



Excess Construction Charges for Openreach Ethernet Access

Direct

Proposed Directions in relation to the Leased Lines
Charge Control

Consultation

Publication date: 14 February 2014

Closing Date for Responses: 14 March 2014

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Section 1

Summary

- 1.1 We concluded our most recent review of competition in the provision of leased lines on 28 March 2013¹ (“BCMR Statement”). In that review we found, amongst other things, that BT has significant market power in the provision of several types of leased line services, and addressed competition concerns we had identified by imposing a number of *ex ante* remedies, including controls on Openreach’s charges for wholesale Ethernet leased line services² known as Ethernet Access Direct.
- 1.2 More recently, and in response to on-going concerns, Openreach has discussed with us, and presented to an industry forum, a proposal to simplify part of the provision process for Ethernet Access Direct, by changing the way it charges for excess construction.
- 1.3 Openreach proposes to exempt most orders for certain Ethernet Access Direct services from excess construction charges, and to make up the resulting loss of its revenue by recovering it from a balancing charge which would be part of the standard connection charges for all orders for the same Ethernet Access Direct services.³
- 1.4 Our current view, subject to this consultation, is that Openreach’s proposal is likely to allow for material improvements in both communication providers’ and the end-users’ experience of provision of Ethernet Access Direct services. While we acknowledge that the proposal may have a distributional impact, in that some communication providers or end-users may pay higher charges than they would have otherwise in the absence of the proposal, and others will pay lower charges, we think that the positive effects are substantial enough to outweigh these possible drawbacks.
- 1.5 However, in our current view, the addition of the proposed balancing charge would be construed as part of the standard connection charge, and this would not allow Openreach to comply with the conditions we imposed in the BCMR Statement to control BT’s charges for Ethernet Access Direct services. We therefore propose to issue two Directions which would disapply, to such extent as is necessary, those conditions from the balancing charge component of the connection charge for certain Ethernet Access Direct services, provided Openreach exempts every order for the same services from a specified fixed amount of excess construction charges.
- 1.6 Importantly, in our view, we consider the proposed Directions ensure the charge controls on BT continue to address both the competition problems for which they were imposed, in particular excessive pricing, and the specific policy objectives which we sought to balance when the charge controls were imposed. Our proposal is that, in light of our impact assessment set out in this document, the Directions would be objectively justifiable, proportionate, not unduly discriminatory and transparent, and that their effect would further the performance of our relevant duties in the Communications Act 2003 (“Act”).

¹ See <http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/final-statement/>

² Ethernet leased lines are used widely in business communications services and in communications providers’ networks.

³ Openreach proposes to include all Ethernet Access Direct services within the scope of its proposal except those which require resilient links known as Resilient Option 1.

- 1.7 If Openreach were to proceed with its proposal, we consider that efficiency in the industry's processes would be best served if the resulting changes in charges for Ethernet Access Direct were to coincide with the price changes Openreach is likely to make in any case in April to comply with the charge controls.
- 1.8 To facilitate timely conclusion, we are therefore setting a closing date for responses to this consultation of 14 March.

Section 2

Background

- 2.1 On 28 March 2013, we published the BCMR Statement.⁴ We imposed *ex ante* remedies to address the competition problems we identified in those markets in which we found significant market power (“SMP”). The remedies include SMP service conditions imposing controls on BT’s charges for several of its leased lines services which include its Ethernet Access Direct (“EAD”) leased line services. We refer in this document to these SMP service Conditions which impose the charge controls on BT collectively as the LLCC Conditions.
- 2.2 In installing a leased line service, including EAD, Openreach often needs to construct specific additional infrastructure to deliver the service to an end-user’s site. It currently charges for such construction work on a bespoke basis, and the corresponding charges are known as Excess Construction Charges (“ECCs”).
- 2.3 Openreach proposes to exempt most orders for certain EAD services from ECCs, and to balance the resulting loss of its revenue by recovering it from the standard connection charges for all orders for the same EAD services.
- 2.4 Following our initial analysis, we see potential benefits in Openreach’s proposal because it could allow Openreach and Communication Providers (“CPs”) to speed up the provision of EAD installations that would be exempted from ECCs, and improve the efficiency of this provision process for the benefit of end-users. However, we also consider that Openreach would be unlikely to comply with the LLCC Conditions as they stand if it were to proceed with its proposal.
- 2.5 In practice, the balancing charge would amount to an additional charge on top of the existing relevant EAD connection charge, which CPs would have no choice but to pay when they order EAD. Therefore, it would appear to us to be appropriate to construe the balancing charge as a part of the standard connection charge for those services.
- 2.6 In summary, under the LLCC Conditions, SMP Conditions 5.2 and 5.3 regulate, amongst other things, the level of EAD connection charges inside the Western, Eastern and Central London Area (WECLA) and outside it respectively.⁵
- 2.7 We consider that the addition of the balancing charge of £548 entailed in Openreach’s proposal, the effect of which would be to increase the EAD standard connection charge, would not allow Openreach to comply with SMP Conditions 5.2 and 5.3 in practice.
- 2.8 We do not intend to change the LLCC Conditions, but are proposing to issue two Directions which would allow Openreach to proceed. The Directions would disapply certain paragraphs of SMP Conditions 5.2 and 5.3 from a specified amount of the relevant EAD connection charges in certain defined circumstances.

