

Wholesale Broadband Access Market Review

Response from Tiscali UK Ltd

Basis for geographical analysis

Some debate has already taken place between industry and Ofcom concerning the use of BT exchanges as the geographical basis for market analysis, as opposed to street cabinets or otherwise. It is probably correct to argue that analysis at more granular levels than exchange would be too complex for the current review exercise, but it may become necessary for future reviews occurring because of significant market changes or on a standard periodic basis. This would link with consideration of the viability of sub-loop unbundling, along with the nature of the market and operational plans of providers.

Other concerns exist around the mapping of Ofcom's methodology to the geographical basis of BT's rebate schemes (for DataStream and IPStream) and pricing commitments, as well as the fact that the Wholesale Broadband Connect (WBC) aggregation points determined by BT do not match the exchange-based markets defined by Ofcom. Anomalies could be caused by any of these factors, as they may conflict with regulatory provisions and render them inaccurate or ineffective. In time, WBC will be the main wholesale product that regulatory remedies in this market apply to, so it is surely important to deal with such issues at an early stage and while the product design and platform is still being agreed. It may also prove necessary to be more specific with BT wholesale product variants relevant to the market remedies, as a lack of clarity on what backhaul solutions are covered persists.

Geographical contiguity

Related to the above points is the concern that 'black holes' may arise where regulatory remedies do not apply in geographical locations surrounded by regulated areas. It may be argued that this phenomenon occurs already, where LLU may be feasible in an exchange next to others where it is not, but consideration should be given to this issue and the potential for positive action to make contiguity work. The business effects that concern Tiscali and others are mainly to do with impacts on national or regional marketing and planning and the LLU comparison is not currently proven, especially as LLU is still in roll-out and mass migration mode.

Another important issue may arise because of merger and acquisition activity that would, in theory, change the market definition of an exchange. Categories will not be altered for at least two years, on current plans, which would mean the risk of anti-competitive anomalies arising may become high. This needs to be thoroughly considered at this stage, even if it proves impractical to revise categories during the life of regulatory remedies set by the review.

Competition in wholesale markets

Careful consideration of the real nature of wholesale competition is required at this stage of the review. Although several operators with theoretical potential may be present in an unregulated area (assuming there are any of those after the review), it could be that none of them offer competing wholesale services. In this scenario, the

presence of qualifying operators in a location would have led to the deregulation of the market it constitutes, regardless of their ability or willingness to supply wholesale products. There may be no real competitive constraints, meaning that BT has an unregulated monopoly with all that that implies. There is a great difference between the use of LLU for self-supply and the wholesaling of it to other operators. Running a wholesale business entails significant resource across sales, product and technical functions that may form no part of the business plan of a large LLU operator.

The fact that Ofcom's analysis must be driven by examination of retail markets and be absent regulation is understood. It may be true that there is no other way for Ofcom to approach this task, given the risk of circular arguments and impractical complexity. However, the business and market reality of outcomes should be considered and proper account taken of potential market activity on the part of alternative operators and BT. The ultimate aim is to produce healthy competition that benefits consumers and that may not be fully realised, even though the rules of analysis are followed.

Transitional arrangements

Would price and margin commitments by BT be enough to ensure the existence of wholesale competition, be it based on LLU or other wholesale products sold by BT? Provision must be made for the transition from existing regulatory remedies applied to wholesale products (ie DataStream obligations and margin rules) to new remedies or complete deregulation. Such arrangements must also take account of pricing and margin commitments applying to existing and 21CN products.

The nature of the transition arrangements and the length of time they are in place needs to be decided during this phase of the market review. It is likely that a plan over two years will be needed, covering supply obligations and pricing. This would serve to protect DataStream and IPStream supply in any deregulated areas, allowing any network changes necessary and preventing harmful impacts on consumers. It is not clear that BT would withdraw supply of wholesale products, of course. However, the answer to that question will not be required, as long as BT could withdraw and had the ability to alter prices without regulatory constraint.

Next Generation Access

The subject of regulatory challenges posed by potential next generation access deployment has been raised by Ofcom elsewhere and will continue to be discussed by Ofcom and industry. The concern in the present case is that current business and regulatory models may be undermined comprehensively by the selective roll-out (by BT) of fibre access to deliver new retail products and/or reduce costs. In the simplest example, if an exchange is bypassed as a result of such plans, LLU is compromised. It has been generally acknowledged that sub-loop unbundling is not sufficiently developed as a solution to deal with this scenario, especially on any significant scale.

If Ofcom were to be forced to refresh the market review as a result of new retail products or geographical changes brought about by such developments, speed and effectiveness would be vital to avoid BT (or anyone else) gaining an unfair first-mover advantage. An 'interim' period arising due to timing of review work and the way in which such developments take place, could easily extend to years in duration, with all the consequences implied. Key questions to be answered by new analysis

would have to deal with whether products (eg 100Mb broadband) were in existing markets and subject to the same remedies.

Other questions arise now and will become more pressing in the future, around potential new wholesale products such as naked DSL and 'Wholesale Converged Access'. If new products are subject to existing remedies, it will be essential for Ofcom to maintain clarity on this from the earliest point. New markets and remedies may, of course, be required in future (eg for some form of MSAN bitstream access, where new fibre access dictated it). How quickly could such issues be dealt with? It is clear that Ofcom is against any concept of regulatory forbearance for next generation access investment, but should more be done to address the issues in the current market review? The key concerns are all around timing and the need to be prepared for all potential developments, for the good of competition and the management of regulatory workload.

Remedies

No price control or cost orientation remedies are proposed in the consultation. It is understandable that Ofcom wants to avoid over-prescriptive regulatory measures and 'burn-in' of structures that may interfere with industry and market development. The issue of potential margin protection for LLU should be dealt with in the next Wholesale Local Access market review and should be considered now. Concerns are particularly acute if LLU does not present enough true constraint on BT in unregulated markets (reference points made on self-supply and wholesale competition above). Will the need for complex and secretive price commitments, such as those in operation today, continue during the life of the next review? These would become ever more complex as new products are introduced by BT, resulting from 21CN developments or for other reasons. How much reliance can be placed on equivalence of inputs obligations applied to increasingly complex product offerings and bundles? Issues of transparency and enforcement inevitably arise and these must be discussed at this point in the review process.

It should be acknowledged that a decision on SMP in market 3 is awaited. The reasoning behind any deregulation should be clear and persuasive and related to commercial reality as well as the economic theory underpinning it.

Conclusion

In view of the current growth of LLU and product developments arising from BT's 21CN plans, there is an argument to say that this market review is premature. However, one could wait indefinitely for the 'right moment' to do such things and the review should be kept to schedule. The key thing is to acknowledge risks arising from geographical development and LLU, 21CN and the potential for next generation access deployment. Ofcom must be prepared to refresh or replace the review analysis and remedies in future as and when the competitive reality demands it. By the same token, BT must be obliged to cooperate and review any voluntary (but essential) commitments upon which the industry relies. These requirements place significant burdens on Ofcom and the best way to tackle them at this stage is to maintain a constructive dialogue across the stakeholder group.