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Introduction

1. UKCTA is a trade association promoting the interests of competitive fixed-line telecommunications companies competing against BT, as well as each other, in the residential and business markets. Its role is to develop and promote the interests of its members to Ofcom and the Government. Details of membership of UKCTA can be found at www.ukcta.com. This response represents the views of UKCTA members with the exception of Virgin Media & TalkTalk, who will be setting out their own views to Ofcom in separate submissions.

2. UKCTA members serve the narrowband market in a variety of ways, using BT regulated services like Wholesale Line Rental (WLR), Wholesale Call Origination (WCO), and Metallic Path Facilities (MPF) as well as using their own access networks to serve both residential and business consumers. Narrowband remains a key market for UK communication providers and although exchange lines and calls are often bought together in a bundle, the regulation underpinning the regulated services underpinning calls and exchange lines is vitally important for a wide range of suppliers to ensure competition in the retail market.

Wholesale Line Rental – the need for appropriate price regulation

3. UKCTA broadly agrees with Ofcom's approach to market definition and market analysis, and its characterisation of the market. It rightly concludes that BT continues to enjoy significant market power (SMP) in the WFAEL market. However, UKCTA does not follow how, after Ofcom sets out the factors contributing to BT's dominance, and the continued extent of its dominance, it has reached the initial view that it is appropriate to relax the pricing remedy on WLR to the extent it proposes. The evidence presented in the consultation points strongly and clearly towards the need for a continued charge control on WLR in order to constrain BT's pricing in light of its sustained dominance in this market. In particular, UKCTA notes the following:

- In relation to BT's market share, Ofcom calculates this to be over 55%, and recognises that it may be significantly higher than that in certain segments. For example, in the business analogue sector Ofcom considers BT to have a wholesale market share of over 80% among SMEs.

- In relation to pricing, Ofcom notes BT is consistently pricing at the regulated cap for WLR, making returns in excess of its cost of capital. Not only does this provide further evidence of the strength of BT's SMP, but it clearly indicates that the proposed softening of the remedy to the extent that Ofcom proposes will inevitably result in a price increase for WLR.

- Further, MPF investment is now sunk and will not be extended. For those providers that have not invested in MPF, then WLR is the rational and indeed only obvious product to deliver service to customers, ahead of a fit for purpose appropriately regulated alternative, which would enable CPs to offer a bundled competitive proposition. In this respect many CPs are highly reliant on BT's WLR product, and this scenario will not change materially during the period of the review.

4. BT's dominance is entrenched by the nature of its position in the market. As an integrated business BT has the ability to "move" the margin around from one part of the group to another to achieve an optimum outcome (i.e. a higher WLR price may mean BT Retail makes less margin, but it benefits BT OR and overall BT Group benefits). Its downstream businesses (BT Consumer / Business and Plusnet /EE) are the largest WLR consumers and are able to disproportionately dictate pricing in all market segments, while the margin squeeze test is highly complex and not necessarily an effective deterrent against excessive pricing. Ultimately BT's market power is strong and sustained, with no prospect of change in the absence of a viable substitutable FTTC voice product.

5. Without robust effective remedies there is a real threat of consumer harm. WLR is still required by all providers in WBA Market A for voice telephony in order to provide a bundled service offering. Ofcom is therefore in danger of leaving rural users without adequate pricing protection, leaving these consumers further disadvantaged in terms of both broadband and now basic fixed telephony.

Serving the Needs of UK Business

6. Analogue WLR Enterprise / SME users are not being adequately protected if adequate WLR price regulation is not maintained. Ofcom has failed to consider the impact on business users properly. Business use falls over a wider range of specialist supplier and Ofcom's market analysis fails to take this adequately into account.

7. Ofcom have essentially suggested that business and residential users of narrowband services are a homogenous group in this market review. Whilst we accept that at the

Small Office Home Office (SOHO) end of the market (e.g. sole trader window cleaners etc.) there is significant merit in this argument, as you start to review larger customers, it becomes ever more difficult to reconcile the presumption.

