BT's response to Ofcom's consultation document

"Promoting network competition in superfast and ultrafast broadband"

18 January 2018

NON-CONFIDENTIAL VERSION

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1 Introduction and summary

1.1 On 1 December 2017 Ofcom published a consultation entitled "Promoting network competition in superfast and ultrafast broadband", as part of its Wholesale Local Access (WLA) Market Review (Consultation).

1.2 BT considers that Ofcom's proposal to prohibit any form of locally targeted discounting is unlawful and, in any case, unnecessary. Ofcom's existing powers under: (a) ex post competition law; (b) dispute resolution powers; and (c) its existing suite of proposed WLA remedies are sufficient to assess properly, on a case-by-case basis, any potential concerns which might arise from any individual prices launched by Openreach.

1.3 Ofcom is expected to issue its draft WLA statement within the next six weeks, to be able to issue the final statement before 1 April 2018, at which time the new WLA remedies are envisaged to come into power. BT is concerned that a consultation on an additional remedy within such a short time window leaves insufficient time for Ofcom and stakeholders to consider fully the legality and the economic consequences of the proposed remedy.

1.4 This is exacerbated by the fact that Ofcom presented no evidence or analysis of its competition concern or any cost-benefit analysis of its proposed remedy. It does not sufficiently consider alternatives to the proposed remedy.

1.5 BT is concerned that the proposed remedy may systematically disadvantage its own downstream businesses where they consume Openreach's GEA services, as well as any other CP relying on Openreach's network. If retail prices for SFBB and/or UFBB services are lowered in certain geographic areas due to localised infrastructure competition, but Openreach is unable to respond, competition in the retail market may be skewed in favour of vertically integrated rival networks and any other retailers using these networks, at the expense of CPs relying on Openreach's network.

1.6 BT faces the additional risk of breaching margin squeeze rules in the event that downstream businesses seek to match lower retail prices and, in so doing, leave insufficient margins over Openreach's input prices. This would be a highly perverse outcome as the margin squeeze would not be caused by BT's pricing behaviour but by a combination of network competitors' pricing behaviour and regulatory restrictions on Openreach's pricing.

1.7 Finally we wish to address misleading allegations included by Vodafone in its letter to Ofcom from October 2017, which is publicly available on Ofcom's website. We address the historical events that Vodafone makes reference to, and explain why they do not show that BT has "form" in relation to strategic responses to market entry.

1.8 For completeness, we confirm that BT also fully supports and endorses the response of Openreach to the Consultation. This submission sets out the additional concerns of BT as a downstream business using inputs from Openreach.

2 Retail prices

2.1 BT's downstream businesses[1] rely on Openreach's GEA and G.fast services to compete in downstream markets. Markets downstream of the WLA market are competitive and largely unregulated[2]; in particular, there is vibrant and effective competition between CPs relying on Openreach's network and vertically integrated network competitors.

2.2 In its response to the March 2017 WLA Market Review consultation, BT explained that [✂].[3] As more localised competition emerges, there may be additional pressure on retail prices.

2.3 This poses a question which Ofcom does not address. Virgin Media will compete unimpeded with network rivals and may do so by introducing targeted geographic discounts at the retail level. If it does, BT and the other users of the Openreach network may be placed at a competitive disadvantage in certain geographic areas unless they also reduce their retail price. Ofcom's proposed regulation means that Openreach cannot support its CPs through targeted discounts, and retailers have to absorb the margin loss.

2.4 If CPs (other than BT) were to switch to become wholesale customers of rival networks in order to address this problem, but BT did not, this would create a further distortion to retail competition.

2.5 For BT's downstream businesses, a further risk of margin squeeze arises. Although Ofcom does not intend to introduce additional measures to restrict BT's retail pricing, it points out that where fair and reasonable pricing applies, Ofcom would be concerned if "*the margin on BT's fibre services was such that retail telecoms providers would be unable to offer these services profitably.*"[4] Ofcom appears to see this as limiting the degree of retail discounting which might take place.

2.6 It would be wholly inappropriate, however, if the wholesale price (which may be artificially held up by Ofcom's proposed remedy) were to give rise to a margin squeeze at competitive retail prices driven by Virgin Media's discounting conduct.

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[1] Consumer, EE, Plusnet, Wholesale and Ventures, Business and Public Sector and Global Services.

[2] BT currently only has SMP in the Wholesale Broadband Access market in Market A, currently encompassing c. 10% of the UK (excluding Hull).

[3] BT Group response to Ofcom's WLA consultation, paragraphs 2.41/42.

