

## **Ofcom consultation: Delivering super-fast broadband in the UK**

### **Response from Tiscali UK Ltd**

**December 2<sup>nd</sup> 2008**

Tiscali responded to the first Ofcom consultation on this subject a year ago and much of what was said then is relevant now. The text of that response is included as an annex to this second response.

Although certain aspects of this subject have moved on since late 2007, most notably BT's announcement of significant fibre access investment plans (which had always been denied), the debate about what Ofcom should do has not changed much. In the absence of a market change that leads to a review and regulatory remedies, much of the discussion is speculation on what may transpire and future possibilities for regulation. Tiscali's main concern in this area is that Ofcom exercises the regulatory powers it has in markets that exist for as long as they exist and that it addresses new markets rapidly and effectively when they are formed. The great risk to the competitive environment is that a dominant access network owner is allowed to enjoy a period of freedom from justifiable regulation that arises from hesitation and inertia on the part of the regulatory authority to the detriment of the market and the UK consumer.

Key points in response to the present consultation are as follows:

- A starting point for the regulatory approach should be that the principles of equality of access and the basis of the BT Undertakings must be maintained and promoted throughout the next era of development in the UK broadband market.
- Ofcom should take a pragmatic view on regulatory activities, enforcing current remedies on existing markets and acting swiftly and decisively to review and regulate new ones as and when necessary.
- Commercial negotiations will address the design of active products and parties will ask for Ofcom intervention if a dispute arises. A continuing review of the potential for passive products is required and existing regulatory requirements for sub-loop unbundling must be enforced as the product is developed and demand is proven.
- Ofcom's approach to price regulation must be practical and avoid delays in deliberation or implementation, to eliminate the risk of periods of uncontrolled dominance that may be unfairly leveraged. Ofcom must be prepared to price regulate active access products if necessary and carry out reviews to address regulatory challenges as quickly as possible.

### **Questions**

**1 Is there further evidence available on the applications and services or consumer benefits that may be supported by next generation access?**

Ofcom identifies many potential applications for consumers and businesses that may be supported by next generation access (NGA) and the industry is currently devoting

considerable time to speculation on the subject. Evidence flows constantly and does not necessarily include one or a few 'killer' applications that will provide a motivation for major NGA investment. Tiscali does not feel that Ofcom needs to focus on this aspect of the subject area as a priority.

## **2 Who should lead on defining and implementing a process for migrations to and from next generation access networks? What roles should industry, Ofcom and other bodies play?**

As far as possible, migrations processes should be consistent with or even the same as those that exist for broadband services and networks that exist today. The lowest effective quantity of rules and processes should be the aim of industry and regulator working in this area. The current approach of the OTA, backed up by Ofcom and working with the industry group is a good one, as long as it produces effective processes. If Ofcom needs to develop new regulatory solutions, it should do so as a matter of course and as a part of its primary responsibilities.

The key point to make on migration capabilities is that they must be built in to new wholesale products as they are developed to ensure that no unnecessary detriment to the consumer is included in product design. This is an issue for Openreach and industry to address now as discussions on the specification of new products proceed.

## **3 What role is there for Ofcom in the ongoing debate on next generation access versus industry's role in progressing this debate through multi-lateral and bi-lateral discussion?**

This question is unnecessary. Owners of next generation access networks will develop products based upon them with their wholesale customers. Ofcom will be required to regulate where some sort of market dominance is detected. This may result in regulatory product and network access specifications, control of prices and investment returns and the review of consumer protection measures.

## **4 How far does current regulation, including market definitions, equivalence and the BT Undertakings, need to evolve as a result of next generation access deployment?**

As NGA is deployed, it may become clear that current regulation needs to evolve very little. Markets may not change, equivalence must remain as a guiding principle and the BT Undertakings may be subject to further variations and exemptions exactly as they have been since their inception. A pragmatic approach to this is required by Ofcom, to ensure that no unnecessary intervention occurs but that all the regulation required by the market realities is carried out. Ultimately, one cannot answer this question until meaningful deployment occurs.