8. We know that businesses place more emphasis on fault resolution times and the certainty of installation date, versus lead time in the residential market. Additionally, the demand side substitutes are different. Mobile is less likely to be an effective substitute at the lower end of the market because the CPE is disproportionately more expensive relative to a fixed line and additionally it lacks many of the features native to a fixed installation such as economically viable group calling, extension dialling, call transfer, call recording, CLI flexibility etc. Nor can mobile be an effective substitute for a lot of legacy data-over-narrowband-voice technology still in use, such as PDQ machines and various alarm and monitoring systems more prevalent in the business market than the residential one.

9. For all of these reasons, it would be inappropriate and damaging to the market to fully remove the charge control remedy and replace it with the fair and reasonable charge obligation as Ofcom suggest. UKCTA strongly disagrees with Ofcom's assertion that BT's SMP has reduced to a point where it should have the degree of pricing flexibility that such a remedy would allow. Ofcom has failed to set out any arguments for why it considers that it is appropriate to jump from a charge control to a fair and reasonable charges obligation. This is a substantial step change in remedy in terms of market impact, yet to back it up Ofcom merely suggests that BT's SMP has "weakened". In fact, given the transition to FTTC overtime, BT's SMP is in fact strengthening in WFAEL market.

10. The fair and reasonable charges obligation carries inherent uncertainty and is likely to lead to consumer harm. It does not offer clarity or the practicality that is needed in the market at this transition point. Further it is notoriously difficult to implement without some form of dispute, even with the benefit of previous practice or guidance. Indeed, Ofcom appears to recognise this by tacit acceptance that disputes are likely as a result of its proposals. This position is exacerbated by Ofcom's proposal not to subject BT to ex ante reporting obligations to demonstrate its compliance. So on the one hand Ofcom invites disputes if BT fails to comply with its obligations, yet on the other it makes it that much harder for CPs to challenge.

11. UKCTA also notes that there is a broader concern with line rental prices with its announcement of a review of retail voice-only consumers. Allowing BT further pricing flexibility (which would appear to lead inevitably to a price rise given its current pricing strategy as described above) could impact on such consumers even further in the sense of price rises passed on to consumers. There would appear to be a disconnect here, given that Ofcom has apparently identified the possibility for exploitation of these customers to the point that it has opened a separate review, but still thinks deregulation at the wholesale level is appropriate.

12. UKCTA considers that Ofcom must take clear action to prevent excess pricing at the earliest opportunity. At the very least, if Ofcom believes WLR pricing is constrained by competition while it retains SMP, a simple charge control should be introduced to track MPF pricing. As a minimum a pricing safeguard should be retained set at CPI-CPI per year for the duration of the control. Such an approach would retain benefits for consumers, because they are protected against likely price increases, and indeed for BT, giving it a degree of pricing flexibility that Ofcom considers necessary.

Wholesale Call Origination

13. The same issues described above for WFAEL are broadly applicable to the wholesale call origination market, and we do not repeat them here. However particularly in relation to call origination, UKCTA is concerned to see that there is no assessment of the impact of BT Wholesale Calls (BT's end to end calls product) on the ability of Carrier Pre-Select to compete. Indeed, Ofcom's analysis is very cursory; focusing in on the developments at a retail level, and concentrating on consumer choice between their fixed line and a mobile or a call by call basis. There is a lack of analysis of the market at a wholesale level and UKCTA considers this to be a major oversight.

14. Ofcom does at least recognise that BT's market share is high and enduring and that "no CP is fully independent of BT at the wholesale level". This is at least in part reflected by BT's WCO charges, which have been at the maximum level allowed throughout most of the review period.

15. Further, the effective bundling of WLR and WCO sales means the relevant decision point for purchasing decisions is not on a per call basis at the retail level, but the arrangements available to CPs to route their calls from UK fixed exchange lines.

