



**CROSS SUBMISSION ON THE DRAFT  
REVIEW OF THE UNBUNDLED BITSTREAM  
ACCESS STANDARD TERMS  
DETERMINATION – THE COMPETITION  
ASSESSMENT**

**21 December 2010**

**Public Version**

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## A. EXECUTIVE SUMMARY

1. We welcome the opportunity to comment on other parties' submissions to the Commission's competition test process for the Unbundled Bitstream Access (**UBA**) Standard Terms Determination (**STD**).
2. We are pleased to see a high degree of alignment amongst respondents and general support for the Commission's proposals along with constructive suggestions on possible refinements.
3. We agree with most of Vodafone and Vector's submissions. However, there are a few instances where clarification by the Commission is required and one or two instances where we would like to test the views put forward.
4. In summary, our key points are:
  - We support the need for a separate consultation on the market definition ahead of the next full competition test review. This investigation would need to look at the impact and possible inclusion of mobile / wireless technologies as well as the triggers for the inclusion of fibre access networks;
  - We agree with Vector that cable is a strong competitor in the local access market today, and acts as a Competing Provider in cabinet areas;
  - The *threat* of new entrants acts as a competitive constraint in deregulated areas just as much as actual knowledge of UCLL operator plans. The Commission's proposed approach to the near entrant constraints is a more pragmatic and workable solution than monitoring actual proposed network rollouts;
  - There are sufficient safeguards to deal with any perceived concerns that Telecom may take advantage of its position in deregulated areas. These also serve to minimise any risks arising from a 'false positive' outcome from the competition test.
5. Our cross submission follows a similar layout to our submission and to the Commission's draft report addressing issues relating to the market definition followed by the competition assessment and a section dealing with other matters.

## **B. MARKET DEFINITION**

6. The broadband access market is undergoing constant competitive change. The submissions demonstrate that there is general alignment between respondents on the Commission's current definition of the relevant market. In particular, all respondents agree that the Commission should maintain a watching brief on key issues and perform regular reviews. We discuss specific issues relating to the market definition below and touch on the review process in the "other matters" section.

### **PRODUCT MARKET**

7. Further analysis is needed on the level to which wireless represents a close substitute before deciding how best to account for the competitive constraint it imposes on DSL. We support both Vodafone and Vector in calling for further analysis and consultation of this issue ahead of the next review.
8. This investigation may also be a good place to consider some broader issues around the market definition; for example Vector's suggestion to adopt a principle-based framework linked to key product characteristics (such as throughput / bandwidth) and criteria for geographic inclusion of competing networks. As Vector notes, this will become all the more important as UFB and RBI providers progressively deploy broadband infrastructure. It will also provide certainty to investors and the industry. The Commission could initiate a consultation early in the New Year to which, as noted in our earlier submission, we would be happy to contribute.

### **GEOGRAPHIC MARKET**

9. We note there is unanimity among respondents on the Commission's geographic market definition of ESAs and cabinet areas. We agree with Vector that a coverage measure or proxy should be defined for the inclusion of competing networks (e.g. cable / fibre). We expect that the Commission will already have such a measure / proxy in mind (and that it may well have used this to decide where to include / exclude cable and fibre networks). We encourage clarification from the Commission on this point.
10. We also agree with Vector that competing networks should be counted as Competing Providers for cabinets that fall within their footprint.

### **FUNCTIONAL DIMENSION**

11. We agree with Vector and the Commission that wholesale markets can be influenced by competition in retail markets. Retail and Wholesale markets are part of the same value chain. The bi-directional linkage between them means that pricing in one market provides signals to the other. We note that this approach is consistent with that adopted by Ofcom in the UK (in the context of wholesale broadband services).

## **C. COMPETITION ASSESSMENT**

12. Respondents appear to agree that the methodology proposed by the Commission is generally robust. We pick up below on a few comments from the respondents.

### **EXISTING COMPETITION**

13. We agree with Vector's suggestion that more robust evidence of the level of constraint provided by competing networks could strengthen the analysis. Vector states: "it could well be that one competing network (TCL by itself) provides sufficient competitive constraint without the need for unbundled UCLL, but the draft review does not investigate this..." We agree that the competitive constraint imposed by TCL's cable network is generally underappreciated in the Commission's analysis, particularly in cabinet areas.
14. The impact of network competition on UBA cabinet services is closely related to this point, as noted in the "market definition" section above. Vector argues that the Commission does not effectively assess the impact of competition directly from competitive networks on UBA cabinet services. We agree with Vector that more consideration should be given to the constraint that cable (and fibre and other competing networks, including wireless, as appropriate) imposes on Telecom Wholesale for cabinetised lines.

