

**Viatel's response to Ofcom's consultation on Future Broadband, the policy approach to next generation access.**

**Executive Summary**

The availability of affordable, high bandwidth broadband connectivity is crucial to the growth and efficiency of UK businesses.

Ofcom should ensure that a full range of wholesale inputs are available to CPs, including sub-loop unbundling, dark fibre in both local loop and backhaul, duct access in both local loop and backhaul, and active line access at various points in the network. Ofcom should not promote one form of competition over another.

Ofcom should not overplay the "risks" involved in investing in NGA networks and should apply price controls to prevent vertically integrated companies from using wholesale pricing to exert a margin squeeze in the retail market.

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

If access networks are not upgraded in line with those in other European Member States there could be serious consequences. Corporate and SME users in the UK will be unable fully to harness the potential of ICT services to increase the efficiency and productivity of their businesses. We continue to be disappointed by Ofcom's apparent failure to grasp the importance of affordable, reliable, low contention rate, high speed broadband connectivity to business users of all sizes<sup>1</sup>.

In terms of consumer consumption, we do not believe that the presence of a mature Pay TV market in the UK will inhibit the take up of IPTV services, firstly because households require multiple viewing choice in multiple rooms; secondly because demand for broadband and the provision of content and applications has historically been shown to grow to meet the bandwidth available; thirdly because the ability to record one programme whilst watching another could require more than 10 Mbit/s; fourthly because events such as the 2012 Olympic Games could present unprecedented opportunity for

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<sup>1</sup> See, for example, paragraph 3.101 of the Review of Wholesale Broadband Access Markets, published on 15/11/07.

flexible content provision by the broadcasters, the demand for which may not be met by digital terrestrial TV services.

The phrase “timely and efficient” is unhelpful. The UK Government has a stark choice: if it leaves NGA investment completely to the market, it is unlikely to happen quickly enough to satisfy users’ demands. We believe, on the contrary, that the UK Government should develop a strong high-level policy objective to ensure rapid, wide-scale deployment of NGA networks (preferably point to point FTTP) by 2012 at the latest.

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

Ofcom places considerable emphasis on “ensuring the conditions are right for timely and efficient investment in these new networks”<sup>2</sup>. We believe this emphasis is wrong. It seems fairly inevitable that, without government intervention to require more widespread fibre deployment, BT will install fibre / PON architecture at greenfield sites (as per Ebbsfleet) and will deploy fibre to the cabinet in brownfield locations.

The European Commission has made it clear<sup>3</sup> that (newly named) Market 4 (wholesale local access) should include access to fibre loops, as well as copper, and sub-loop unbundling. It has also made it clear that “regulatory holidays” are not an option. So the only uncertainty relates to “how” to regulate access to NGAs, not “whether” or “when” to regulate.

Market forces will determine when companies deem investment to be “timely”, and they would not proceed unless they considered such investment to be “efficient”. We believe it would be inappropriate (absent Government intervention) for Ofcom to favour one business model over another, and that it should withdraw from its mantra of “promoting competition at the deepest levels of infrastructure where it will be effective and sustainable”. Instead, Ofcom should ensure that the full range of active and passive line access products are available to CPs, at both the local loop and in backhaul, so that CPs can choose the access methods that are most efficient for their purposes (which may vary from location to location). We disagree with the principle expressed in paragraph 4.24 that Ofcom should promote competition based on passive inputs or “*active inputs which offer the most scope for downstream innovation*”. Ofcom should allow CPs to choose where they interconnect – to do otherwise is to manipulate the market and is beyond Ofcom’s remit.

We note that Commissioner Reding has announced that the European Commission will publish guidelines on the application of the Framework Directives to the deployment of fibre and NGA networks in June 2008.

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<sup>2</sup> Paragraph 4.12

<sup>3</sup> Commission recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, published on 13/11/07

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

Ofcom's objective should be to promote competition and to promote the interests of consumers and business users.

We believe that the issue of "risk" is overstated. In the case of greenfield sites, it would be perverse to install early 20<sup>th</sup> Century technology (copper) instead of current technology (fibre) that should see users through the 21<sup>st</sup> Century. Given that BT's preferred design only promises to offer 10mbit/s downstream, this is hardly "unlimited" bandwidth and indeed is less than many providers offer customers today.

Similarly, the deployment of VDSL via FTTC will only give consumers what is clearly needed to support IPTV/ HDTV and other peer to peer applications. These are not applications of the future, but are already in use and it is only bandwidth availability that is limiting their growth and popularity.

If there is any uncertainty, it is around the price customers are willing to pay, not in demand *per se*.

Arguably, NGA investment does not constitute a specific "project", but merely a network upgrade, something that communications providers undertake all the time.

In any event, we believe that some form of price control is essential, whether it is a requirement for cost oriented prices (preferably), or merely an obligation that prices are reasonable. Where SMP undertakings are vertically integrated, they will still have the incentive to foreclose retail markets by excessive pricing at the wholesale level.

Equivalence of inputs goes some way to mitigating this risk, but, in the absence of structural separation, and whilst BT remains one organization, Equivalence does not eradicate BT's ability to squeeze the retail market. For example, Equivalence applies to some products but not others, and does not apply to collocation. It is also weakened by bundled offers. It is not enough on its own.

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

Yes. CPs must be able to purchase copper paths, dark fibre and duct access wherever such deployment is economically viable for that provider in a particular location.

However, in terms of "local loop unbundling" as we currently understand it, there is general acceptance that the VDSL model will not support as many infrastructure operators as LLU is thought to. Clearly, as one moves up the customer value chain, there is value in network build and in ensuring resilience. However, in our view, there is no merit to duplicating network infrastructure where it is unnecessarily and uneconomic to do so.

We therefore welcome Ofcom's shift in emphasis towards active line access. We stress that active line access must be made available at any point in the network where CP

customers require access and the local loop owner must be required to provide suitable backhaul to its customers' networks.

Duct access is important as an option for CPs to obtain backhaul from, for example, a street cabinet to their own networks. However, it should also be mandated in the local loop as CPs may wish to use ducts to install their own fibre to the premises. This may not be possible in all situations, but should be available as an option where such deployment is viable.

Ofcom is due to publish a statement on its review of the Wholesale Broadband Access market in June 2008. Ofcom is likely to find that BT does not have SMP in Market 3, as proposed in its November 2007 consultation document. We would be grateful if Ofcom could clarify what the likely impact of such deregulation on the regulatory obligations to offer active line access on NGA networks would be.

We think Ofcom should consider whether the wholesale local access market and the wholesale broadband access market (new Markets 4 and 5) should be reviewed *together* in future, in order to ensure that competitors can continue to get access to networks and to ensure that a holistic approach is taken. The European Commission said in November 2007: "Depending on the way in which network upgrades occur or the particular demand and supply conditions evolve in Member States, these two wholesale markets may remain distinct, or conceivably merge into one. Consequently it is recommended that the markets be analysed together."<sup>4</sup>

**Question 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?**

See response to Question 1 above.

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<sup>4</sup> Explanatory note: Accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, published 13/11/07.