[4] Ofcom, "*Wholesale Local Access Market Review- Promoting network competition in superfast and ultrafast broadband*", December 2017, paragraph 4.14.

3 BT does not have "form" as alleged by Vodafone

3.1 BT is concerned about the reliability of evidence put to Ofcom by Vodafone in a letter dated 17 October 2017. Specifically it contains a number of misleading claims about BT's historical behaviour. The letter is publicly available on Ofcom's website, and even if Ofcom did not refer in its consultation to the misleading evidence contained in Vodafone's letter, other readers may wrongly assume that Vodafone's claims are accurate. We therefore wish to explain here why they are misleading and do not show that BT has "form" in relation to strategic responses to market entry.

3.2 Vodafone alleges in its letter to Ofcom that BT has "*form when it comes to strategic responses to market entry*".[5] Vodafone quotes two examples in which it alleges BT used aggressive discounting to deter competition, namely: (a) bidding for wholesale end to end calls in 2007/8; and (b) bidding for EE's contract for scale emergency call handling (999/112) in 2011.

3.3 For the reasons set out below Vodafone's claims are misleading.

The market for wholesale end to end calls

3.4 Vodafone has claimed that BT's aggressive pricing behaviour in 2007/8 had a "*lasting impact on the market and consumers more broadly*", and that *"BT carr[ied] over its dominance into successor services (like IPX), where it remains unchallenged by any serious wholesale competition*", despite technological changes having altered the shape of today's market for end to end calls. Vodafone is wrong on all counts:

- First, Ofcom undertook a lengthy and detailed investigation into BT's behaviour at the time and did not find any abuse of dominance by BT or any anti-competitive effects.[6]
- Second, in the most recent Narrowband Market Review Ofcom found that BT's market share in the wholesale call origination market (a key regulated input product for Wholesale Calls) had declined to 48% in 2016/17, "*just below the level which creates a presumption of SMP*".[7] It has been declining steadily over the last five years. BT's market position has therefore not remained unchallenged.[8]
- Third, IPX services are an interconnect and transit service between different IP platforms, rather than an end-to-end call service. It is inaccurate to describe it as a "successor service" to end to end calls. The new IP technology has a different architecture to the old TDM technology and does not allow for direct comparisons of the kind that Vodafone is insinuating.

[5] Letter from Vodafone to Ofcom dated 6 October 2017. Available at https://www.ofcom.org.uk/__data/assets/pdf_file/0020/108371/vodafone-letter.pdf.

[6] Final Decision of The Office of Communications - CW/988/06/08: Complaint from THUS plc and Gamma Telecom Limited against BT about alleged margin squeeze in Wholesale Calls pricing, 20 June 2013, available at https://www.ofcom.org.uk/__data/assets/pdf_file/0018/79011/final.pdf, paragraph 1.4: *"Our analysis of the evidence shows that anti-competitive effects did not arise in this case".*

[7] Ofcom's Narrowband Market Review Final Statement, November 2017, Figure 6.2 and paragraph 6.42, available at https://www.ofcom.org.uk/__data/assets/pdf_file/0020/108353/final-statement-narrowband-market-review.pdf.

[8] Furthermore, Ofcom did not deem the end-to-end wholesale calls market to be a market that was susceptible to ex ante regulation. Ibid, para 4.158.

The market for scale emergency call handling

3.5 Vodafone alleges that BT won EE's contract for emergency call handling as a result of aggressive targeted discounting, forcing Cable & Wireless Worldwide (C&WW) to exit the market.

3.6 Vodafone's allegation is inaccurate and misleading. BT's prices did not cause EE to award its 999 call handling business to BT. The real trigger was instead the announcement in April 2012 of Vodafone's acquisition of C&WW.

3.7 In late 2011 C&WW had beaten BT to win the tender to handle all of EE's 999 calls. In April 2012, Vodafone announced its intention to take over C&WW. Shortly afterwards EE contacted BT and reopened discussions about its emergency call handling requirements. EE took this proactive step because it did not want a major competitor in the mobile market to be handling its emergency calls. In other words, EE's decision to reconsider BT had nothing to do with BT's pricing and everything to do with Vodafone's takeover of C&WW.

3.8 EE and BT only reached agreement over EE's emergency calls contract in early 2013, after C&WW had announced it was closing down its 999 platform in December 2012.

3.9 Contrary to Vodafone's allegation that BT now exploits a "*monopoly position*", BT did not increase its prices for nearly seven years, from 2009 until October 2016. [✂]