**5 How important are passive products such as forms of sub-loop unbundling and duct access? Can the economics of these products support the promotion of effective and sustainable competition at this level? Which passive products should Ofcom pursue?**

Sub-loop unbundling is a regulatory product requirement and an existing Openreach product. Industry has been working on making it fit for purpose and should continue to do so. Issues to resolve include systems and process integration and the availability of adequate backhaul products. Sub-loop unbundling may not be universally geographically viable, but it should be maintained as a passive access solution. It should also form a part of the equivalence product stack that will emerge as Openreach develops fibre access and regulatory questions regarding BT consumption of the product must be answered before BT renders them unanswerable by developing products that circumvent regulation. There may be some way to go before the true model of investment that will support the deployment of sub-loop unbundling by CPs emerges. A relatively small amount of true external demand will be enough to justify the strong regulatory stance on sub-loop unbundling as an equivalence product and Ofcom must be prepared to act decisively in this area to avoid an outcome where BT is able to kill sub-loop unbundling even while it is a regulatory product requirement and real investment plans exist.

Duct access should be pursued as a possibility, as Ofcom suggests. Regulatory attention must be driven by the likelihood of investment, however, to ensure that resources that may be directed towards other solutions are not wasted.

To promote the principles established by the strategic review that the UK industry relies on, Ofcom should continue to investigate regulatory solutions based on fibre and wavelength unbundling, especially in view of recent developments in the Netherlands. The outcomes of the strategic review were focused on LLU as the deepest level of infrastructure competition and principles should be carried over to NGA, rather than rejected in favour of super-bitstream products, which could be little better than wholesale broadband access products of the past.

**6 What are the characteristics of high quality, fit for purpose active wholesale products? How far can active products with these characteristics support effective and sustainable competition?**

Openreach is currently developing these products, in negotiation with its customers. If specifications are not agreed, CPs may reasonably be expected to approach Ofcom for help in resolving a dispute, especially if BT has a position of dominance to gain advantage from. Active products can certainly form an important part of any competitive environment arising after NGA investment, but only in conjunction with effective and viable passive access alternatives. The reasons for CPs choosing passive access will be the same as they were for choosing DataStream or LLU in the past and the key principles in operation now will need to be protected in the future.

**7 Are there other options for promoting competition through regulated access that have not been considered here?**

Ofcom has identified enough options for current purposes.

**8 How far may options for joint investment provide greater opportunities for competition based on passive inputs? Are there lessons that can be learned from similar ventures in other industries? What are the risks and advantages of such approaches?**

Opportunities may arise, but are likely to depend heavily on the presence of material investment by any party other than BT. Market conditions and the nature of competition will have a large influence on this, even to the extent of rendering it irrelevant for some time to come.

Sub-loop unbundling may lend itself to a co-investment approach and this will be clarified as development continues and demand is established.

**9 What should be the respective roles of Ofcom and industry in defining and implementing product standards?**

Industry should certainly be encouraged by regulatory and technical authorities to implement product standards wherever possible. It is to be hoped that industry would devise solutions that work, based on its own interests. Ofcom should be prepared to intervene to protect the interests of the consumer based on existing regulatory powers.

**10 How far do stakeholders consider the pricing approach outlined here of pricing flexibility for active products and cost orientation plus considerations for risk is appropriate at this stage of market development?**

Any price regulation policy should be based on existing regulatory powers and identification of a market situation that requires regulatory intervention. The approach that Ofcom takes, when there is something to take an approach to, should start with an assumption that existing market definitions and remedies are valid and then modify those based on issues that need to be addressed. It may be that super-fast broadband is no more than another product variant within existing markets. It may be that it creates a new and distinct retail market that leads to a new wholesale market for regulation. Where a new market is identified, relevant dominance by participating entities must be established to allow regulatory action.

