

Review of the wholesale broadband access markets 2006/07

Identification of relevant markets, assessment of market power and proposed remedies

The Welsh Assembly Government is grateful for the opportunity to respond to this Consultation, which builds upon the responses Ofcom received to an initial consultation on this subject which was launched on November 21st 2006 (“the November consultation”).

In our response to the November consultation we noted that

“The Welsh Assembly Government largely agrees with Ofcom’s approach to regulation as described in the Review of Wholesale Broadband Access 2006/7.”

However, Ofcom has itself recognised the speed at which converged communications markets are evolving, including the market for wholesale broadband access services. We cautioned in our initial response that

“The telecoms market is changing rapidly and the broadband market is still developing. Ofcom should continue to review and amend its approach to reflect the pace of these changes.”

Our own assessment of developments in both technology and the marketplace during the course of this review process now leads us to question certain conclusions made by Ofcom regarding:

- an appropriate definition for the current wholesale broadband access market;
- identification of valid sub-national markets for wholesale broadband access;
- the regulatory proposals put forward to address the sub-national markets;
- the timeframe across which said proposals would operate

In our recent response to Ofcom’s consultation *“Future Broadband: Policy Approach to Next Generation Access”*¹, we expressed concerns that the regulatory proposals covering Next Generation Access networks (NGAs) were built upon existing principles which were developed to foster a competitive broadband market in an environment where an incumbent operator with SMP is both the primary provider of core network services and a major retail player. Ofcom’s view that these principles represent a robust starting point for future regulation seemed predicated on the assumption that wireline solutions will continue to dominate the access market across the UK in future, with fixed wireless or mobile solutions and alternative, open-access backhaul infrastructure all playing, at best, very limited roles. We questioned the validity (and desirability) of this apparent assumption and the appropriateness of the resulting, regulatory proposals. We await Ofcom’s response to our views, and the views of other respondents, with interest.

We have noted this here as some (though not all) of our reservations about Ofcom’s proposals relating to wholesale broadband access are founded on similar concerns.

¹ <http://www.ofcom.org.uk/consult/condocs/nga/responses/WAG.pdf>

Our approach from this point onwards will be to address the specific areas of concern identified above.

An appropriate definition for the current wholesale broadband access market.

Ofcom has defined the retail broadband markets which are relevant downstream markets to wholesale broadband access as follows:

“asymmetric broadband internet access which as a minimum provides an always on capability, allows both voice and data services to be used simultaneously and provides data at speeds greater than a dial up connection. This market includes both business and residential customers.”

We have a number of concerns relating to this definition:

- Simultaneous use of voice and data services

We acknowledge that most existing, asymmetric broadband services, regardless of technology, allow simultaneous use of voice and data services. This is a basic expectation of many business and residential consumers and is likely to remain so. For these consumers a choice of products already exists and we would expect many of the new services which might enter the market during the lifetime of this Review (i.e., by the end of 2010) to deliver identical functionality.

However, several, affordable alternatives to standard, fixed-line telephony services are now widely available to consumers (e.g., 2G or 3G mobile, VOIP telephony). Many consumers view these as complimentary to standard telephony services; however, a growing number of business and residential consumers already view these services as acceptable (or even superior) replacements for standard telephony. For such consumers, a broadband product which best suits their requirements need *not* include a facility to allow simultaneous use of voice and data services. Retail broadband products which could be considered within this market are already excluded, regardless of any other, more important characteristics, because of this condition. Therefore, we believe that a requirement for simultaneous use of voice and data services should no longer be included within any definition of retail markets downstream to wholesale broadband access.

- Symmetric services

Many respondents to the November consultation expressed concern at the exclusion of symmetric services from Ofcom’s definition, including several, competing communications providers. Typical of these, BT stated²:

“We note that separate regulation of different services using the same access

² <http://www.ofcom.org.uk/consult/condocs/wbamr/responses/bt.pdf>

technology leads to ambiguous regulation and uncertainty for investment. This is especially the case with baseband voice, asymmetric broadband and symmetric broadband. In our view, this has unintended consequences in the choice of technology and creates a considerable barrier to investment in access technology convergence.”