⁴ See <http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/final-statement/>

⁵ See Annex 7 to BCMR Statement.

2.9 The following Section of this document describes our understanding of Openreach's proposal. Section 4 presents our current analysis of that proposal and sets out our initial view. We set out the effect that our proposed Directions would have in Section 5. The draft text of the Directions is at Annex 4.

Legal framework

2.10 As already mentioned, we propose to give effect to this proposal by two Directions which would direct that certain paragraphs of the LLCC Conditions would not apply to such extent as set out in those Directions. The relevant LLCC Conditions are Condition 5.2 and 5.3. The power to give such Directions is provided for in those Conditions, specifically paragraph (e) of Condition 5.2⁶ and paragraph (o) of Condition 5.3⁷.

2.11 As one of our functions under the Act, in order to give a Direction there are relevant legal tests and statutory duties to be considered. Section 49 of the Act requires that we must be satisfied that to give a Direction is:

- objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
- not such as to discriminate unduly against particular persons or against a particular description of persons;
- proportionate to what it is intended to achieve; and
- in relation to what it is intended to achieve, transparent.

2.12 Regarding our statutory duties, under section 3 of the Act, our principal duty in carrying out our functions is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition. In so doing, we are required to secure a number of specific objectives and to have regard to a number of matters set out in section 3⁸. In performing our duties, we are also required to have regard to a range of other considerations, as appear to us to be relevant in the circumstances⁹.

2.13 Section 4 of the Act requires us to act in accordance with the six Community requirements for regulation. Finally, section 4A of the Act requires us to take due account of all application recommendations issued by the European Commission under the Framework Directive¹⁰.

2.14 We explain in Section 5 how we consider that the two Directions would meet the relevant legal tests and how they would further the performance of our statutory duties.

⁶ Paragraph (e) of Condition 5.2 states: Paragraphs (a) to (d) shall not apply to such extent as Ofcom may direct.

⁷ Paragraph (o) of Condition 5.3 states: Paragraphs (a) to (n) shall not apply to such extent as Ofcom may direct.

⁸ See section 3(1) to (3) of the Act.

⁹ See section 3(4) of the Act.

¹⁰ Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, as amended.

Impact and Equality impact assessments

- 2.15 The analysis presented in this document constitutes an impact assessment for the purposes of section 7 of the Act. An impact assessment must set out how, in our opinion, the performance of our duties (within the meaning of section 3 of the Act) is secured or furthered by or in relation to what we propose¹¹.
- 2.16 Ofcom is separately required by statute to assess the potential impact of all our functions, policies, projects and practices on race, disability and gender equality. Equality impact assessments (EIAs) also assist us in making sure that we are meeting our principal duty of furthering the interests of citizens and consumers regardless of their background or identity. On the basis of our analysis as set out in this document, it is not apparent to us that the proposed Directions would have any particular impact on race, disability and gender equality. Specifically, we do not envisage the impact of the proposed Directions to be to the detriment of any group of society.
- 2.17 Nor are we envisaging any need to carry out separate EIAs in relation to race or gender equality or equality schemes under the Northern Ireland and Disability Equality Schemes. This is because, on the basis of our analysis as set out in this document, we anticipate that the proposed Directions would affect all industry stakeholders equally and will not have a differential impact in relation to people of different gender or ethnicity, on consumers in Northern Ireland or on disabled consumers compared to consumers in general. Similarly, we are not envisaging making a distinction between consumers in different parts of the UK or between consumers on low incomes. Again, we consider the proposed Directions would not have a particular effect on one group of consumers over another.

¹¹ See section 7(4) of the Act. For further information about our approach to impact assessments, see the guidelines "Better policy-making: Ofcom's approach to impact assessment" which are on our website: <http://www.ofcom.org.uk/about/policies-and-guidelines/better-policy-making-ofcoms-approach-to-impact-assessment/>.