Where adjustments are to be made for NGA products and markets, different allowances for risk and returns may be appropriate. It is positive of Ofcom to begin discussing these factors now and to offer as much indication of current thinking as possible. Ofcom proposes to continue regulating upstream access products in a familiar way and to allow greater pricing freedom for NGA products while the networks and the market development. This may well be what transpires and the transition from the developing phase to the next one may occur smoothly and without disruption in the wholesale market. However, this is less a policy or proposal and more of a commitment to not do certain things on the regulator's part. Ofcom cannot regulate if there is no cause to do so, be it dominance of a market or consumer protection. As alternative NGA products launch they may not be subject to existing regulatory remedies, as suggested above. If this is the case, the approach that Ofcom proposes will automatically be valid. If, however, a demonstrable dominance on the part of any access network owner arises, with or without accompanying dominance in

retail markets, Ofcom will be required to act in accordance with its duties. The great risk to competing operators and the choice and variety enjoyed by consumers will be of lack of competition due to a time lag between changes in the market that produce dominance and regulatory remedies coming into operation to address them. Tiscali urges Ofcom to consider this risk, look ahead to investments that are planned (especially by BT) and devise a strategy for dealing with new dominance and new markets relating to NGA deployment. In particular, Ofcom must be prepared to regulate the prices of new NGA-based wholesale products if they are not adequately constrained by upstream products (sub-loop unbundling or LLU) or other access networks (cable).

**11 Will indirect constraints allow for an approach based on more price flexibility for active products? How will such an approach affect the incentives of different operators to invest and deliver super-fast broadband services to end customers?**

The types of constraint envisaged will probably mean that super-fast broadband is an addition to the range of broadband services available rather than a completely new market. This will mean that improved retail services will be unlikely to entail very high prices and investment decisions will be based on scale and quality factors as well as line speeds. This would indicate incentives being limited to either small-scale local opportunities or national scale roll out, with nothing in between.

**12 What period of time would be appropriate for such an approach to ensure a balance between the need for longer term regulatory certainty with the inherent demand and supply side uncertainty in super-fast broadband and next generation access?**

It is not possible to answer this question and it is not appropriate for Ofcom to consider a strategy of reduced regulatory certainty where the facts of the case will indicate the requirement for regulation. As discussed above, the policy proposed is really a decision not to do things while there is no requirement to do them. Once the requirement is there, Ofcom must act upon it.

**13 What are the key factors that could make a review of any pricing approach necessary?**

It will not be possible for Ofcom to measure the extent to which the market has 'settled down'. Ofcom should monitor all the elements of the market that are available on an ongoing basis as NGA products are launched. It should also review requirements to regulate under existing powers and in existing markets and explicitly communicate the results of that review to inform market participants. There will not need to be any suggestion of special flexibility or forbearance by Ofcom to allow the market to develop. Caution on the risk of margin squeeze will be essential, as suggested.

**14 How far can the generic model for transition outlined here deliver both incentives to invest in next generation access while ensuring existing competition is not undermined?**

Any such transition process will depend on the willingness of the network owner to engage in it and it is not clear what role the regulatory authority would have in enforcing the use of one. It is likely that a meaningful and effective plan will arise from the need for the network owner to collaborate with its customers and provide products that address consumer needs.

It is helpful to discuss generic approaches at an early stage, but this should not be Ofcom's focus. It is not clear how any defined approach would affect investment decisions, but an effective process will allow for the protection of existing retail markets and consumer choice. Ofcom is correct to consider those aspects of transition scenarios on the basis of consumer welfare and, if appropriate, obligations to maintain wholesale supply.

**15 What triggers would be appropriate for the commencement of any transition process?**

The trigger would be the launch of NGA products upon which retail offerings are based. As Openreach GEA products are now well specified and approaching launch capability, the commencement is nearer than may be supposed. Ofcom should consider conflicts between Openreach proposals and existing regulatory obligations to assess any need to modify the proposals and any subsequent transition plan.

**16 Once triggers or circumstances for transition are achieved, what would be an appropriate period for the various phases of transition (consultation, notice period, transition)?**

It is not appropriate to attempt to answer questions of detail at this stage, especially with the perspective on this subject offered above. The industry group should be able to address this as and when needed and Ofcom will be requested to intervene if a dispute arises between a NGA network owner and its customers. Ofcom does need to be prepared to implement transition between existing and new regulatory regimes, should the need arise, and this has been discussed above.

