



# Excess Construction Charges for Openreach Ethernet Access

## Direct

Directions affecting the operation of the Leased Lines  
Charge Control

Statement

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# About this document

This document concerns a change that Openreach, the company that installs and maintains connections to BT's network on behalf of competing providers, proposes to make to the way it charges communications providers for installing certain wholesale, high-bandwidth data services.

The Openreach product in question is called Ethernet Access Direct. In providing this service to businesses, Openreach sometimes needs to carry out construction work to extend its network to end-users' premises. In these cases it charges bespoke excess construction charges. Openreach has proposed to change the way it levies these charges, in order to simplify part of the provision process. The change would exempt most orders from the bespoke charges while adding a fixed amount to the standard connection charge.

This document presents and explains our decision to support the proposed change and to issue formal Directions which enable Openreach – should it go ahead with the change – to comply with controls previously imposed by Ofcom.

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## Section 1

# Summary

- 1.1 This document concerns Openreach's wholesale Ethernet leased line services known as Ethernet Access Direct (EAD). Communications providers (CPs) use EAD both to provide business end-users with services, such as Internet access, and as components in the provision of fixed and mobile broadband services to the mass market.
- 1.2 In providing EAD services, Openreach sometimes needs to carry out construction to extend its network to the end-users' premises. In such cases, it charges bespoke excess construction charges (ECCs).
- 1.3 Openreach is working with the industry on a programme to re-engineer its provision process for EAD and improve its delivery performance. As part of this programme, it has proposed to change the way it charges ECCs relating to EAD services, in order to simplify part of the provision process.
- 1.4 Openreach has proposed to exempt new provisions of EAD services from the first £2,800 of ECCs, and to make up the resulting loss of its revenue with a balancing charge of £548, which would be part of the standard connection charge for EAD. The proposed change would apply to all EAD services except EAD Resilient Option 1.
- 1.5 Openreach's charges for both ECCs and EAD fall within the scope of the leased lines charge control (LLCC), which we imposed on BT in March 2013 in concluding our most recent review of competition in the provision of leased line services.<sup>1</sup> The LLCC requires BT to reduce each year a broad basket of charges for Ethernet leased line services, including EAD connection charges. However, ECCs are not included in this basket and are subject within the LLCC to a separate control on each charge. If Openreach were to proceed with the proposed change, the balancing charge of £548 could be construed as part of the EAD connection charge, and this would not allow Openreach to comply with the LLCC, unless it made a compensating reduction in other Ethernet charges.
- 1.6 Our initial analysis found that Openreach's proposed change would reduce significantly the lead times for provision of most of the EAD orders which incur ECCs. The analysis also showed that the proposed change would have no net impact on Openreach's revenues, and so is not likely to renew potential concerns of excessive pricing, which we had addressed by imposing the LLCC. Although we identified some distributional effects, with "winners and losers" among end-users and CPs, we thought that the benefits would be substantial enough to outweigh any concerns that such effects might raise.
- 1.7 On 14 February 2014 we published a consultation in which we proposed to issue two Directions which would have the effect of allowing Openreach to comply with the LLCC if it were to proceed with its proposed change. Importantly, we considered that, if Openreach were to proceed with its proposed change, the Directions would ensure

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<sup>1</sup> See *Business Connectivity Market Review*, 28 March 2013, available at <http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/final-statement/>

that the conditions we imposed on BT in the LLCC would 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 we imposed them.

- 1.8 In response to our proposal, Vodafone, Talk Talk, MBNL, Level 3, Gamma and Gradwell, in addition to BT Group and Openreach, said they supported the proposed Directions. They identified reduction in lead-time, increased certainty of prices, improvement of end-users' experience and reduction in handling costs as particular benefits. Verizon opposed the proposal, arguing that while it and some other CPs would pay more, BT Group would derive net financial benefit, because the average of ECCs per order which the rest of BT is charged in consuming EAD from Openreach is higher than the overall average of ECCs for all EAD orders. Virgin Media, Talk Talk and MBNL also described a similar potential concern.
- 1.9 We have carefully considered the responses to the consultation, and have set out our considerations in this Statement. We consider that 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"). We have therefore decided to issue the Directions, enabling Openreach to proceed with its proposal.
- 1.10 The Directions, and their Schedule, are published at Annex 1.