Section 3

Description of Openreach's proposal

- 3.1 EAD is Openreach's product name for its current generation of wholesale Ethernet leased line access services. A description of the product range can be found on Openreach's web-site.¹²
- 3.2 While nominal delivery lead-time for EAD services is 30 working days, requirements to construct physical infrastructure contribute significantly to longer delivery times in many cases. Openreach currently assesses the need for any construction within 14 working days of the date of the order. If construction work is required in order to deliver the service to an end-user's site, Openreach provides the ordering CP with an itemised quotation of ECCs for such work and waits for approval.
- 3.3 The current arrangements, under which Openreach quotes bespoke ECCs and awaits the ordering CP's approval before it proceeds with providing the service, build delay into the delivery of the EAD orders affected.
- 3.4 In order to reduce the number of instances in which such delay occurs, Openreach proposes to exempt the first £2,800 of itemised ECCs from all orders for certain EAD services, while offsetting the revenue it would lose in exempted ECCs by adding a £548 balancing charge to the connection charge for the same EAD services. The balancing charge has been calculated with the aim of neutralising the effect of the exempted amount of ECCs on Openreach's revenue.
- 3.5 Openreach has included all current variants of its EAD services in its proposal except resilient services known as "Resilient Option 1". Those resilient services usually require construction of an additional and separate physical connection to the end-user's premises at significant cost, and Openreach has therefore not included them in its proposal.

¹² See <http://www.openreach.co.uk/orpg/home/products/ethernetservices/ethernetaccessdirect/ead.do>

Section 4

Ofcom's Considerations

- 4.1 In this Section, we set out our current analysis of the impact that the implementation of Openreach's proposal would have. The analysis is based on information obtained from Openreach. In summary, our current analysis suggests the following likely impact of implementing Openreach's proposal:
- A reduction of several days in the installation lead time of most EAD services which require construction of infrastructure at or near end-users' premises;
 - A modest reduction in the rate of cancellation of EAD orders;
 - No expected change in Openreach's revenue associated with ECCs and EAD connections combined;
 - A distributional impact in that end-users of EAD services, which do not require construction of infrastructure at or near their premises, could face higher charges, while those whose orders do require such construction would pay less;
 - No impact on competition for individual circuits as all CPs purchasing EAD services to supply an end-user would face the same terms;
 - There may be an indirect impact on competition in that some CPs which order EAD services to provide backhaul for their fixed broadband services may face an increase in average EAD charges (although others will pay less). Our analysis suggests this impact would be modest and unlikely to have any material effect on competition.

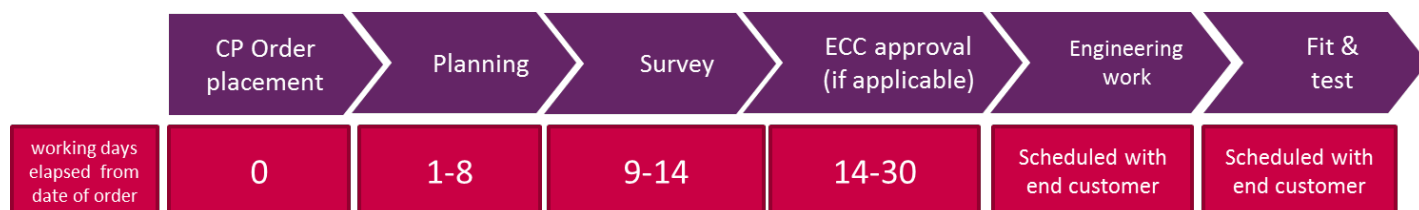
Impact on the ordering and provision process for EAD services

- 4.2 In conducting our analysis of the proposal, we first assess the likely impact of the change on the ordering and provision process for EAD services.
- 4.3 The assessment of the impact on the provisioning process needs to be seen in the relevant context. As volumes of EAD services have risen, some CPs have raised concerns about Openreach's provision process. Openreach has been discussing a number of potential improvements of the process with CPs and the Office of the Telecommunications Adjudicator (OTA). Openreach's proposal regarding ECCs should be seen in this broad context. The benefits from its implementation would be part of the wider improvements which Openreach and the industry are working to deliver.
- 4.4 The EAD order process can be divided into six steps. These are:
- a) A CP places an order.
 - b) Openreach plans the works necessary for the provision of the EAD service.
 - c) If ECCs are likely to be required, there is a survey stage where the real cost of the EAD service is assessed.

- d) Openreach sends a quote stating the ECC (if applicable), and waits for the CP to approve it or not.
- e) If the CP approves the quote, engineering works can start
- f) Finally, there is a test phase to ensure the EAD line is operational.

4.5 Openreach has provided an estimation of the total number of working days elapsed from the date of the order as the provision progresses through each step. These are indicated under each of the steps below.