**17 Over what geographic area should any process of transition be managed, for example region by region or nationally?**

Nationally.

**18 What actions, if any, should Ofcom undertake to support new revenue models from next generation access?**

The market will develop new revenue models as a natural evolution and Ofcom does not need to do anything in relation to this. Although it is interesting to examine economic models and possibilities and stimulate discussion across the industry community, resource should be directed towards the maintenance of existing regulatory regimes and the need to review them or new markets.

**19 What role should public sector intervention have in delivering next generation access?**

Tiscali believes that any participation by the public sector in NGA deployments will be based on individual cases of need and appropriateness. It is to be hoped that such participations will be in partnership with the private sector wherever that will assist in achieving objectives to benefit the UK population.

Tiscali does not believe that there is a problem in the UK market that needs to be fixed by public sector intervention. Any public sector involvement in such deployments must always comply with legal and regulatory restrictions on this type of activity, to protect competition and promote the growth of the market.

**20 Are these the right actions for Ofcom and other stakeholders to be undertaking at this time? What other actions need to be taken or co-ordinated by Ofcom?**

Ofcom correctly identifies the range of actions and interactions that will be needed across the stakeholder group during future months. Ofcom does not, however, need to involve itself in commercial relationships and discussions or to coordinate activities that do not relate directly to regulatory policy development. Ofcom should focus on how existing regulation will be affected by new networks, how new market review activity may be required by new networks and how consumer welfare may be affected by new networks. An assumption that new products fall within existing markets is a good place to start. Ofcom should also review all NGA product proposals to ensure that they do not subvert or circumvent regulatory obligations in a way that would entail a deeper review. As deployments occur and the market develops, it should not be difficult to identify changes that require new market definitions and more work in reviewing regulatory remedies. At this stage, the focus for Ofcom should be on preparing to engage in this type of review without losing time to the detriment of competition and the UK consumer.

## **Annex**

Tiscali's response to the first NGA consultation, submitted December 2007.

### **Next Generation Access**

#### **Tiscali UK response to Ofcom consultation**

What follows is the response of Tiscali UK to the Ofcom consultation on Next Generation Access published on 26<sup>th</sup> September 2007. Key points that Tiscali wishes to make are presented below, followed by answers to the questions posed by Ofcom in the consultation document.

- There is no current delay or failure in technological and market development in the UK relating to this subject. The potential of the copper access network is not exhausted and LLU operators are delivering innovative services and product bundles to UK consumers across the full range of service types.
- Regardless of the above and in view of the fact that BT is now planning to deploy fibre to the home in new developments, regulatory certainty as promoted by Ofcom is a desirable objective that the industry should support.
- There is currently no case for regulatory forbearance or public intervention or investment to stimulate next generation access network deployment in the UK.
- As the subjects of this debate are networks, products and markets that do not exist, Ofcom should aim to clearly describe scenarios that may transpire in future to aid understanding of it's thinking and proposals. This would be to go further than what is in the consultation document and take a very simple, practical view of the purpose of the current debate.
- Ofcom should clearly state any aims or tolerances that it has for the UK industry in terms of infrastructure competition, regulatory bottlenecks and eventual outcomes for consumers (in a way similar to the commitment to LLU made during the strategic review and undertakings process). If Ofcom does not have any such aims, it should make that clear and then address potential impacts on previous commitments demonstrated in the scenario approach suggested above.

Further brief comments and observations are organised under headings below.

#### **Risk returns**

Ofcom's approach to regulated risk returns is irrelevant if no investment in next generation access networks is made. It is also irrelevant if no investment creates an SMP situation requiring regulatory intervention. Ofcom should not be concerned with devising an approach that gives an investment incentive (there is no problem to address), but should aim to achieve clarity of views and the simplest policy possible. It is very unlikely that anchor product regulation would meet these criteria, as it would bring enough potential for margin squeeze and continuous industry dispute to render it inoperable.