## Section 2

# Background

## Introduction

- 2.1 In March 2013 we concluded our most recent review of competition in leased lines (BCMR 2013) with a published Statement (the BCMR Statement).<sup>2</sup> We imposed *ex ante* remedies to address the competition problems we identified in those markets in which we found SMP. The remedies include controls on BT's charges for several of its leased lines services, including EAD, which are set out in the BCMR Statement in the form of SMP service conditions (the LLCC Conditions).
- 2.2 Openreach currently charges excess construction charges (ECCs) on a bespoke basis for each leased line installation which requires construction work at the end-user's premises. This type of construction is needed to fulfil about 30% of EAD orders.
- 2.3 In cases in which they arise, ECCs are a source of delays because Openreach must quote bespoke charges and then suspend the work until the purchasing CP agrees to pay them. The delays can be substantial because the CP often asks its customer to commit to pay the ECCs before it authorises Openreach to proceed.

## Openreach's proposed change and its implication on compliance with the LLCC

- 2.4 Openreach is working with the industry on a programme designed to improve delivery of EAD services. As part of this programme, Openreach proposes to change the way it charges ECCs relating to EAD installations, in order to simplify part of the provision process.
- 2.5 Openreach's improvement programme should be seen in the context of concerns expressed by CPs, particularly over the last year or so, about the quality of delivery of Ethernet services. The concerns focus on the speed and predictability of provision of new circuits, and appear to relate to a range of features of Openreach's provision process, of which the treatment of ECCs is only one. We have recently launched a separate consultation announcing the start of a new review of competition in leased lines, and asking stakeholders for their views on a number of topics, including the quality of BT's service in providing leased lines.<sup>3</sup>
- 2.6 Openreach's current proposal, specifically in relation to ECCs, is to exempt orders for new provisions of EAD services from the first £2,800 of ECCs, and to make up the resulting loss of its revenue with a balancing charge of £548, which would be part of the standard EAD connection charge. The proposed change would apply to all EAD services except those for EAD Resilient Option 1.

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<sup>2</sup> See *Business Connectivity Market Review*, 28 March 2013, available at <http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/final-statement/>

<sup>3</sup> See *Business Connectivity Market Review, Timetable and initial call for inputs*, 1 April 2014, available at <http://stakeholders.ofcom.org.uk/binaries/consultations/business-connectivity-market-review/summary/Business-Connectivity-Market-Review.pdf>

- 2.7 Two of 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.<sup>4</sup>
- 2.8 The balancing charge in Openreach's proposed change would amount in practice 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. We consider that the addition of the £548 balancing charge to the standard EAD connection charge would not allow Openreach to comply with SMP Conditions 5.2 and 5.3 in practice. Although the amount of ECC revenues would decrease, this reduction in ECC revenues would not count towards compliance with conditions 5.2 and 5.3. Therefore even though the proposal would be revenue neutral for Openreach, without the current Directions, it would be considered an increase in EAD prices, with no account taken of the offsetting reduction in ECCs.

## Our proposal and consultation

- 2.9 We assessed the potential impacts of the change proposed by Openreach, and reached an initial view that we should support it. We therefore published a consultation on 14 February 2014 (the Consultation), in which we proposed to issue two Directions which would disapply the balancing charge of £548 from SMP Conditions 5.2 and 5.3 respectively, provided that Openreach does in fact exempt connection of the relevant EAD services from the first £2,800 of ECCs.<sup>5</sup>
- 2.10 In the Consultation, we identified potential impacts, which can be summarised as follows:
- a reduction of 16.6 calendar days on average in the installation lead time of approximately 22% of orders for EAD services;
  - a modest reduction in the rate of cancellation of EAD orders;
  - no expected material 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, would 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; and
  - a potential 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 would pay less). Our initial analysis suggested that this impact would be modest and unlikely to have a material effect on competition.