Figure 1: EAD process



4.6 The effect of the proposed Directions would be to reduce the ECC approval period for those orders which would now be exempt from ECCs. In order to estimate the approval time, Openreach has provided evidence from a sample of 872 orders completed in November 2013, of which:

- 366 orders had clean data supporting a calculated dwell time of 19.8 days from ECC quote to confirmed acceptance;
- 280 did not have sufficient data (within the notes fields) to determine the ECC approval dwell time, we have assumed for these the average ECC quote to acceptance as above;
- 137 included ECC notes that suggested ECCs may have been pre-approved. Openreach assumed no dwell between ECC quote and acceptance on these orders; and finally
- 89 had multiple ECCs calculation making it difficult to analyse the true ECC quote to acceptance dwell – we have assumed the average observed dwell time of 19.8 days would apply.

4.7 Taking the averaged dwell observed and weighting it by the above the total sample results in a 16.6 calendar day delay from ECC quote to acceptance. This is the potential reduction in order time for those EAD orders which would be exempt from variable ECC charges under the proposed Directions.

4.8 Over the past three years, circa 30% of all EAD orders have incurred ECCs and so have been subject to the process described above. As we explain below, based on our calculations, the proposed exemption would reduce the proportion of orders with variable ECCs from circa 30% to circa 8% (a reduction of 22% percentage points).¹³ Although construction work would still be required, for those 22% of orders there would be no need for an ECC approval period and so the time to provision would reduce.

¹³ 92% order coverage is based on a £2,800 exemption applied to 12/13 ECC data excluding resilient option 1 variants.

- 4.9 In addition to the reduction in provisioning time, there may be further benefits from Openreach's proposal. The reduction in the number of EAD orders which incur variable ECCs may also reduce order cancellations because end-users and CPs would face fewer unexpected charges. The proposed change may also enable greater automation of the CPs' provision process as it would involve them in fewer manual steps.

Impacts on Openreach's recovery of the costs of excess construction

- 4.10 In assessing the proposal, we have been careful to ensure that the proposed Directions should not allow Openreach more revenues than it would otherwise have earned under the LLCC 2013. If the revenue Openreach collected by adding the balancing charge to EAD orders were to exceed the value of ECCs exempted from those orders, then Openreach could over-recover.
- 4.11 In accordance with Openreach's proposal, we understand that it would exempt the first £2,800 of ECCs by charging a balancing charge of £548 on all orders for certain EAD services. We have assessed whether this proposal is likely to result in any change in Openreach's net revenues. That is, we have assessed whether the value of the ECCs exempted and the additional revenues from the EAD connection charge would cancel out.
- 4.12 We have compared the total ECCs paid by CPs for orders completed in the FY 2012-2013 and the total ECCs that CPs would have paid had the proposal been implemented during the same period. To take into account the price changes that occurred on 1st April 2013 following the coming into force of the LLCC, the value of ECCs for orders placed before 1st April 2013 were adjusted downwards by 29%. To take into account the 1.25% price increase BT will apply to its prices by 1st April 2014, we have adjusted upwards the value of each ECCs by 1.25%.
- 4.13 In 2012/13, there were 30,616 completed EAD orders.¹⁴ These orders attracted total ECCs of £38,129,607. Given the 29% reduction in ECC charges which came into effect on 1st April 2013, and given the 1.25% price increase that will come into effect in 1st April 2014, this corresponds to an adjusted ECC spend of £27,410,421. If there had been an exemption for the first £2,800 of ECCs, then the total amount of variable ECCs would have been £10,527,154.
- 4.14 The difference between the two ECC levels is £ 16,883,267. Spreading this amount across all completed EAD orders (excluding resilient option 1 orders) would correspond to £551 per EAD order. This is shown in the table below.

¹⁴ Excluding EAD RO1 (resilient option 1) orders. The proposed exemption would not apply to resilient orders and so resilient orders were excluded from our calculations.

Table 1: Calculation of the balancing charge

	Total
Number of EAD orders (2012/2013)	30,616
Total ECCs (2012/13)*	£27,410,421
ECCs with a £2,800 exemption	£10,527,154
Balancing charge	£551

*With a 29% reduction due to the reduction in ECCs from the LLCC 2013

- 4.15 The calculations above were based on 2012/13 data. We have also calculated the corresponding values for the years 2011/12 and 2013/14. We have checked the proposed rate against data from the FY 2013/14 and 2011/12. These show that the incidence and level of ECCs have been relatively stable over time, with only minor differences in the implied value as shown in the next table.

