BEREC Broadband Promotion Report

Virgin Media Consultation Response

23rd January 2012

Executive Summary

Virgin Media Limited ("Virgin Media") welcomes the opportunity to contribute to BEREC's consideration of the regulatory tools and policies which can be used to facilitate the promotion of broadband. The economic, social and cultural benefits of broadband adoption are increasingly evident – not to mention of great importance. The internet economy constitutes a growing proportion of Member States' GDP, and is one of the few growth areas in these times of fiscal crisis. Indeed it is viewed by many as a key facilitator of economic recovery. As such it is vital that the adoption of the underpinning broadband networks is encouraged and advanced and that any barriers to it are appropriately addressed. Regulation and public policy can play a principal role in this, but must be targeted and proportionate and must not undermine or otherwise disrupt market forces. In particular, as we set out below, we consider that NRAs and policy makers must ensure the right balance between the application of regulatory and policy stimuli, and allowing the full potential of market based adoption to be realised. Moreover certainty of, and stability in the regulatory approach is critical in attracting future private investment to the sector and in ensuring that existing investments are not undermined. Such factors are also crucial in driving innovation – a prime example of which is the privately funded doubling of customers' broadband speeds, as recently announced by Virgin Media.

We are firmly of the view that broadband evolution should be market led, and that the promotion of market driven competition should prevail as NRAs' principal objective. While we accept, of course, that the market will not deliver the desired outcomes of its own accord in all cases, and that as such intervention will in some instances be inevitable, it should be approached on the basis of it being a 'last resort', political influence should not be allowed to prevail at the expense of established regulatory best practice, and inconsistencies between (Governmental) policy and regulators' approaches should be avoided. By the same token, care must be taken when selecting the type of regulatory tool or measure, and in any consideration of the interaction between differing types. For example, in Virgin Media's view an over-focus on supply side strategies at the expense of demand side measures could be counter productive. In this regard we are encouraged by BEREC's focus on the latter in the draft report, and believe that such measures should play a more significant and earlier role in NRAs' and policy makers' strategies. We elaborate on our views in the pages that follow. In order to focus our input we have chosen on this occasion to limit our response to high level points of principle, rather than address the consultation questions specifically. However, we believe that our submission incorporates the key elements on which BEREC is seeking input.

Introduction

As the UK's principal Cable operator, Virgin Media provides fixed and mobile telephony, broadband and television services to over 4 million residential and business customers. We have already made substantial investments in next generation facilities and operate a hybrid fibre coaxial (HFC) infrastructure which is a next generation network in its own right. This network covers in excess of 50% of UK households and by mid 2012 will be capable of delivering a 100Mbit/s broadband service to all customers. We are, in addition, in the process of doubling our customers' speeds across the various product tiers that we offer. All of these advancements have been achieved on a fully privately funded, market driven basis.

It is widely recognized that competition is the primary facilitator of broadband promotion: the best outcomes are delivered by market forces. For example, investment by Cable operators has been a catalyst for investment and innovation by other, competing operators which has lead to consumers having a choice of both innovative and cutting edge services, and of provider, at competitive prices. This is no more true than in the UK where Virgin Media has a history of continual investment, and has pioneered the introduction of successive generations of internet access product. In each case, competing providers – in particular the incumbent BT – have reacted to these innovations and have been spurred to invest in comparable products and services on a reactive basis.

The rapid advancement of capability and services that Virgin Media has achieved, and the corresponding investments and network/service upgrades that competing providers have made in response to these, is a prime example of the benefits of privately driven, infrastructure based competition and the positive effects that it ultimately delivers for consumers. We consider that policy makers and NRAs should therefore hold as a principal objective the promotion and facilitation of such competition and should allow market forces to prevail to the greatest extent possible.

In this regard, the promotion of broadband should not be confined to supply side aspects. Broadband adoption is critically dependent on perceived need, willingness to pay and affordability. Moreover, the nature and scale of demand are critical factors in any broadband provider's business case. In promoting broadband and attempting to drive adoption therefore, we consider it vital that demand side factors play a principal role in the first instance, and that in any event an appropriate blend of both supply and demand side measures is required – and NRAs and policy makers have a role to play in the latter, as much as the former.

Approach to Broadband Promotion: Regulation and Policy Perspective

While there may be many facets to a broadband promotion strategy, regulatory and policy measures will arguably constitute a central component. It is therefore vital that these measures are targeted and proportionate, and founded on a sound, established underpinning. A key factor in ensuring supply of broadband and in achieving market lead outcomes is the existence and availability of private investment. It is therefore vital that this aspect is taken account of in the exercising of any broadband promotion tools. Mis-targeted regulatory or policy intervention, for example, sends a fatal message to potential investors in what is intrinsically a high risk sector, regardless of the current economic situation. Inappropriate intervention jeopardises not only future investments but risks undermining existing investments and thus the progress towards policy goals that has already been achieved.