16. For these reasons it is clear that, in relation to the WCO market, BT's SMP remains strong and will endure through the period under review. As with the WLR market, UKCTA does not consider that BT's SMP is reducing to a point where it is appropriate to take the de-regulatory steps that Ofcom is proposing and some form of back stop charge control (CPI-CPI) is required to safeguard the consumer interest and prevent excessive pricing.

FTRs for calls originating from non-EEA countries

17. UKCTA supports Ofcom's provisional conclusion at paragraph 13.116 that all calls terminated in the UK should be subject to the fixed termination rates (FTRs) charge control set at LRIC, regardless of origin (including from non-EEA countries). UKCTA agrees that "differential regulation"[1] for FTRs would be disproportionate and unnecessarily complex, with little benefit for consumers.

[1] "Differential Regulation" is where CPs are allowed to commercially negotiate non-EEA FTRs and/or where CPs are allowed to charge non-EEA CPs higher rates so long as they are reciprocal.

18. UKCTA considers that applying “differential regulation” would go against the principles of non-discrimination and cost-orientation as set out in the EU telecoms framework and also in the World Trade Organisation’s General Agreement on Trade in Services (WTO GATS)[2]. Furthermore, as Ofcom has identified that all CPs are dominant in the termination of calls onto their own network, charging higher FTRs for calls from non-EEA countries would go against general competition rules too (e.g. abuse of a dominant position, excessive pricing, and/or discriminatory pricing). A situation such as exists presently, whereby a Communications Provider can generate a supernormal profit by such surcharges in another member state and use that to subsidise competition against a UK only operator which is not afforded the same privilege is demonstrably against the principles of Article 8 of the Framework Directive.

19. UKCTA also agrees with the concerns highlighted by Ofcom in paragraphs 13.104 to 13.115 of the consultation which would be brought about by having “differential regulation”. As Ofcom notes, such an approach could introduce higher costs in terms of system changes and a need for individual negotiations with CPs based in other countries (which in itself could be challenging). Ofcom rightly notes that negotiations could even result in higher FTRs which would be passed on to consumers.

20. “Differential regulation” could also lead to the risk of more complex and inefficient traffic routing which would in turn mean more difficult tracing and enforcement of nuisance callers. Such an approach could therefore have a potentially negative impact on consumers, as well as hamper Ofcom’s efforts to combat such calls.

ISDN

21. With BT having ~100% Market Share of the ISDN 2 and ~65% of the ISDN 30 market there can be no doubt that they have SMP in both markets. In such circumstances ex-ante price controls are needed and we support Ofcom’s proposals to ensure a price cap is introduced, however we don’t believe it is proportionate to draw a distinction between circuits in situ and new orders and Ofcom should impose a remedy that covers all services, regardless of their age.

22. If an existing ISDN customer moves premises, they are potentially facing a price hike to receive the same service, falling out of regulatory pricing protection as a result of circumstances that might be out with their control. In many cases consumers may be unable to move off ISDN services when they move premises within a local area, as Ofcom’s own research demonstrates that business user dense geographic areas are not always capable of receiving sufficient broadband speeds to replace 30 channels of ISDN, nor may Ethernet be an economically viable alternative. This cannot be the intension of Ofcom’s proposals and all consumers should continue to receive the same level of pricing protection in the market. A two-tiered structure is unduly complicated and

[2] See for example, Article II of the WTO GATS, Article 5(a) of the Annex on Telecommunications to the WTO GATS, and Section 2.2 of the Telecommunications Services Reference Paper.

Ofcom should aim to keep pricing regulation simple at this stage in the product's lifecycle.

23. Ofcom are rightly mindful not to impose an aggressive charge control in the ISDN30 market, as it is likely to be alternative suppliers (representing ~35% of the market) that will face negative consequences of a charge control before BT, as they have a higher cost to serve the market and may be reliant on other regulated inputs such as PPCs (which until recently were on an upward pricing trajectory). Such an approach is likely to entrench BT's market dominance and discourage other infrastructure players from participating, rather than to address BT's dominance.

