

Business Impact Assessment of Ofcom's Actions

CMA is pleased that Ofcom has made a considerable effort to consider the needs of the business community, in line with its principal statutory duty. Ofcom however does not appear to have adequately understood the impact of its proposed actions on the business community. There appear to be errors in the underlying research, and in Ofcom's understanding of products and services in the business consumer marketplace. There is no definition of "Principal Operator," and a considerable amount of avoidable repetition in the document itself. We are also driven to comment that document size is no surrogate for document quality and conclude that the needs of business consumers are not met by this document as it stands.

Nevertheless, we are pleased that Lord Currie's comments at last year's CMA conference that Ofcom would pay closer attention to the need of business consumers are being heeded – even if we believe that the conclusions drawn in this paper are wrong in some respects.

Specifically, we are concerned that choice of the wrong policy at this point could lead to geographically de-averaged pricing and the death of infrastructure competition. A core problem is the lack of infrastructure capable of supporting adequate broadband speeds for business, and Ofcom producing a Wholesale Broadband Access review that does not even mention this is especially worrying. Furthermore, Ofcom's claim that it cannot impose regulation on market 3 appears to be in error, because it relies on a skewed definition of the market, and by so doing can claim that its hands are tied under EU law. We refute this. With the correct market definition, EU law would not apply and Ofcom would thus be free to act.

Question 1: Do respondents have any comments, additional to those made in their responses to the November consultation, on Ofcom's approach and conclusions on market definition as set out in Section 3 of this document?

Under the section Residential and Business Wholesale Broadband Access, Ofcom notes:

3.185 This section considers, in light of the responses to the November consultation, whether wholesale broadband access products required to support business retail asymmetric broadband internet access are in the same market as wholesale broadband access products required to support residential retail broadband internet access. As noted above in the discussion of retail product market definition, Ofcom considers that business and residential asymmetric broadband internet access services are in the same relevant market at the retail level. However, as noted there this review is concerned with wholesale level.

3.186 The respondents to the November consultation that commented on Ofcom's conclusion in terms of the wholesale product market definition were concerned that Ofcom had wrongly concluded that a broad market exists, which includes wholesale broadband access for both residential and business asymmetric broadband internet access products. These respondents were of the view that separate residential and business wholesale markets exist.

3.187 Ofcom has carefully reconsidered its conclusions on the definition of the residential and business wholesale broadband access product market in light of the comments received in response to the November consultation. However, Ofcom continues to consider that a broad market exists, which includes wholesale broadband access for both residential and business asymmetric broadband internet access products. This is for the following main reasons:

- The wholesale input to support the provision of asymmetric broadband internet access services to business customers is to all intents and purposes the same as that used to support the provision of such services to residential customers;
- The underlying costs of providing a wholesale broadband access product for business end-use is identical to that for residential end-use;
- There is extremely limited scope for a provider of wholesale broadband access services to price discriminate between the provision of such services for business and residential end use; and
- While there may be a distinction in the "service wrap" around the business service, this additional service wrap is generally downstream to the wholesale broadband access level. This includes the situation where wholesale broadband access is used as part of a VPN. Indeed, as noted in paragraph 3.99 it is possible for a VPN service to be downstream to the retail level.

The extracts above strongly suggest a lack of clarity of appreciation of the differences between the demands of business and residential consumers, which is regrettable.

The key differences include significantly greater demand for capacity, intolerance to poor contention ratios, “military grade” security requirements for mission critical applications, a different “bespoke” product set not even used by consumers (including VPN’s), and the need for the above regardless of geography.

Consequently, the claims made under the bullet points at 3.187 are wrong because:

1. The wholesale inputs (and costs), which might even include the need to provide new infrastructure, are significantly different from those suggested. They are **not** as stated “to all intents and purposes the same.”
2. Other operators may offer a service called a “Broadband” service, but it is not “fit for purpose in the business environment,” and neither is it the same “Broadband” that business requires. The costs are therefore not identical between business and residential end use as claimed.
3. Consequently price discrimination will occur. In fact it must occur, as the inputs used are different.
4. The “service wrap” argument is a red herring. No thought appears to have been given to a scenario where Retail costs to big business might fall below Wholesale rates. Initially this seems impossible – yet it has already occurred in the mobile market. In a forward-looking document, this needs to be considered – whatever the economic and operational difficulties this might pose for the regulator. The specific VPN example cited is unfortunate: VPN’s are not a substitute for Wholesale Broadband.

What really concerns business is that the industry is failing to meet its needs and while the underlying problem of a lack of fibre in local loops persists, reviews of existing markets not only divert attention from this issue; they also divert valuable resources.

We also have some specific concerns about the research undertaken into the business community. Our concerns with the consumer research include:

1. We do not know the size of the businesses approached
2. We do not know how many ADSL lines they had
3. Was an SSNIP test done for business v residential products?
4. No mention was made of VPN’s
5. Why was no attempt made to cross tabulate with the largest business database available for such an important document?