### **Wholesale remedies**

If next generation access networks were to exist that were owned by organisations with SMP, a complete and workable solution to the issue of wholesale supply to enable competition would have to be found. This would involve the design of high quality active line access products as well as infrastructure/unbundling products that may be feasible and required. It is far too early to draw negative conclusions on unbundling of fibre access, as other countries are pursuing developments in this area (Japan, for example) that challenge current thinking in the UK on the viability of fibre and wavelength unbundling. The equivalence of inputs product stack would have to be redesigned to take account of new wholesale products and absolute clarity achieved on what Openreach would sell and BT Wholesale/Retail would buy.

### **Sub-loop unbundling**

Ofcom is correct to suggest that this is one of the remedies that will prove necessary and that it is in need of further development. A workable business case is required to give a sensible view of what might be done with SLU, but this will depend on answers to questions about backhaul products and capabilities (to both exchange and street cabinet) and whether or not SLU is to be an equivalence of input product sold by Openreach to downstream BT divisions.

### **Transition plans**

Although this will be very much theoretical thinking, there must be strong protection for business models based on current regulation and commitments, focused on LLU. If Ofcom needs to adapt the regulatory environment to take account of new access networks in the future, it must also adapt commitments made to investment models that have been implemented by industry members in good faith. Measures necessary would have to take account of the potential for stranded assets and recovered network investment costs and may include elements of financial compensation.

### **Network issues**

There is currently an issue in the UK market, caused by third party video distribution across the Internet, that creates capacity and cost problems that need to be addressed by all parties across the industry. If access network speeds and capacities were boosted, this type of application would be encouraged, but current backhaul products available from Openreach would be even less appropriate to the situation than they are now. These products are not cheap or scalable enough to suit next generation demands and this will need to be addressed alongside any consideration of regulatory approaches to next generation access. Ofcom acknowledges this in the consultation document, but much more detail and examination will be needed to ensure that both things are dealt with at once.

Answers to questions contained within the consultation document are set out below.

### **1 When do you consider it would be timely and efficient for next generation access investment to take place in the UK?**

Although the UK may be later to begin deploying fibre access than other developed countries, this is not evidence of any problem or deficiency in the UK industry. Relative timing is affected mainly by issues to do with established technology (DSL versus cable, quality of DSL etc), geography (population density, cable footprint) and

penetration of different platforms (such as satellite TV). Therefore, there is no reason to conclude that there is a delay to investment or implementation in the UK.

Ofcom should provide clarity on regulatory factors that would affect any future investment in next generation access, especially as BT has begun the trial of FTTH at Ebbsfleet, but should not be tasked with ensuring that any investment actually occurs. The market will take care of investment decisions, led by consumer demand as Ofcom suggests, and they will be made easier by the absence of confusion about regulatory environmental aspects.

It may be the case that next generation access investments take place that are not timely or efficient, but they will occur because of the market and this is not under the control of Ofcom. The question above is impossible to answer, but Tiscali will always be interested to optimise the use of access technologies to achieve the best possible combination of cost efficiency and service functionality to the benefit of end users.

## **2 Do you agree with the principles outlined for regulating next generation access?**

Tiscali does generally agree with principles outlined by Ofcom.

As mentioned above, Tiscali does not accept that Ofcom has any duty to secure investment of any specific type, size or timing. Therefore, relevant principles should be framed with this in mind. Ofcom does have a duty to ensure that regulatory clarity is provided where possible and that markets and investments are contestable.

The principles for promoting competition are good ones and Ofcom is correct to remain true to those established during the Strategic Review and to adopt a pragmatic approach to the transition from existing regulation, as and when that becomes necessary.

## **3 How should Ofcom reflect risk in regulated access terms?**

While Tiscali agrees that a sensible approach to risk returns should be taken to ensure that regulatory factors are not disincentives to investment, there are major issues to address with the more complex solutions discussed in the consultation document. Some aspects of anchor product price regulation may be usable in practical solutions, but the many problems and drawbacks with this untested regulatory technique render it inappropriate for Ofcom consideration currently. It is unlikely that industry could agree on products and prices to begin with and very likely that the need for review would be onerous and continuous thereafter. There is no good precedent for regulatory measures requiring constant update by Ofcom and Tiscali does not believe that Ofcom is organised or motivated to enter into such an arrangement.