Table 2: Simulation of the difference in the last three years¹⁵

	Flat charge
FY 2011/2012	£547
FY 2012/2013	£551
FY 2013/2014	£546
Average	£548

- 4.16 The proposed balancing charge of £548 has been designed based on historical data, using the non-resilient EAD orders completed between FY2011-2012 to FY2013-2014.¹⁶ It is possible that if the order patterns were to change in the two remaining years of the current LLCC, the proposal could affect Openreach's recovery of ECC unit costs (i.e. it could either under- or over-recover the ECC costs).
- 4.17 On the basis of our analysis, we consider that any effect on Openreach's recovery of ECC unit costs is unlikely to be material. First, we note that the rate has been stable over the past three years. Secondly, to the extent that implementation of the proposal would change purchaser behaviour, it is likely to lead to an increase in the incidence and value of ECCs (as the marginal charges faced by CPs due to bespoke ECCs would fall). This means that the direction of any change would be towards under-recovery by Openreach, and so would not lead to higher revenues.

Distributional impacts on CPs and end-users

- 4.18 Given the calculations above, we anticipate that the overall impact of the proposed change is likely to be revenue neutral, with any potential bias weighted towards under-recovery by Openreach.

¹⁵ The revenues for FY 2011/2012 and FY 2012/2013 were also adjusted by 29% to take into account the change in prices that occurred on 1st April 2013. The revenues in FY 2013/2014 were not adjusted as they are assumed to be at 2013/14 prices.

¹⁶ The data we have for FY2013/2014 contains orders completed as of 28 January 2011.

- 4.19 However, the proposal does have distributional impacts. Given the nature of the proposal, CPs and end customers whose EAD orders require fewer ECCs than average (particularly services which terminate in locations already served by fibre, such as exchanges) would end up paying more, and CPs and end-customers which place orders that require more ECCs than average would end up paying less.
- 4.20 We have assessed whether this distributional impact would be unduly discriminatory and in particular whether it would place any group of CPs at a competitive disadvantage.
- 4.21 In considering this impact, we have distinguished between situations where CPs are competing to supply a circuit to an end-user and situations where CPs are purchasing the circuit for their internal use e.g. to construct their own network.
- 4.22 In relation to situations where the CP is supplying a circuit to an end customer, we consider that the proposal should have no material impact on direct competition between CPs. CPs competing to supply an EAD circuit to the same customer will face the same wholesale price for the circuit they purchase from Openreach. BT's internal operations would also be subject to Equivalence of Inputs (EOI) obligations which mean that they would also pay the same price as CPs. The proposal therefore does not place them at a competitive disadvantage.
- 4.23 However, in other situations, CPs may purchase the EAD circuit for construction of their own network, which they then use to deliver other services in competition with BT and with each other. Those CPs whose network construction requires proportionately fewer ECCs would face higher charges and those whose network construction requires proportionately more ECCs would face lower charges.
- 4.24 Our preliminary view is that this impact would be also modest. We have calculated the hypothetical loss for those CPs who would be net losers from the change. Our analysis estimates this would be £115 per EAD order on average¹⁷. It would amount to 1% of the costs of an EAD 100 circuit or 0.5% of the cost of an EAD 1000 circuit, over a 3 year period.¹⁸ As the EAD circuit is just one element of the CP's network cost, the overall impact on their charges to end-users is likely to be modest.
- 4.25 Our preliminary view is that the overall distributional impact is modest and that the efficiency benefits of an improved ordering process outweigh this distributional impact.

Conclusion

- 4.26 The proposed change in ECC charging structure is a simple measure that is likely to allow for material improvements in the end-users' experience of provision of EAD services. We acknowledge that the proposal may have a distributional impact: some CPs or end-users may pay higher ECC than they would have otherwise in the absence of the change while others will pay less. However we think that the positive effects are substantial enough to outweigh these possible drawbacks. On that basis, we believe the proposed change would be objectively justifiable, proportionate and not unduly discriminatory.

¹⁷ The hypothetical loss per order is a weighted average of the individual losses CPs would have made (based on 2012/13 data) had the change been implemented in 2012/13.

¹⁸ The cost of an EAD 100 or EAD 1000 circuit includes the connection charge and the annual rental charge over three years but does not include the main link charge. Compared to the cost of an EAD LA 100 circuit (which includes the connection charge and the annual rental over three years), the hypothetical loss would be also 2%, while it would at most 1% of the cost an EAD LA 1000 circuit.