We can only conclude that the underlying research was flawed and that has led Ofcom to some flawed conclusions.

We have recently heard that the approach that we are suggesting is in line with the regulatory policy of another EU National Regulator, so it is clear others see merit in it.

Question 2: Do respondents have any comments, additional to those made in their responses to the November consultation, on Ofcom’s proposed market power findings for the Hull area, Market 1 or Market 2?

At 1.9 Ofcom notes that only 30 responses to the previous consultation were received and at 1.13 notes that “a number of responses” decried the lack of choice of broadband supplier in their area. We do not know what is meant by “a number of responses” and wonder whether this was a statistically significant number. We also are uncertain what Ofcom means by the term: “Principal Operator” This requires definition if we are to measure future progress.

Question 3: Do respondents agree with the approach set out by Ofcom for its market power assessment in Market 3 and its conclusion that there is no-SMP?

No. Furthermore, it is flawed as it stands.

CMA is uneasy about Ofcom's proposal to remove SMP constraints in Market 3. Looking at the demand side the research carried out among the business community shows that in many cases (especially within the small business sector) there is a significant degree of ignorance about the service actually being provided under contract. There is little or no real appreciation of what might happen were Market 3 to be deregulated and the questions looking to future scenarios are limited to a hypothetical 10% price fluctuation.

From the supply side, whilst it is true that Market 3 is rich in competing LLUOs it is also evident that most LLUOs are primarily *consumer-focused* and have little interest in the business market. Consequently, we fear that the emphasis on LLUO activity has not been sufficiently disaggregated and it is this lack of refinement that appears to have led to the conclusion that there is no SMP in Market 3. This is an error and needs to be rectified before Ofcom proceeds further.

We must point out that for business consumers there is limited competition in Market 3 because there is no wholesale provider other than BT.

In the experience of our members the existence of a non-BT wholesale product can often be an illusion. Competing CPs who offer service will not necessarily offer it to other competitors and some of the most significant LLUOs who claim to have businesses xDSL services tend to be uninterested in providing them as they are devoting all their efforts to growing their consumer multi-play market.

The implied risk to business arising from the proposal to remove SMP constraints from Market 3 is that we could see gradual discrimination within BT in favour of BT Retail or Global Service through pricing, services or even development of new products exclusively for BT. Indeed, BT's duties to its shareholders would make this a highly probable outcome – hardly what Ofcom intended.

The likely consequences include a further degradation of already inadequate SLA/SLGs for business-grade services, together with the creation of an in-built competitive advantage for BT Wholesale/ Global when bidding for large tenders that involve ADSL tails covering the sort of geographic spread that medium - large enterprises require. We are also likely see more instances of BTGS deploying their own ADSL equipment in local exchanges (as they are already doing for Ethernet aggregation).

Our overall conclusion is that Ofcom's proposed approach to Market 3 carries with it the danger of handing to BT the business broadband market for medium to large enterprises on a plate.

Question 4: Do respondents have any comments, additional to those made in their response to the November consultation, on Ofcom's proposed regulatory remedies for the Hull area Market 1 or Market 2?

No

Question 5: Do respondents agree with Ofcom's proposals in relation to providing affected parties with a period of notice prior to the removal of certain SMP services conditions in Market 3? In particular do respondents agree with the proposed notice period and the proposed SMP service conditions to which the notice period applies?

CMA does not object to 12 months "per se."

However, we have some concerns because, so far as we can discover, a 12 month notice period only applies to existing customers. Therefore anyone wanting to enter the market to provide retail services using Wholesale Broadband Access may not be able to do so from June 2008 since, as things stand, BT will have no obligation to supply. This does not seem to be an attractive outcome.

CMA

7 Feb 08

Footnote - CMA's Internal Consultation Process on Regulatory Issues

Any consultation document (condoc) received by or notified to CMA is analysed initially by the appropriate Forum Leader for its relevance to business users based in the UK. (The majority of CMA's members are based in this country, with a third of them having responsibility for their employers' international networks and systems).

If the document is considered to be relevant to CMA, it is passed, with initial comments, to members of both the appropriate Forum and the 20 or so members of CMA's "Regulatory College" – ie: those members who have experience in regulatory issues, either with their current employer, or previously with a supplier. The CMA Chairman and CEO are also members of the College. The detailed comments from the College are collated by the Forum Leader in the form of a draft response to the condoc. Note: if the condoc has significant international import, the views of the international user community are likely to be sought. This is done through the International Telecoms User Group (INTUG).

The draft response is sent to all 1500+ user members of the Association, with a request for comment. Comments received are used to modify the initial draft. The final version is cleared with members of the appropriate Forum and Regulatory College (and, if the subject of the consultation is sufficiently weighty, with the CMA Board).

The cleared response is sent by the CMA Secretariat to the originating authority. It might be signed off by the Leader of CMA's Regulatory Forum, and/or by the CMA Chief Executive and Chairman.