24. While we believe a price ceiling approach across all ISDN services regardless of age strikes the right balance for consumers, other CPs, BT and Ofcom. It is not onerous on BT or Ofcom, prevents harm to competitive supply and protects consumers with a pricing backstop. While we acknowledge that Ofcom is proposing that ISDN prices are capped at a level above their cost and this may this may be proportionate approach in this case, it is important that the excess profits earned by BT as a result of this policy based decision should be accounted for elsewhere, for example by reducing the prices of other regulated products without BT's overall cost recovery being threatened.

Interconnect Circuits

25. We believe Ofcom have overstated the cost of BT's interconnect circuits. Given the transition to IP, it would seem appropriate to use an efficient IP architecture, rather than TDM. However, if Ofcom continue to use BT's cost base it should be rigorously scrutinised to ensure assets fully depreciated (most TDM kit) are removed from the cost base and that the costs are as efficient as possible for this stage in the TDM lifecycle. Given the shrinking nature demand, BT's costs look overstated and there is a risk of over-recovery if these costs aren't subject to greater scrutiny by Ofcom.

Forced Re-Classification of Transit & Conveyance charges

26. UKCTA considers that the recent changes made by BT to its charging for transit calls on the tandem layer show that BT remains very dominant in this market. In its EBC briefing of 1 December 2016, BT informed industry that for transit calls sent by an originating CP to BT at an IPEX before being routed to the terminating provider via a TDM tandem exchange, it intended to charge double tandem rates from 1 January 2017 instead of single tandem rates as had previously been the case. This effectively doubles charges for such operators and is therefore having a severe impact on many UCKTA members.

27. Firstly, we do not agree that an IPEX to TDM transit call should be charged at double tandem rates as such a route does not meet the definition of a double tandem transit call (as set out in Schedule 102 to the SIA) as an IPEX is not included in the definition of a BT Tandem Exchange (as set out in Annex D to the SIA). We also consider that the

change does not meet the requirements set out in the regulated SIA terms, and cannot be forced in through a billing change alone – such a change would require a contract change and be considered a “system alteration”, requiring a seven-month notice period as per SIA term 4.1 (which UCKTA members have not received). There is also a larger concern that BT is forcing operators to build out to the IPEX in order to avoid the double charges, especially when the terminating operator has no control over where the originator sends the traffic to BT. In addition, BT is forcing such operators to sign up to an unregulated contract and terms without the guarantee that access will continue to be provided.

28. Such behaviour demonstrates BT’s continued dominance, and UCKTA considers that Ofcom should therefore immediately consider the case for regulation of IP interconnect as well as continuing with TDM interconnect regulation.

BT Exerting wider market control

29. Ofcom need to appreciate that BT’s market power across the narrowband market manifests itself cumulatively across the various products and systems in place which BT controls by virtue of their legacy incumbency positon. While the market has been progressively deregulated since 1997, BT’s SIA has changed little and it retains the ability to impose price changes and reject CP initiated pricing requests. When a contract assumes a significant amount of regulation and that regulation is no longer in place, it results in unfair contract terms being in force, by virtue of the fact they no longer fit the market circumstances.

30. BT controls a range of monopoly essential services such as emergency call handing, text relay, payphone access and is involved in most fixed porting transactions. Its refusal to make purchases from other transit providers demonstrates its market power and the functioning of the BT Carrier Price List means that unless a CP reaches agreement with BT over pricing, they can’t make unilateral changes to the price of accessing their own services (as the previous price continues to be offered to the market via the BT CPL).

31. The inability of the industry to successfully dispute such charges (for example Ofcom declined to open two disputes into the level of the payphone access charge despite it being priced at 79ppm) means that Ofcom needs to act within this market review to ensure BT isn’t able to exercise its market power to the detriment of other communication providers.

32. A safeguard cap on all monopoly services and Ofcom facilitated reform of the SIA are long overdue.

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