Of course, simply allowing the monopoly access network owner to charge whatever it likes for next generation access products is not feasible and that would represent a lack of regulation rather than a regulatory approach. Ofcom has always been correct to stand firm against regulatory forbearance in such examples.

A solution to the need to reflect risk in access terms will probably lie in the development of risk assessment for price regulation developing out of principles with which the UK is very well acquainted. Although calculations may be complex and somewhat onerous to complete and update going forward, such a method would at least guarantee a level of fairness and transparency that is based on established principles and methods and should work adequately for both sides of the commercial equation.

#### **4 Do you agree with the need for both passive and active access remedies to promote competition?**

Tiscali does agree with this and generally supports Ofcom's conclusions within the consultation document. Although the landscape will be changed, it will remain essential to maintain the commitment to overall principles such as equivalence and deepest level infrastructure competition when next generation access becomes a reality.

It does appear that FTTH deployments will be based on GPON technology and therefore an active access remedy will be appropriate and viable. This is already being discussed with BT in relation to Ebbsfleet and one hopes that good precedents will be set for any future scale deployment of FTTH. It is vital that Ofcom is prepared to play an active role in this process as the danger of wholesale products being sub-standard or tailored to suit BT downstream businesses is very real. It should also be acknowledged that there could be a geographical aspect to SMP in the future, where localised fibre access networks create localised dominance, so remedies may need to be applied to a number of different access network owners.

Sub-loop unbundling and active access are desirable remedies for FTTC deployment scenarios. There are many outstanding issues to be resolved with sub-loop unbundling as a viable product and the industry group is addressing these. Tiscali believes that this effort should continue and also that no passive access remedies should be definitively excluded at this theoretical stage. It may be that duct access becomes economically viable at some future stage or that fibre unbundling benefits from technological developments that make it more feasible as a solution. Ofcom is correct to acknowledge the historical commitment to infrastructure competition and this commitment should be maintained, to both existing platforms like LLU and future ones like wholesale fibre access.

As Ofcom suggests, the availability of appropriate backhaul services is critical. Where control of bottleneck assets extends into backhaul, it will be necessary to ensure that new high-performance backhaul products are made available. These are likely to include new dark fibre products as well as Ethernet products similar to those offered by BT today. Current solutions will not be adequate in a world of high capacity fibre access networks and services that rely on them and they are proving inadequate even today when faced with demands created by new applications. Strong regulatory action will be necessary to produce a backhaul outcome that is significantly better than the expensive and inefficient one that CPs suffer currently.

The Strategic Review and BT undertakings promote LLU as the central solution to competition problems and the UK industry has responded to this commitment by

making LLU a success. Next generation access may change the network fundamentals, but the commitment to principles should remain. Where passive access is not viable, flexibility on active access specifications should be a key focus. Thus, there is likely to be the need for versions of new bitstream products that allow interconnection at exchange level as well as core node level. This should allow CPs to continue to choose how to configure technologies and services and optimise innovation potential in the UK market.

**5 Do you consider there to be a role of direct regulatory or public policy intervention to create artificial incentives for earlier investment in next generation access?**

Tiscali does not believe there is any case for regulatory or state intervention of any kind to stimulate earlier investment in next generation access.

Tiscali generally agrees with Ofcom's analysis and conclusions on this subject. The UK communications market is innovative and competitive and consumer demand would lead to investment in and commercial development of new fibre-based access deployments, where it existed. There is still some way to go to achieve full exploitation of network technologies that already exist and reason to believe that the copper network may have more to offer. Demand for new or improved retail services, such as HD IPTV or very high speed Internet access, will need much more than high capacity access networks anyway. Issues with backhaul networks, including product design and cost and network capacity, would have to be resolved to enable such improvements to be made and this is being demonstrated by new challenges arising from the proliferation of third party video offerings that are creating load and congestion problems for CP networks in the UK.