### **DEFINITION OF "COMPETING PROVIDERS"**

15. As noted above, we agree with Vector that cable should be considered as a Competing Provider for cabinets that fall within its network footprint.
16. Vector argues that the lack of an ex-post assessment in individual ESAs could increase the risk of a "false positive" (i.e. concluding an ESA is competitive when it is not). It proposes some form of de minimis rule around the number of unbundled lines in each exchange. We believe that the Commission's proposal, which is based on an analysis of competition in different exchange areas (and excludes niche or localised unbundlers from the Competing Providers definition), is robust while also being pragmatic. We do not agree with Vector's suggestion of an ex-post assessment in individual ESA's and note that, in any case, there are sufficient safeguards (regular competition reviews, the Undertakings and provisions of the Commerce Act) to mitigate any risk of a "false positive".

### **COMPETITION IN AN ESA**

17. There appears to be agreement with the Commission's proposal that an ESA is competitive where two Competing Providers (or one Competing Provider and >6500 addressable lines) are present.
18. We note Vodafone's concern that the status of exchanges may change over time as the cabinetisation programme proceeds and agree that clarity is needed. We suggest, in the interests of simplicity and stability, that a reference point in time for determining the number of active lines in each ESA should be adopted. In our

earlier submission we proposed that the 6500 lines threshold is measured based on the number of lines that will remain on each exchange at the end of the cabinetisation programme in 2011. We note this appears consistent with the Commission's own analysis. We believe this is a practical means of dealing with these concerns.

19. We agree with Vector that the Commission needs to clarify how the competition test would apply to individual cabinet areas. As suggested above, the clarification should confirm that cable and fibre as well as SLU operators (and in due course wireless operators) are Competing Providers if they are present in a cabinet area.
20. Vector claims that the Commission has failed to address the issue of Telecom's national market power. Their concern appears to be that Telecom could somehow cross subsidise competitive urban areas from non-competitive rural areas. We do not accept this suggestion. In fact, any risks of this type seem to us to be mitigated both by the various regulatory safeguards (the Undertakings, the Commerce Act and reviews of the UBA competition test) and by basic competition economics on the supply side (threat of entry) and the demand side (retail market pressure and elasticity of demand).

#### **NEAR ENTRANT CONSTRAINT**

21. Vector noted that the Commission's analysis does not (but should) take account of intentions of Competing Providers. While we understand their concern, we believe that the key constraints on Telecom Wholesale are existing competition and the continued *threat* of competition – rather than the *knowledge*, per se, that entry is imminent. We also note that investment plans frequently change. In particular UCLL investment plans are likely to be susceptible to change at present and would need to be constantly kept under review. In any case, such plans are highly confidential and not visible (in any form) to Telecom Wholesale (i.e. they will not know competitor's plans and therefore not respond to it). On this basis we encourage the Commission to retain the current near entrant test which recognises the *threat* of entry as the real constraint on Telecom Wholesale.

### **E. OTHER MATTERS**

#### **INCENTIVES FOR TELECOM WHOLESALE**

22. We welcome Vodafone's recognition of the commercial incentives that operate for Telecom Wholesale. We agree that the potential for fundamental changes in the industry (including any future change to Telecom's structure) make regular reviews of the UBA competition assessment by the Commission necessary.

#### **REVIEW PROCESS**

23. In our earlier submission we noted the three key elements to the review process as *quarterly data reviews*, *annual policy review*, and, *ad hoc reviews*. Reflecting on the submissions and the draft report there is another important aspect that,

although not essential for this review, should be addressed ahead of the next review. As discussed above and noted by other respondents, we agree that it is important to consider and to consult on the competitive constraints which arise from wireless and other technologies (including their incremental rollout). The results of this consultation can then be used to modify the market definition, as appropriate to ensure a transparent and objective set of criteria showing how these matters are accounted for. We believe that there would be merit in the Commission issuing a discussion paper / consultation on these questions early in the New Year.

24. Submissions from Vector and Vodafone reinforced our perception that this market remains dynamic with multiple potentially fundamental shifts in the competitive landscape. The most obvious examples of change are of course UFB (and potential structural changes at Telecom), the RBI and changes in the mobile market with respect to pricing, speed and data allowance for 3G mobile and the prospect of further change with 4G/LTE in the longer term.