A further position where consumers need protection. Likewise, there is no rationale or justification for the duplication of such assets given the likely cost, and therefore regulation needs to ensure competition in service provision based upon high performing infrastructure relevant to the location and the end user performance experience.

Different approaches to regulating OR (and segments of the market such as WLA) may well therefore be needed in different areas including the USO, wider industry levy(ies) to support hard to reach areas roll-out and / or direction by Ofcom for investment against a regulated asset return. Furthermore, a

review of the evidence of where investment has occurred in recent years by OR and others (excluding the BDUK contracts) should be undertaken to understand how and where industry invests, and more specifically how OR's investment has been targeted across the UK. This ties back into considering the differently performing regions of the UK (and Scotland).

The regulatory aspects that underpin the telecoms industry are complex in nature, and one of the key aim of regulation should be to ensure a high-quality experience for end users, thereby considering the end-to-end workings of the telecoms value chain. At the time of writing, there are a number of key Ofcom consultations that are seeking a response: Customer Compensation, Quality of Service, the WLA and PIA in the near future. Whilst each deal with a specific aspect of the industry and its workings, they do also have elements of inter-relationship. At present, there are some very clear linkages, for instance quality of service is a key aspect of the WLA, and how this performs has impact upon Quality of Service, which in turn impacts upon whether compensation would be due for poor performance. There are different ways in which a high quality of user experience can be achieved, whether through cascading SLAs and SLGs down to the end user, or through a compensation mechanism which should incentivise Communications and Wholesale Infrastructure Providers to deliver targeted performance levels.

Likewise, linked to WLA, how agreements between Openreach ("OR") (and other wholesale infrastructure providers) impact upon the quality of experience of end users should be considered. For instance, what is the connection between OR and any Service Provider, and the speeds which the end user receives from the Service Provider in turn? Thought should be given, whether through SLAs and SLGs, that the products and services sold to consumers are capable of providing the expected services levels that are marketed. Where they don't (and Ofcom has given thought to this) what remedies are available to the end user? Ultimately, however, regulation needs to consider how stated performance standards (and related advertising) are linked through Quality of Service (and end user experience), and how this manifest itself at the WLA level; and what happens with regards to compensation. The measurement and performance reporting from any SMP entity should capture a comparison against any requirements for minimum or guaranteed speeds and product requirements.

The WLA also needs to be considered with regards to the functional separation of OR from the wider BT Group, and whilst there are still conditions attributable to investment, BT Retail as a service (equally as for other parts of the BT Group), should interact with OR in the same way as other service providers. Indeed, it may be for BT Retail that is impacted by elements such as Sub-Loop Unbundling and the proposed provisions around new technologies / approaches. Ultimately, Ofcom should consider how the provisions of functional separation impact upon WLA; whilst there is reference to separation activities in the consultation further clarity on how this would impact upon the WLA OR offering and the workings of the market would be welcome. Also, it is not clear the extent to which the impact of functional OR separation has been assessed as part of the modelling undertaken: for instance, would the WACC change – driving a different result at an OR level, which has responsibility for separate accounting policies to the wider group.

V1, Question 3.2: Do you agree with our proposal that BT holds SMP in the supply of WLA products in the UK excluding the Hull Area? Please provide reasons and evidence in support of your views.

We agree with Ofcom's conclusion with respect to BT's ownership of SMP throughout the UK, and would suggest that this SMP is further amplified in Scotland's rural and semi-rural areas.

V1, Question 5.1: Do you agree with our proposed general remedies? Please provide reasons and evidence in support of your views.

Ofcom has proposed the following general remedies:

- Requirement to provide network access on reasonable request;
- Requirement to publish and operate a process for requests for new forms of network access;
- Requirement not to unduly discriminate and EOI;
- Requirement to publish a reference offer;
- Requirement to notify changes to charges, terms and conditions;
- Requirement to notify technical information;
- Cost accounting; and
- Accounting separation.