Section 5

Our proposals

- 5.1 As explained above, following initial analysis we consider that Openreach's proposal is likely to allow for material improvements in both CPs' and the end-users' experience of provision of certain Ethernet Access Direct services.
- 5.2 Therefore, to effect Openreach's proposal, we propose to issue two Directions to disapply £548 from the connection charge for certain EAD services from Conditions 5.2 and 5.3, provided that, at the same time, Openreach exempts the first £2,800 of ECCs from orders for connection of all such EAD services.
- 5.3 The proposed text of the Directions is set out in the statutory notification published at Annex 4.
- 5.4 On the basis of our initial assessment set out in Section 4, we consider that issuing the proposed Directions would be objectively justifiable because it would enable Openreach to improve the provision process of EAD services to the benefit of CPs, and ultimately end-users, without increasing materially Openreach's recovery of the unit costs associated with ECCs. In particular, we consider that the Directions would allow Openreach to reduce the provisioning time of most of the orders for EAD services which would otherwise require variable ECCs. In addition, the Directions may also ultimately result in a reduction of the number of EAD order which CPs cancel because of unexpected charges, and enable CPs to employ more automation and fewer manual steps in managing the ordering process for the EAD services they purchase.
- 5.5 Furthermore, in considering Openreach's proposal, we have had regard to the LLCC Conditions themselves and the charge control obligations they impose on BT in the relevant markets. In light of the initial analysis set out in Section 4 above, we consider the proposed Directions ensure the charge controls on BT continue to address both the competition problems for which they were imposed, in particular excessive pricing, and the specific policy objectives which we sought to balance when the charge controls were imposed¹⁹.
- 5.6 We consider that the proposed Directions would not be unduly discriminatory. Whilst, as we have set out in Section 4, our initial assessment has identified distributional impacts, we consider they are likely to be modest relative to the benefits of streamlining the provision process for EAD.
- 5.7 We also consider that issuing the Directions would be proportionate because:
- it would be effective in enabling Openreach to achieve the improvements in the provision process for EAD which it proposes;
 - it would impose no requirements on Openreach beyond those needed to ensure that it complies with the LLCC in achieving those improvements; and

¹⁹ Those specific policy objectives are set out in the BCMR Statement at paragraph 2.52.

- in line with our initial assessment set out in Section 4, it is not likely to produce adverse effects which are disproportionate, making no changes beyond those needed to put the proposed process improvements into effect, while the benefits of those improvements are likely to outweigh any limited detriment to CPs and end-users whose EAD services require few or no ECCs.

5.8 We consider that the Directions are transparent in relation to the purpose that they are intended to achieve as set out in this document, in particular Section 4, and the text of the Directions at Annex 4 is drafted with a view to secure that purpose.

5.9 Finally, on the basis of our initial assessment set out in Section 4 of this document, we consider that in issuing these Directions we would be acting in accordance with the relevant duties set out in section 3 and 4 of the Act, and we have had regard to our duty under section 4A of the Act. We consider improved provision of EAD services should ultimately further the interests of citizens in relation to communication matters and consumers in the relevant markets affected by the proposed Directions, by facilitating the competitive supply of EAD services. This, in our view, will contribute to securing the availability throughout the UK of a wide range of electronic communications services. Further, in proposing the Directions, we consider it particularly relevant to have regard to the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom. In addition, we consider that in proposing to give these Directions we are acting in accordance with the six Community requirements set out in section 4 of the Act, in particular the first²⁰, fourth²¹ and fifth²² Community requirements.

Consultation Question: Do you agree with the assessment of Openreach's proposal set out in this document, and do you agree with the Directions we propose to issue as set out in Annex 4?

²⁰ The first Community requirement is a requirement to promote competition – (a) in relation to the provision of electronic communications networks and electronic communications services; (b) in relation to the provision and making available of services and facilities that are provided or made available in association with the provision of electronic communications networks or electronic communications services; and (c) in relation to the supply of directories capable of being used in connection with the use of electronic communications networks or electronic communication services.

²¹ The fourth Community requirement is a requirement to take account of the desirability of Ofcom's carrying out their functions in a manner which, so far as practicable, does not favour – (a) one form of electronic communications network, electronic communications service or associated facility; or (b) one means of providing or making available such a network, service or facility, over another.

²² The fifth Community requirement is a requirement to encourage, to such extent as Ofcom consider appropriate for the purpose of securing efficiency and sustainable competition, efficient investment and innovation, and the maximum benefit for the persons who are customers of communications providers and of persons who make associated facilities available, the provision of network access and service interoperability.