Ofcom responded to such concerns by re-iterating its view that symmetric services should not be included within the same market, noting that:

“This conclusion is based on the evidence from relative charges and costs and from consumer surveys. Ofcom considers that symmetric broadband internet access does not constrain the price of asymmetric broadband internet access...”

From arguments made within the consultation document it seems clear that Ofcom considers the connectivity requirements of Small to Medium sized Enterprises (SMEs) and residential consumers are best served by mass-market, asymmetric products (i.e., the services currently within the scope of this Review), whilst symmetric services of all kinds, regardless of technology and delivery cost, remain more appropriate for larger, corporate businesses and should remain entirely within the scope of Ofcom’s Business Connectivity Market Review³.

We disagree with this conclusion. Ofcom notes in the consultation document, whilst considering the residential market, that:

“... current internet access usage patterns will change over time, with more end-users demanding increasingly symmetric internet access. This is because of the growth in end-users placing their own content on the internet, including video and music content. These demand trends may mean that over time there is a dilution of the boundary between asymmetric and symmetric broadband internet access. However, there are currently significant technical challenges associated with the large scale delivery of symmetric services to end-users and consequently they are unlikely to be deployed significantly within the period covered by this review. Thus, these issues are more likely to be relevant for future market reviews.”

The technical challenges Ofcom refers to are the inherently asymmetric nature of cable networks, which we accept, plus a requirement for either a second phone line or significant network re-engineering to allow SDSL products to facilitate simultaneous use of voice and data services. However, as we have already acknowledged, increasing numbers of both business and residential consumers either have replaced, or would be content to replace, their fixed line telephony service with a suitable, alternative product. With this in mind we believe that the technical challenges identified in relation to DSL as a delivery mechanism for symmetric services are no longer relevant.

³ <http://www.ofcom.org.uk/consult/condocs/bcmr/>

It is therefore possible that residential demand for *deliverable* symmetric services may increase significantly during the lifetime of this Review. However, we perceive a more pressing, existing requirement from within the SME community. Since the November consultation, the Welsh Assembly Government has been contacted by a number of SMEs raising consistent concerns, namely:

- that they require an affordable, symmetric broadband solution for their business;
- they require good quality of service but *not* ultra-high bandwidth;
- they have identified SDSL products available nationally as potential, affordable solutions (taking additional telephony costs into consideration), but these are unavailable locally;
- the cost of leased line products is prohibitive.

These businesses are left with little alternative but to accept an asymmetric product which they do not view as appropriate for their existing business needs or scalable enough to support their plans for growth.

This demonstrates that demand for symmetric products delivering mass-markets speeds is increasingly coming from SMEs; also demand is likely to emerge from residential customers during the lifetime of this Review. With this in mind it is clear that symmetric broadband internet access is becoming less and less analogous to “traditional” leased-line products targeted at larger businesses. Ofcom’s point that symmetric broadband internet access does not currently constrain the price of asymmetric broadband internet is a function of the clear lack of provision in the marketplace, despite evidence of growing demand from many consumers who currently purchase asymmetric broadband. We discuss the likely reasons for current under-provision later. In our view Ofcom could and should address these issues - by accepting that symmetric services delivered via the same access technology as asymmetric products should similarly be considered as a retail market downstream to wholesale broadband access and by regulating to encourage provision and competition in this market across the UK. We note that other European regulators have already considered this issue and would draw particular attention to France, where symmetric services have already been moved into the Wholesale Broadband Market review. It is our understanding that prices for symmetric services have dropped by as much as 50% since this occurred.

