

14 February 2008

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Dear David

**O2 (UK) Limited response to Ofcom Statement and Notification: Review of the Wholesale Broadband Access markets 2006/07, Identification of relevant markets, assessment of market power and proposed remedies, November 2007**

**Introduction**

1. As an LLU investor in the UK broadband market, O2 (UK) Limited ("O2") has read Ofcom's Review of the Wholesale Broadband Access Markets 2006/07 (November 2007) ("the Consultation") with interest<sup>1</sup>. We welcome the opportunity to respond to the Consultation.

**Ensuring the regulatory approach remains relevant to the market**

2. We support Ofcom's desire to ensure its regulatory approach remains relevant to the market – and hence, where geographic markets have emerged, to respond accordingly. In our response to Ofcom's earlier consultation: Review of the Wholesale Broadband Access markets 2006/07 in November 2006<sup>2</sup> ("the November Consultation"), we supported Ofcom's proposal that, given the generally anticipated growth of LLU, it would be appropriate to assess Market 3 in a second consultation later in 2007 – thereby enabling Ofcom's analysis to take into account market developments. As regards the other geographic markets identified in the November Consultation, O2 generally agreed with Ofcom's initial assessment that BT (and Hull in its relevant market) had SMP in those markets.

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<sup>1</sup> In 2006, O2 acquired Be, one of the most innovative and technically advanced UK broadband providers and in 2007, O2 launched its well received home broadband service "O2 Broadband".

<sup>2</sup> <http://www.ofcom.org.uk/consult/condocs/wbamr/>

### Ofcom's strategic approach to broadband

3. We note Ofcom's assessment of competition in Market 3 and the conclusion that no player (BT or other) possesses SMP in the Market. In this response, we do not comment in detail on Ofcom's assessment in this respect. Rather, our focus is forward looking: how will Ofcom ensure that its approach to Market 3 interleaves with the holistic context of Ofcom's overall strategic approach to broadband (flowing from Ofcom's Strategic Review of Telecommunications<sup>3</sup>) and all the pieces of the 'regulatory' jigsaw for broadband including BT's Undertakings and wholesale broadband pricing Commitments<sup>4</sup>.
4. We are concerned that, overall, the Consultation doesn't reference this wider strategic approach. For example, Ofcom remarks at paragraph A6.27 of the Consultation that:

*"Ofcom ...does not consider it necessary to assess the impact of the removal of regulation in Market 3 since it does not have the discretion as to whether or not to impose regulation in that market",*

We believe this takes too narrow a view. Notwithstanding Ofcom's logic of this approach in relation to Market 3<sup>5</sup> we do not believe that this should stop Ofcom generally considering the wider context of the Market 3 review as it relates to Ofcom's overall strategic approach to broadband.

5. We would stress that this wider perspective is **not** to determine if Ofcom should remove regulation in Market 3 but rather to ensure that deregulation in the market interleaves with the other elements of Ofcom's overall broadband regulatory "jigsaw". Below, we discuss some of these elements. Ofcom must ensure that it continues to take a holistic approach to broadband – otherwise it risks undoing the regulatory clarity established under the Telecoms Strategic Review.

### Local Loop Unbundling

6. At the outset of the Consultation, Ofcom makes clear that *"Ofcom has identified that competition between networks based on LLU, rather than competition based on wholesale product, is crucial to maintaining the UK's broadband progress."* Ofcom also notes in the Consultation (see section 1.16 – 1.18) that BT commits to providing a period of stability to LLU by not introducing geographically targeted reductions, below a certain level, to its wholesale broadband prices.

<sup>3</sup> [http://www.ofcom.org.uk/consult/condocs/telecoms\\_p2/](http://www.ofcom.org.uk/consult/condocs/telecoms_p2/)

<sup>4</sup> <http://www.ofcom.org.uk/telecoms/ioi/bbpricing/>

<sup>5</sup> In any event, Ofcom does consider the impact of removing the regulation by assessing the impact on Communications Providers who currently purchase wholesale broadband access products from BT (see paragraphs 5.2.06 to 5.2.08 of the Consultation)

7. However, Ofcom fails to mention its own underpinning commitment to supporting LLU margins in its Statement: Broadband Regulation, 30 June 2005<sup>6</sup>. In this Statement, Ofcom makes clear its commitment to support LLU margins should BT reduce the price of its wholesale or intermediate broadband products: “...*should formal regulation be necessary to support the margin available for LLU operators then Ofcom will intervene swiftly and decisively*”. Ofcom’s ongoing commitment to supporting LLU margins is fundamental and there is a clear legitimate expectation that Ofcom will honour this commitment.