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 14 March 2014**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://stakeholders.ofcom.org.uk/consultations/excess-construction-charges/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please e-mail gideon.senensieb@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Gideon Senensieb
4th floor
Competition Group
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7783 4109
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex X. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Gideon Senensieb on 020 7981 3545

Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.
- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement in April 2014.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Graham Howell, Secretary to the Corporation, who is Ofcom's consultation champion:

Graham Howell
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA

Tel: 020 7981 3601

Email Graham.Howell@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Annex 4

Proposed Text of the Direction

Notification under sections 49 and 49A of the Communications Act 2003

Proposed Directions under sections 49 and 49A of the Communications Act 2003 and pursuant to paragraph (e) of SMP services Condition 5.2 and to paragraph (o) of SMP services Condition 5.3

Background

1. On 28 March 2013 Ofcom published a statement entitled "*Business Connectivity Market Review, Review of retail leased lines, wholesale symmetric broadband origination and wholesale trunk segments*" ("BCMR Statement"). At Annex 7 to the BCMR Statement, Ofcom published a notification ("BCMR Notification") under sections 48(1) and 79(4) of the Communications Act ("Act") in which, amongst other things, Ofcom set SMP conditions to apply to BT.
2. SMP services Condition 5 imposes various charge controls on BT. In particular:
 - a. Condition 5.2 imposes charge controls on the AI WECLA Services. The products and/or services, and charges of which such products and/or services comprise, which are subject to Condition 5.2 are set out in the Annex to that Condition;
 - b. Condition 5.3 imposes charge controls on products and/or services in the Ethernet Services Basket. The products and/or services, and charges of which such products and/or services comprise, which are subject to Condition 5.3 are set out in the Annex to that Condition.
3. Paragraph (e) of SMP services Condition 5.2 provides that paragraphs (a) to (d) of this Condition shall not apply to such extent as Ofcom may direct. Similarly, paragraph (o) of SMP services Condition 5.3 provides that paragraphs (a) to (n) of this Condition shall not apply to such extent as Ofcom may direct.

Proposal in this Notification

4. Ofcom hereby makes, in accordance with section 49A of the Act, the following proposal to give a Direction:
 - a. pursuant to paragraph (e) of SMP services Condition 5.2, dis-applying certain paragraphs of this Condition to the extent set out in the Direction below; and
 - b. pursuant to (o) of SMP services Condition 5.3, dis-applying certain paragraphs of this Condition to the extent set out in the Direction below.
5. The proposed Directions are set out in the Schedules to this Notification.

6. The effect of, and reasons for giving, the proposed Directions are set out in the document accompanying this Notification.

Ofcom's duties

7. In making the proposal, Ofcom has considered and acted in accordance with its general duties in section 3 of the Act and the six Community requirements in section 4 of the Act, and section 4A of the Act.
8. Ofcom will consider every representation about the proposal made to Ofcom during the period during which representations may be made.
9. Ofcom will have regard to every international obligation of the United Kingdom which has been notified to Ofcom for the purposes of section 49A(6) of the Act.

Making representations

10. Representations may be made to Ofcom about the proposal set out in this Notification, and in the document accompanying this Notification, by no later than 14 March 2014.

Delivery of copies of notifications in respect of Directions

11. In accordance with section 49C(1)(a) of the Act, a copy of the Notification, together with the Schedules, has been sent to the Secretary of State.

Interpretation

12. For the purpose of interpreting this Notification:
 - a. except as otherwise defined in the proposed Directions, terms used in this Notification and in the two Directions, including the Schedule to the two Directions, have the same definitions as those set out in the BCMR Notification;
 - b. the Interpretation Act 1978 shall apply as if the Notification were an Act of Parliament; and
 - c. headings and titles shall be disregarded.

M. Gibbs

Marina Gibbs

Competition Policy Director

A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

14 February 2014

Schedule 1 to the Notification

[DRAFT] Direction pursuant to paragraph (e) of SMP services Condition 5.2

Ofcom hereby directs, pursuant to paragraph (e) of Condition 5.2, that—

- (1) For the purposes of complying with paragraph (a) of Condition 5.2, paragraph (b) shall not apply to the extent that the sum of £[548] in respect of each published charge for each of the products and services specified in the Schedule hereto shall be excluded, subject to the requirement set out in [2] being satisfied. For the avoidance of doubt, the published charge is $p0$ (but excluding $p0$ where the Relevant Year is the First Relevant Year) and pt .

For example and for illustrative purposes only, if the published charge for a single EAD 100 connection in the year 14/15 were to be £2,110.00 excluding VAT but the Dominant Provider has exempted each and every EAD 100 connection from Excess Construction Charges of up to £2,800, then in calculating the Percentage Change, and the Accrued Revenue, the sum of £[548] would be deducted from the published charge for the EAD 100 connection, such that only the amount of £1,562.00 excluding VAT shall be taken into account. However, the sum of [£548] would not be deducted from the published charge for the year 13/14 (i.e. the First Relevant Year) as there was no such exemption provided for.

- (2) The requirement is that, where the Dominant Provider provides one or more ECC Services to a Third Party in connection with the provision of a product or service specified in the Schedule hereto, the Dominant Provider must not charge the Third Party for such ECC services, unless the total amount of charges for the ECC Services for each separate product or service exceeds £[2,800], in which case the Dominant Provider may only charge the Third Party, as a maximum, the amount in excess for providing such ECC Services.