- Backhaul

In the consultation document, Ofcom indicates that it takes broadband internet access to mean:

“... broadband access and any backhaul as necessary to allow interconnection with other Communications Providers

noting that:

“Network topologies are expected to change from a service specific arrangement to a more converged arrangement... capable of providing much higher levels of control and quality and thus... able to support product differentiation. As a result... Communications Providers are now demanding services that have a higher level of aggregation whilst still allowing differentiation, as opposed to network element based type services... there is also an increasing tendency to use wholesale products at different levels of the value chain in different geographic areas to support the provision of retail broadband internet access... The combination of these developments has led Ofcom to conclude... that it is no longer appropriate to have separate markets for origination and conveyance and to instead define a single wholesale broadband access product market being... broadband access and any backhaul as necessary to allow interconnection with other Communications Providers.”

We acknowledge that the roll-out of BT's 21CN network will support the scenario Ofcom describes. For the present, we would agree that it is sensible to consider required backhaul as a component of any broadband markets defined as downstream of wholesale broadband access. However, we are not confident that this will necessarily remain the case for the lifetime of this Review.

In our recent response to Ofcom's consultation *“Future Broadband: Policy Approach to Next Generation Access”*⁴, we described a likely scenario where:

“... alternative, open-access backhaul infrastructures are strategically deployed across the UK. The Welsh Assembly Government's FibreSpeed₁ project, phase 1 of which will be deployed across North Wales during 2008, will provide an open-access telecommunications infrastructure network offering a range of advanced wholesale products to service providers on an equitable, non-discriminatory and fully transparent basis. The project's initial focus is on serving key strategic business parks, but it is also expected to have a positive impact on the converged communications market and the economy by making available an alternative infrastructure that could be used by other network operators such as local loop unbundlers (LLU), fixed network operators, system integrators; wireless and mobile network operators. Ofcom makes the point [in the NGA consultation document] that:

‘.. in the UK, there appears to be limited appetite for .. (NGA) investment by third parties’

Whilst this may be true at present, most accept that the main barrier to third party investment is the cost of backhaul. Projects such as FibreSpeed seek to remove this barrier by stimulating competition in provision of next generation network (NGN) services. Many are now looking to FibreSpeed for an early proof of concept that shows this model is commercially viable. It will certainly

⁴ <http://www.ofcom.org.uk/consult/condocs/nga/responses/WAG.pdf>

provide a useful case-study for Ofcom and if it is successful it may help to stimulate similar projects elsewhere in the UK.”

The impact of open-access backhaul networks such as FibreSpeed may be felt within retail markets downstream of wholesale broadband access during the lifetime of this Review. Dependent on the geographic coverage of such networks, a scenario may emerge where consumers in some parts of a sub-national market, as defined today, will gain access to more competitive services than consumers elsewhere in that market because of increased competition within the backhaul element of the service they receive. This may necessitate consideration of differing regulatory approaches within an area which is considered a single, sub-national market at present.

Ofcom states in the consultation document that it reserves the right to review the wholesale broadband access market again, before the end of the 2010, if conditions change. We agree, but would strongly suggest that Ofcom should go further, additionally reserving the right to review individual, sub-national markets and/or specific components of service delivery within these markets during the lifetime of the Review, and to implement changes to sub-national market definitions and/or approaches to regulation within these markets as required.

- Bandwidth

Ofcom defines appropriate bandwidth for broadband internet access as:

“providing data at speeds greater than a dial up connection”

noting that the maximum speed available over a dial up connection is:

“128kbit/s over the two bonded digital channels of an ISDN 2 line.”

We are unable to agree that this is a suitable definition for broadband internet access services. Ofcom states in the consultation document:

“As wholesale broadband access will ultimately be used to provide broadband internet access at the retail level, it is important that it can deliver the services that characterise broadband internet access. That is to say, the wholesale broadband access product must be capable of supporting broadband internet access and other multimedia applications...”