We agree with the general remedies proposed above, however, we would suggest that these need to be considered in the context of overall regulatory remedies in relation to the full end user experience and quality of service that addresses the full value chain of service provision (from the World Wide Web through to end user router point). Clarity on the interaction of the various remedies that address this end to end user experience – beyond those considered as part of this WLA consultation - would be welcomed.

Ofcom should ensure that Openreach provide sufficient EOI for other service providers to guard against market distortion at the service level due to reduced costs to the incumbent provider. This is particularly important in those areas where there will be few potential service providers due to limited market demand – for example rural Scotland.

The WLA (and other industry products and services), would benefit from an asset and condition register from OR. Access to such information when considering investment roll out should not be an additional cost for any infrastructure provider looking to build upon existing OR infrastructure. Such information should be readily available at a high level to engender investment considerations.

In terms of the specific remedies highlighted in the consultation document, Ofcom may wish to give further consideration to the 'Proposed framework for allowing changes to BT's LLU obligations'⁴. In this instance, the Consultation discusses a rationale for where Ofcom may consider a change to BT's (we presume OR's?) LLU obligations to support the deployment of new technology. The provisions propose the way in which this would happen, however, Ofcom may wish to give consideration as to how compensation would be made to any incumbent provider utilising the LLU provisions. Given the example, LR-VDSL, this may be applicable in areas where community organisations, or community focussed providers are present and changing the business model may have an impact upon the

⁴ p.103, WLA Market Review – Volume 1, 2017

viability of a competing service. In this instance as well, any change should be predicated upon being able to offer guaranteed speeds and service in excess of the previous solutions, with a no 'better or worse off' provision for the end user in terms of affordability (possibly for a defined period) and/or service provision (including the cost of 'switching').

Ofcom may also wish to consider how many cabinets and/or exchanges are deployed and upgraded within rural areas. To ensure that they are configured to allow LLU and VULA products to be offered and that other service providers are not financially disadvantaged in trying to offer services to a disparate number of users within a rural area.

V1, Question 7.1: Do you agree with our proposal to impose a quality of service SMP condition? Please provide reasons and evidence in support of your views.

We agree and support the Quality of Service SMP condition. However, we note the other consultations around the QoS issue and that these should all align from the Infrastructure provider through to the service provider. There should be transparency to the consumer of what they should expect and which part of the value chain holds responsibility/liability for any SLAs and SLG's.

V1, Question 8.1: Do you agree with our proposals for the price regulation of VULA? Please provide reasons and evidence in support of your views.

We are in broad agreement with Ofcom as regards the proposed approach to the above. We would however suggest that Ofcom should ensure that the regulations evolve to see a sliding approach to benchmarking charge controlled services. For instance, 40/10 services being re-rated as 80/20 in the future.

Such benchmarks should also be comparable for different regions and parts of the Country, such that there should be an aspiration for rural and remote areas to have access to similar products and services as other more populated areas of Scotland.

Regarding ultrafast broadband, there is a link to other Ofcom regulation and the basis of the BCMR. Thought should be given as to how these regulatory approaches may converge, particularly in providing better services and products for Scotland's (and the UK's) businesses regardless of size.

Question 9.1: Do you agree with our proposals for the price regulation of LLU and SLU? Please provide reasons and evidence in support of your views

See question 5.1 and 8.1. similar elements would apply here.

Given the nature of Volume 2, and industry having a greater level of knowledge and understanding of the specifics outlined. We do have a question of clarity about the WACC and its basis for the modelling.

V2, Question 4.4: Do you agree with our proposed bottom-up cost modelling for GEA services? Please provide reasons and evidence to support your answer.

Given the (effective removal) of cost of capital where publicly funded investment in a network is made, greater clarity as to how publicly funded element of infrastructure investment is recognised in the calculations of, amongst other things, WACC would be helpful. Given the relative scale of recent public funding through the BDUK frameworks, it would be helpful to assess the impact this might have on, primarily OR, WACC vis-à-vis other infrastructure providers. Having reviewed the consultation material, we have been unable to clearly establish how the impact of public funding is reflected through the financial calculations.

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