It is also important for the regulatory and policy aspects of any broadband promotion strategy to be coordinated – both with each other and with other measures – and for full account to be taken of their interdependencies. There must, for example, be consistency between Governmental strategies and regulatory policy/associated measures. In this regard we would highlight what we perceive to be an emerging tension in the UK as between the regulator's hitherto established promotion of competition/market based approach and the Government's apparent subsequent interventionist aspirations, in respect of the deployment of NGA in urban areas and the promotion of 'ultra fast' broadband. As we set out below such situations are undesirable, not least because they are disruptive to the market and can result in unintended consequences. While the setting of the agenda and overall strategy is of course a Governmental prerogative, implementation of the regulatory aspects of such should be left to NRAs

Moreover, politically motivated objectives should not lead to deviation from established regulatory policy, if those objectives are not founded on sound economic and regulatory rationale or fail to reflect the realities of the market. In this regard, it is important for actual market conditions (including demand factors) to be taken into account when developing both policy and regulation. More broadly, while we recognise the benefits of driving broadband adoption and the need to drive such adoption, we would observe that a (perceived) slow deployment or take up of NGA does not in and of itself constitute 'market failure' – and thus prescriptive formal intervention is not always warranted in such circumstances, particularly in respect of supply side measures. On the contrary, forcing the pace on the supply side can actually result in opposite outcomes to those desired. Complementary demand side measures can often be a far more appropriate remedy to such a situation. In a similar vein, a desire to stimulate investment in less competitive markets or regions should not be advanced at the expense of the substantive areas that are already delivering the right outcomes: in other words, a 'lowest common denominator' approach should be avoided.

At a higher level, the sequencing and relative weighting of the different types of policy and regulatory measures are also of great importance. The sequential approach advocated by the Florence School of Regulation as referenced in BEREC's draft report is, in our view, too simplistic. That approach suggests that supply side measures should be advanced in the first instance, with demand side measures taken forward at a subsequent stage. Furthermore there is also an inference that greater focus should be conferred upon supply side measures.

As BEREC recognises, low or uncertain return on investment is a principal barrier to the deployment of broadband and in particular NGA networks. In Virgin Media's view, the existence of demand side measures, or at least firm plans to bring such measures forward and clarity around them, can help to strengthen the investment case in the first place. This could potentially reduce the need for supply side measures, which tend to be more intrusive and potentially disruptive to the market. We believe therefore that a simplistic sequential application of supply and demand side measures is rarely the optimal approach, Furthermore, we consider that it is important not to underestimate the effects of demand side activity and that as such primacy of supply side measures should not necessarily be the default position or automatic assumption.

While we are strong advocates of non-interventionist, pro-competitive approaches to policy and regulation, and allowing market forces to prevail to the greatest extent possible, we recognise that intervention will be necessary in some instances. In this regard, we welcome the recognition by BEREC that NRAs have a comprehensive tool kit available to them in the form of the recently updated Telecoms Framework. We consider that the core set of established measures contained within that framework provide sufficient means to advance the promotion of broadband where regulatory intervention is warranted – and these should be afforded the fullest opportunity to have effect before more interventionist, recent additions are contemplated.

Where it is proven that there is no prospect of privately funded investments meeting a demonstrable market demand, we also recognise that the relevant authorities may consider the use of public funds. Such a move should however, be considered a 'last resort' and should be approached with great caution, ensuring that full account is taken of the impact on wider broadband promotion measures and the market as a whole (including ensuring that demand is properly understood). In particular the application of State aid must be accompanied by comprehensive, transparent assessment of market conditions in relevant areas, and notification of framework schemes must be approached with great caution (for example, any devolution of approval of individual projects to national authorities must be accompanied by rigorous assessment and transparency requirements, with a high burden of proof obligation on the authorising body).

Barriers to the Promotion of Broadband

We broadly concur with the barriers to broadband promotion identified by BEREC - as such we do not comment on them all in detail herein. We do however consider the factors of stability, certainty and consistency in the regulatory environment to be of particular relevance and indeed concern in this regard.

The specific nature of any measure that is advanced for the purposes of promoting broadband is not the only concern for investors – they also need to have certainty around, and long term confidence in, the prevailing policy and regulatory framework. Any doubt around the longevity or lifespan of any measure, suggestion of deviation from established best practice or fear of future regulatory intervention can significantly undermine investment incentives. Moreover a lack of certainty or consistency in the prevailing regulatory approach will equally very likely have a major chilling effect on prospective investors. In this regard, Virgin Media is concerned at the emerging suggestions that the Commission may be contemplating a deviation from established best practice in the interests of achieving its broadband adoption aspirations – for example the potential manipulation of regulatory tools to artificially incentivise the retirement of legacy networks, the apparent divergence form the established principle of technology neutrality in favouring fibre based deployments. By the same token, investors will very likely be unsettled by the potential devolution of approval for individual elements of State aid schemes to national authorities, and the potential willingness of the Commission to intervene in nascent and emerging markets as a part of the net neutrality debate. These types of approaches serve only to undermine investor confidence and, if progressed, will very likely result in those investors allocating their funds to markets that exhibit greater stability and certainty in their regulatory approach.

We welcome BEREC's undertaking of this exercise and while we have noted certain cautions above, we are generally encouraged by the measured approach that it appears to advocate. We look forward to the output of the initiative and in the mean time would of course be happy to elaborate on any of the points that we have made in this submission.

Andrew Wileman
Virgin Media, January 2012.