In our view, the experience of accessing the wide choice of internet based multimedia services available today using bandwidth which is little better than dual ISDN would be unacceptable to most business or residential consumers. Downloading large video and audio files would take an extremely long time, whilst streaming, multimedia services would not run properly under such constraints.

In a speech given at the Second Business Roundtable with the European

Commission in January this year⁵, the European Commissioner responsible for Information Society and Media Viviane Reding noted that:

“To offer competitive VOIP services you need a fair amount of bandwidth (I am told at least 1 Meg). To give good quality video and voice probably requires next generation access (10 to 20 Megs).”

This may be an extremely forward-looking assessment of actual bandwidth requirements; nevertheless it demonstrates that most informed stakeholders would not consider bandwidth which is in any way analogous to dial-up as being acceptable to deliver multimedia applications. Our own experience of using streaming video services such as the BBC’s iPlayer⁶ shows that these typically require 250-300kbps of dedicated bandwidth to deliver a single video stream of sub-broadcast quality. BT Vision uses a 1.5Mbps data stream⁷ to deliver higher quality video-on-demand services. SignWales, a Cardiff-based social enterprise, has created a new videotelephony service allowing deaf people to communicate with each other in sign language at a distance and also to talk with the hearing community through the use of online interpreters⁸. SignWales has shared research with the Welsh Assembly Government which demonstrates that guaranteed symmetric bandwidth of 256kbps is required to facilitate an acceptable user experience. This is conservative when compared to the minimum specification of business focused videoconferencing services, which often require 384kbps or more⁹.

With these observations in mind, we propose that the lower limit for acceptable download bandwidth should be raised now, within any broadband internet access markets defined as downstream of wholesale broadband access. We believe that 512kbps is the bare minimum which Ofcom should consider, for both symmetric and asymmetric services. In our view 1Mbps would be a more a sensible level, taking into account a typical business requirement that several employees have functional internet access simultaneously at a single site – a scenario which is also becoming increasingly common within family homes served as part of the residential market. Ofcom should also reserve the right to review the appropriateness of this lower limit during the lifetime of the Review, as new applications and services emerge.

We accept that this will impact on the make-up of all sub-national, geographic markets defined by Ofcom, as the number of Principal Operators delivering an

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http://ec.europa.eu/commission_barroso/reding/docs/speeches/2008/brussels_20080129.pdf

⁶ <http://www.bbc.co.uk/iplayer/>

⁷ <http://informatv.com/articles/2006/10/13/btvisionforesees/>

⁸ http://www.businessinfocus.co.uk/content/public/about/news_item.asp?ID=156

⁹ http://ali.apple.com/ali_sites/hpli/exhibits/1001371/Video_Necessities.html

acceptable service in a given area may change when this revised bandwidth floor is imposed. It is extremely important that this happens, to ensure that no area moves into a market which may be exempt from regulation until competition within that area is delivering an acceptable level of service.

We would also point out this may lead to the identification of exchange areas where NO Principal Operator is delivering an acceptable level of service to all consumers. Ofcom is aware of various, ongoing public-sector initiatives across the UK to address broadband not-spots where no provision currently exists, including the Welsh Assembly Government's Regional Innovative Broadband Support Scheme (RIBS)¹⁰, which is designed specifically to provide these areas within Wales with first-generation (512Kbps to 2Mbps to the customer and 256Kbps to 512Kbps away from the customer) broadband services, at affordable prices comparable with urban areas of Wales.

During the lifetime of this Review it will become apparent whether initiatives such as RIBS have been entirely successful at addressing the broadband not-spots which exist today. If significant numbers of not-spots persist, for whatever reason, Ofcom should reserve the right to review the relevant sub-national markets in which these not-spots reside, if necessary identifying and applying separate, regulatory principles at these locations and creating new, non-contiguous sub-national markets to accommodate them if required.

Identification of valid sub-national markets for wholesale broadband access.