For example and for illustrative purposes only, if the Dominant Provider supplies ECC Services amounting to a total of £3,500 excluding VAT in connection with the provision of a single EAD 100 connection, the Dominant Provider may only charge the Third Party a maximum amount of £[700] excluding VAT for such ECC Services.

- (3) Paragraphs (a) to (d) of Condition 5.2 are to be read accordingly.

Schedule 2 to the Notification

[DRAFT] Direction pursuant to paragraph (o) of SMP services Condition 5.3

Ofcom hereby directs, pursuant to paragraph (o) of Condition 5.3, that—

- (1) For the purpose of complying with paragraph (a) of Condition 5.3, paragraphs (b) and (c) shall not apply to the extent that; and
- (2) For the purpose of complying with paragraph (f) of Condition 5.3, paragraph (c) shall not apply to the extent that; and
- (3) For the purpose of complying with paragraph (i) of Condition 5.3, paragraph (j) shall not apply to the extent that;

the sum of £[548] in respect of each published charge for each of the products and services specified in the Schedule hereto shall be excluded, subject to the requirement set out in [4] being satisfied. For the avoidance of doubt, the published charge is $p0$ (but excluding $p0$ where the Relevant Year is the First Relevant Year), $p1$ and pt .

For example and for illustrative purposes only, if the published charge for a single EAD 100 connection in the year 14/15 were to be £2,110.00 excluding VAT but the Dominant Provider has exempted each and every EAD 100 connection from Excess Construction Charges of up to £2,800, then in calculating the Percentage Change, and the Accrued Revenue, the sum of £[548] would be deducted from the published charge for the EAD 100 connection, such that only the amount of £1,562.00 excluding VAT shall be taken into account. However, the sum of [£548] would not be deducted from the published charge for the year 13/14 (i.e. the First Relevant Year) as there was no such exemption provided for.

- (4) The requirement is that, where the Dominant Provider provides one or more ECC Services to a Third Party in connection with the provision of a product or service specified in the Schedule hereto, the Dominant Provider must not charge the Third Party for such ECC services, unless the total amount of charges for the ECC Services for each separate product or service exceeds £[2,800], in which case the Dominant Provider may only charge the Third Party, as a maximum, the amount in excess for providing such ECC Services.

For example and for illustrative purposes only, if the Dominant Provider supplies ECC Services amounting to a total of £3,500 excluding VAT in connection with the provision of a single EAD 100 connection, the Dominant Provider may only charge the Third Party a maximum amount of £[700] excluding VAT for such ECC Services.

- (5) Paragraphs (a) to (n) of Condition 5.3 are to be read accordingly.

Schedule to [DRAFT] Direction pursuant to paragraph (e) of SMP services Condition 5.2 and to [DRAFT] Direction pursuant to paragraph (o) of SMP services Condition 5.3

As per, and consistent with the construction of, the relevant list in the Annex to Condition 5.2 and in the Annex to Condition 5.3, the list below is subject to such changes, unless Ofcom direct otherwise, following:

- the withdrawal by the Dominant Provider of one or more of the products and/or services, and/or of one or more of the charges of which such products and/or services comprise; and/or
- the introduction by the Dominant Provider of a new product and/or service, and/or a new charge, wholly or substantially in substitution for an existing product and/or services and/or charge, in which case this list shall be construed accordingly.

List of EAD connections within the scope of the [DRAFT] Directions referred to above

- EAD 1000 connection
- EAD 1000 (60 month minimum period) connection
- EAD 1000 (84 month minimum period) connection
- EAD 1000 Extended Reach connection
- EAD 1000 Extended Reach (60 month minimum period) connection
- EAD 1000 Extended Reach (84 month minimum period) connection
- EAD Local Access 1000 connection
- EAD Local Access 1000 (60 month minimum period) connection
- EAD Local Access 1000 (84 month minimum period) connection
- EAD Enable 1000 connection
- EAD Enable 1000 Local Access connection
- EAD Enable 1000 Extended Reach connection
- EAD Enable 1000 (60 month term) connection
- EAD Enable 1000 Local Access (60 month term) connection
- EAD Enable 1000 Extended Reach (60 month term) connection

Excess Construction Charges for Openreach Ethernet Access Direct

- EAD 100 connection
- EAD 100 Extended Reach connection
- EAD Local Access 100 connection
- EAD Enable 100 connection
- EAD Enable 100 Local Access connection
- EAD 10 connection
- EAD 10 Extended Reach connection
- EAD Local Access 10 connection
- EAD Enable 10 connection
- EAD Enable 10 Local Access connection