### **BT’s Undertakings**

8. We believe that Ofcom should identify where any elements of BT’s Undertakings and the obligations there under are affected as a result of the removal of BT’s SMP in Market 3 – and the impact thereof generally.

### **Next Generation Access**

9. We recommend that Ofcom ensure that its approach to next generation access is absolutely clear and seamless between the comments it makes in its overlapping Consultation in respect of Next Generation Access (Future broadband - Policy approach to next generation access, 26 September 2007) and the comments made in the Consultation. For example, Ofcom explains at paragraph 1.191 of the Consultation that:

*“It is possible that available speeds may increase over the period of this review, for example using so called next generation access technologies. If it transpires that new higher speed applications are developed and increasingly taken up by end consumers, it may be necessary for Ofcom to consider further its definition of broadband internet access services in future market reviews. However, until such a time, these new higher speed services are considered to be included within the scope of this market” (emphasis added).*

10. However, in Ofcom’s Next Generation Access consultation, Ofcom explains:

*“Ofcom has not to date defined which market next generation access networks may fit within – whether an existing market(s) or a new one. Part of the reason for this is that markets are not in general defined by technology but rather in terms of the services they provide. At this time it is not clear whether services provided over fibre access networks would constitute a separate market or fit within the definition of an existing one. Given this uncertainty on the retail services that may be offered over a next generation access network, it is not possible to define the relevant wholesale products. This is because demand for*

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<sup>6</sup> <http://www.ofcom.org.uk/consult/condocs/rwlam/bbr/bbr.pdf>

*wholesale broadband services is derived from retail demand.*" (See Paragraph 8.3, Future broadband - Policy approach to next generation access, 26 September 2007. Paragraph 8.6 also provides relevant context<sup>7</sup>)

11. We believe Ofcom should make clear whether the current "Review of the Wholesale Broadband Access markets 2006/07" is the "market review" Ofcom refers to at paragraph 8.7 and 8.10<sup>8</sup> of its parallel Next Generation Access consultation - or does Ofcom mean that it will address next generation access in a subsequent market review once next generation retail products have emerged more widely? In short, has Ofcom concluded that – for the time being - BT possesses SMP for next generation access deployments in all Wholesale Broadband Access markets save Market 3 but in Market 3, BT does not possess SMP – or is this assessment to be undertaken in a subsequent review?

### Concluding Comments

12. We welcome the opportunity to respond to the Consultation. We support Ofcom's principle of responding where sub-national geographic markets are identified. The process of deregulation should not be unduly complicated. However, we believe that Ofcom must maintain a balanced and holistic strategic approach to broadband and, in this context, Ofcom must ensure that where it (rightly) rolls back regulation it also maintains the correct climate for LLU investment. We look forward to hearing from Ofcom as to how it will address the questions we raise in respect of the context of the overall broadband regulatory "jigsaw". We would be happy to discuss our comments in further detail if that would be helpful.

Yours sincerely



**Ian Roy**  
**Regulatory Manager**

<sup>7</sup> "8.6 Ofcom recently consulted on the Wholesale Broadband Access market, indicating that our economic analysis of this market suggests there are four specific geographic markets for wholesale broadband access based on differing competitive conditions. It may be that, for market 3 areas with four or more competitors the wholesale broadband access market is increasingly competitive based on competition from cable and other operators using local loop unbundling as an upstream input into wholesale broadband access services. This raises the question of what the most appropriate regulatory approach to next generation access would be if there was a finding of no significant market power in a specific geographic market.

<sup>8</sup> 8.7 Should higher speed broadband services arise in the future, it may be that the chain of substitution across broadband access services suggests that next generation access services fall within the current definition of wholesale broadband access market. We would need to assess this chain of substitution as and when new retail applications services using the next generation access were launched to ensure that it remained unbroken. Additionally, if following a new market review there was a finding of no significant market power in the wholesale broadband access market, Ofcom would not require any operator to offer active products on regulated terms."

8.10 "We would need to conduct a market review before identifying any next generation access provider as having significant market power."