Ofcom considers that there are four, non-contiguous geographic markets across the UK within which competitive conditions are broadly similar but where competitive conditions between the markets are distinct. These are defined as follows, using BT exchange areas as the basic geographic unit within which competitive conditions are assessed:

- those geographic areas covered by exchanges where KCOM is the only operator ("the Hull area");
- those geographic areas covered by exchanges where BT is the only operator ("Market 1");
- those geographic areas covered by exchanges where there are 2 or 3 Principal Operators present (actual or forecast) AND exchanges where there are forecast to be 4 or more Principal Operators but where the exchange serves less than 10,000 premises ("Market 2");
- those geographic areas covered by exchanges where there are currently 4 or more Principal Operators present AND exchanges where there are forecast to be 4 or more Principal Operators but where the exchange serves 10,000 or more premises ("Market 3")

¹⁰

<http://new.wales.gov.uk/topics/businessandconomy/broadbandandict/bbw/ewalesinitiatives/RIBS/?lang=en>

Ofcom presents a robust case for its methodological approach, including the decision to adopt BT exchange areas as the basic geographic unit to be assessed. However, as explained above would strongly urge Ofcom to immediately amend its definition of the retail broadband markets that are downstream of wholesale broadband access to:

- remove the constraint that simultaneous voice and data services must be deliverable;
- include symmetric services delivered over the same access technology as asymmetric services within the definition;
- raise the required minimum bandwidth for both symmetric and asymmetric services to either 512kbps or 1Mbps

Exchanges across the UK will then need to be re-assessed under these new criteria to establish the level of competitiveness that exists in delivery of asymmetric services and, separately, symmetric services. A given exchange might fall into a competitive market with regard to asymmetric services but a non-competitive market where symmetric services are concerned; thus differing regulatory approaches may be needed. We expect that most exchanges will have fewer Principal Operators delivering symmetric services than asymmetric services. Therefore Ofcom should define four, non-contiguous markets across the UK for asymmetric services, as planned, plus four separate, non-contiguous markets across the UK for symmetric services (using the same criteria for the number of Principal Operators delivering service). Each exchange area across the UK will reside in one of the asymmetric markets and one of the symmetric markets. The regulatory approaches that might be adopted across these eight markets are discussed later.

Although we accept Ofcom's rationale for considering competitiveness within BT exchange areas at present, we believe there is a strong possibility that exchange areas will become inappropriate as a proxy for distribution of competitive services during the lifetime of this Review. We have already discussed the potential impact that open-access, backhaul networks such as FibreSpeed may have over the next few years within retail markets downstream of wholesale broadband access. These networks will not only make the cost of backhaul more competitive at nearby exchanges, they will potentially provide alternative points of access to local markets. For example, a service provider may choose to deliver access services which connect to an alternative backhaul network via a hub at a local business park, rather than running "middle-mile" backhaul from that hub to the local exchange at additional cost. This may seem especially attractive to operators who choose to take advantage of improvements in wireless/mobile technology to deliver alternatives to fixed-line broadband access. These will, by their nature, bypass the existing copper local loop and coverage of these services will not align with exchange boundaries. Equally, BT and others are looking to deliver high-speed, NGA services via fibre-optic cable to new build sites across the UK. Again, these services will bypass the existing local loop, rendering current exchange boundaries irrelevant.

Ofcom acknowledges these possibilities, but has concluded that they are unlikely to have a significant impact during the lifetime of this Review. We do not agree with conclusion, noting especially that:

- alternative backhaul networks will be deployed during the lifetime of this Review (e.g., FibreSpeed is on target to become fully operational by early 2009);
- WiMAX access services are already available in some urban locations and trials of this technology a potential solution for rural delivery are already underway in several countries;
- several UK mobile operators already offer broadband solutions based on HSDPA technology, delivering speeds up to 7.2Mbps. Following a recent decision by the European Radio Spectrum Committee (RSC) to liberalise the use of certain spectrum currently reserved for 2G mobile telephony, Ofcom is required to designate and make available the 900 MHz and 1800 MHz for GSM systems and make them available for 3G systems¹¹. This will potentially facilitate the economically viable delivery of affordable, mass-market broadband products based on HSDPA wireless technology across the UK;
- other existing access services such as Openreach's Street Access¹² and sub-loop unbundling¹³ products have the potential to facilitate significant, non-exchange based service delivery within the lifetime of this Review;
- high-speed NGA products based on fibre technology are already being developed and trialled, with a view to deployment at new build sites within the lifetime of this Review (e.g., BT's deployment of fibre and associated, new access services across the housing development at Ebbsfleet).

With these developments in mind, Ofcom should commit to regularly reviewing the make-up of markets they will define at the outset. As part of this ongoing assessment Ofcom should carefully consider at what point it becomes appropriate for specific operators that may choose to deliver services using mobile, wireless or fibre access technologies to be counted as Principal Operators in a given area. This may contribute to an exchange area moving from one geographic market into another during the lifetime of the Review. Deployment of these new access technologies, coupled with improved availability of alternative backhaul infrastructure, will also necessitate ongoing consideration by Ofcom, during the lifetime of the Review, of the appropriateness of exchange areas as the basic unit within which competitiveness is assessed. Ofcom should accept that changes may need to be implemented before the end of the review period and should conduct further work to define alternative geographic measures ready for implementation.

The regulatory proposals put forward to address the sub-national markets.

Subject to the geographic markets being re-defined as described earlier and monitored and updated frequently during the lifetime of the Review to reflect the

¹¹ <http://www.ofcom.org.uk/consult/condocs/liberalisation/liberalisation.pdf>

¹² <http://www.openreach.co.uk/orpg/products/streetaccess/streetaccess.do>

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http://www.btinterconnect.com/llunbundle/subloop/Sub_Loop_Unbundling_Product_Description_Issue3%20.doc

impact on competitiveness at the exchange level of services delivered using alternative backhaul or new access technologies, we are broadly content with the regulatory proposals put forward by Ofcom with regard to regulation of asymmetric broadband markets, although we do have some concerns about their likely effectiveness in Market 1. We would also accept Ofcom's proposals as a useful starting point for regulation of the symmetric markets that we consider necessary, although again we have specific comments with regard to Market 1 for symmetric services.

Our specific comments on each of the proposed, geographic markets that might include areas of Wales are as follows:

- Market 3 for asymmetric services
Assuming that the distribution of market share for asymmetric services remains broadly unchanged in the smaller, revised group of exchange areas where we would expect four or more Principal Operators to be found once our revised criteria have been applied, we are content with Ofcom's proposal for Market 3 - i.e., a finding of no SMP and removal of existing regulation, with 12 month's notice where appropriate. Although this is not mentioned in the consultation document, we would urge Ofcom to negotiate the voluntary continuance of accounting separation by BT in Market 3, to enable easier tracking of developments in this rapidly moving market by Ofcom. We are also concerned that the removal of regulation following a finding of no SMP may potentially lead to the eventual rollout of high-speed, NGA services being concentrated within areas of Market 3, resulting in a next-generation "digital divide". Ofcom should track these developments closely and consider or consult on regulatory options to promote NGA deployment in other areas if necessary.
- Market 3 for symmetric services
We would expect this market to be very significantly smaller than Market 3 for asymmetric services at the present time. However, if exchange areas are found where four or more Principal Operators are delivering symmetric services and where market share is analogous to Market 3 for asymmetric services then we would expect a similar finding of no SMP and no imposition of regulation, although the concerns expressed above about accounting separation and the likely impact of NGA rollout remain relevant.
- Market 2 for asymmetric services
Assuming that the distribution of market share for asymmetric services remains broadly unchanged in the revised group of exchange areas where we would expect two to three Principal Operators to be found once our revised criteria have been applied, we are content with Ofcom's proposal for Market 2 – i.e., a finding that BT has SMP and implementation of access, non-discrimination and quality of service obligations as described in paragraph 5.198 of the consultation document.
- Market 2 for symmetric services
We would expect this market to be significantly smaller than Market 2 for asymmetric services at the present time. However, if exchange areas are found

where two to three Principal Operators are delivering symmetric services and where market share is analogous to Market 2 for asymmetric services then we would expect a similar finding that BT has SMP and would accept implementation of access, non-discrimination and quality of service obligations as described in paragraph 5.198 of the consultation document.

- Market 1 for asymmetric services

For the larger, revised group of exchange areas where we would expect one or no Principal Operators delivering asymmetric services to be found once our revised criteria have been applied, we are content with Ofcom's proposal for Market 1 *as a starting point* – i.e., a finding that BT has SMP and implementation of access, non-discrimination and quality of service obligations as described in paragraph 5.185 of the consultation document. However, whilst we accept that these measures would support competition once it exists, it is less clear that they will help to stimulate competition in the first place - a fundamental part of Ofcom's remit, acknowledged in the consultation document. With this in mind, we would urge Ofcom to consider now how it might regulate to both promote competition and to encourage the deployment of alternative backhaul infrastructure within this market.

Furthermore, as we suggested in our response to Ofcom's consultation "*Future Broadband: Policy Approach to Next Generation Access*"¹⁴, we would urge Ofcom to lead an open debate about a possible Universal Service Obligation (USO) for broadband, in which Government should actively participate. No assumptions should be made in advance of the debate about how a USO might be structured, funded or implemented and the differing models already in existence globally should be investigated as a starting point for this discussion.

- Market 1 for symmetric services

We would expect this market to be significantly larger than Market 1 for asymmetric services at the present time. Where exchange areas are found in which one or no Principal Operators are delivering symmetric services we would expect a finding that BT has SMP and would accept implementation of access, non-discrimination and quality of service obligations as described in paragraph 5.198 of the consultation document *as a starting point*. However, it seems clear that these measures alone will not stimulate competition in delivery of symmetric services.

We have already discussed our rationale for recommending that Ofcom include symmetric services delivered via the same access technology as asymmetric products within this Review. Currently Ofcom considers such services within its Business Connectivity Market Review, even though services such as wholesale SDSL are technically similar and are delivered over the same infrastructure as corresponding asymmetric services. Ofcom acknowledges a key constraint to provision of competitive service in paragraph 8.170 of the Business Connectivity Market Review and proposes a potential solution:

¹⁴ <http://www.ofcom.org.uk/consult/condocs/nga/responses/WAG.pdf>

“... several CPs have argued that BT has failed to make available wholesale SDSL services that would enable them to compete effectively in downstream markets. In particular, there has been dissatisfaction with the pricing regime, which, some OCPs have argued, is not reflective of the underlying cost of provision. In view of the concerns that have been raised, we propose to review the charge controls going forward after the current one expires in September 2008 and consider the possibility of extending it to wholesale SDSL.”

We believe Ofcom is right to consider charge controls for wholesale SDSL, but we would urge Ofcom to make these considerations now, within the context of this Review. We have already made the case that SMEs constitute much of the growing market for these services, as opposed to the corporate nature of demand for “traditional” interface circuits such as leased lines. Ofcom has noted that demand for symmetric services from residential consumers will also rise. The divergence of these markets is set to continue, so it would seem unwise to bundle regulation of wholesale SDSL with regulation of leased line products for a further 4 years, as currently proposed. Crucially however, consideration within this Review would allow Ofcom to act now. Current charge controls set within the previous Business Connectivity Market Review do not cover wholesale SDSL, so their continuance until September 2008 will not prevent Ofcom from implementing charge controls on wholesale SDSL products immediately within this Review, if deemed appropriate. In our view, given evidence of rising demand and of constraints that may be preventing a competitive market response, Ofcom should consider this proposal as a matter of urgency.

The timeframe across which said proposals would operate.

We appreciate Ofcom’s rationale for aligning the period of this Review with that of BT’s ceiling pricing commitment (i.e., to the end of 2010). However, the market for wholesale broadband services is moving very swiftly and, in our view, Ofcom may have downplayed the speed with which things might change during the lifetime of the Review. We acknowledge that Ofcom has reserved the right to re-review the market if unexpected market developments occur. However, as outlined earlier, we believe Ofcom should go further, tracking the effect of the removal of SMP in certain markets and the impact of deployment of alternative backhaul networks and new access technologies during the lifetime of the Review. As already discussed, Ofcom should retain the option to review any or all of the sub-national markets and, if needed, to review specific market segments within these. Given the potential for significant change, Ofcom should re-assess the appropriateness of exchange areas as a proxy for distribution of competitive services as markets evolve during the lifetime of this Review, reserving the right to revise geographic units, market definitions and regulatory principles if and when needed.

Conclusion

The detailed response we have provided reflects the complexity of the issues affecting the wholesale broadband access market. Our critique of the proposals

contained in Ofcom's consultation document is designed to be entirely constructive and we hope it will prove useful as Ofcom moves forward. Although we have expressed clear concerns about the scope of the consultation and some of the assumptions which underpin Ofcom's approach to market definition and regulation, we firmly believe that it is possible to address these issues and design regulation which is appropriate, effective and adaptable to changing market conditions.

In summary, to achieve this goal Ofcom should:

- Revise the definition of retail broadband markets which are downstream to wholesale broadband access to:
 - remove the constraint that simultaneous voice and data services must be deliverable;
 - include symmetric services delivered over the same access technology as asymmetric services within the definition;
 - raise the required minimum bandwidth for both symmetric and asymmetric services to either 512kbps or 1Mbps
- Re-assess exchange areas across the UK under these new criteria to establish the level of competitiveness that exists in delivery of asymmetric services and, separately, symmetric services.
- Define four, non-contiguous markets across the UK for asymmetric services, as planned, plus four separate, non-contiguous markets for symmetric services (using the same criteria in each for the number of Principal Operators delivering service). Each exchange area across the UK will reside in one of the asymmetric markets and one of the symmetric markets.
- Apply the following regulatory principles:
 - a finding of no SMP in Market 3 for asymmetric services and (if relevant) Market 3 for symmetric services, leading to the removal of regulation;
 - a finding that BT has SMP in Market 2 for asymmetric services and (if relevant) Market 2 for symmetric services, leading to the implementation of access, non-discrimination and quality of service obligations;
 - a finding that BT has SMP in Market 1 for asymmetric services and Market 1 for symmetric services, leading to the implementation of access, non-discrimination and quality of service obligations;
 - re Market 1 for asymmetric services, Ofcom should consider now how it might regulate to both promote competition and to encourage the deployment of alternative backhaul infrastructure. Ofcom should also lead an open debate about a possible Universal Service Obligation for broadband;
 - re Market 1 for symmetric services, Ofcom should urgently consider charge controls for wholesale SDSL, but within the context of this Review and not the Business Connectivity Market Review, which currently contains a similar proposal that might be implemented at a future date.
- Track the effect of the removal of SMP in certain markets and the impact of deployment of alternative backhaul networks and new access technologies

during the lifetime of the Review. Ofcom should reserve the right to review any or all of the sub-national markets or market segments. Ofcom should re-assess the appropriateness of exchange areas as a proxy for distribution of competitive services during the lifetime of this Review, reserving the right to revise geographic units, market definitions and regulatory principles if needed.

The Welsh Assembly Government is committed to working with and supporting Ofcom in order to achieve the right regulatory approach for Wales and for the UK as a whole. We would be pleased to discuss further with Ofcom any of the issues we have raised in this consultation response.