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<sup>4</sup> The WECLA is defined in section 5 of the BCMR Statement.

<sup>5</sup> The Consultation document is available at <http://stakeholders.ofcom.org.uk/consultations/excess-construction-charges/>

- 2.11 On the basis of our initial assessment, we proposed that we should issue the Directions, noting in particular that:
- they 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;
  - they would ensure that the charge controls on BT would 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;<sup>6</sup>
  - the distributional impacts which we had identified would be likely to be modest relative to the benefits of streamlining the provision process for EAD;
  - the aim sought to be achieved by issuing the Directions appeared to us to be objectively justifiable, not unduly discriminatory, proportionate and transparent.
- 2.12 We asked stakeholders whether they agreed with our assessment of Openreach's proposal, and with our proposal to issue the Directions.

## Legal framework

- 2.13 The power to give the Directions with which we proposed to disapply the balancing charge from SMP Conditions 5.2 and 5.3 is provided for in those Conditions, specifically paragraph (e) of Condition 5.2<sup>7</sup> and paragraph (o) of Condition 5.3<sup>8</sup>.
- 2.14 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.
- 2.15 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

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<sup>6</sup> Those specific policy objectives are set out in the BCMR Statement at paragraph 2.52.

<sup>7</sup> Paragraph (e) of Condition 5.2 states: Paragraphs (a) to (d) shall not apply to such extent as Ofcom may direct.

<sup>8</sup> Paragraph (o) of Condition 5.3 states: Paragraphs (a) to (n) shall not apply to such extent as Ofcom may direct.

out in section 3<sup>9</sup>. 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 circumstances<sup>10</sup>.

- 2.16 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 Directive<sup>11</sup>.

## Impact and Equality impact assessments

2.17 Having taken all representations into account:

- this Statement sets out our decision on the likely impact of implementing the two Directions (for the purposes of section 7 of the Act);
- we have decided, as per initial view set out in the Consultation, that it is not apparent the Directions would have any particular impact on race, disability and gender equality, and that the Directions would not be to the detriment of any group of society; and
- we have decided, as per initial view set out in the Consultation, that there is no need to carry out separate EIAs in relation to race or gender equality or equality schemes under the Northern Ireland and Disability Equality Schemes because the Directions would affect all industry stakeholders equally and would 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, and that we do not need to make a distinction between consumers in different parts of the UK or between consumers on low incomes because the Directions will not have a particular effect on one group of consumers over another.

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<sup>9</sup> See section 3(1) to (3) of the Act.

<sup>10</sup> See section 3(4) of the Act.

<sup>11</sup> Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, as amended.

## Section 3

# Responses to the Consultation

- 3.1 We received responses to our Consultation from BT Group (specifically BT Global Services and BT Wholesale), Gradwell, Level 3, MBNL, Openreach, Talk Talk, Verizon, Virgin Media and Vodafone. We also received an e-mail response from Gamma.
- 3.2 Vodafone, Talk Talk, MBNL, Level 3, Gamma Gradwell and BT Group said they supported Openreach's proposed change. Verizon opposed it. Virgin Media suggested we should carry out further analysis.
- 3.3 We set out below our considerations of stakeholders' responses to the Consultation.

## Benefits of the proposed change

### Stakeholders' views

- 3.4 Level 3 was attracted by the prospect that the change would reduce the lead-time of 22% of EAD orders. Talk Talk said it agreed with the change because it will result in a number of operational benefits for the EAD orders which the change would exempt from ECCs. It identified specifically reduced lead-times, simplification of the process for customers, greater certainty, fewer cancellations and reduced costs of order-handling for all parties.
- 3.5 Gradwell stated that
- “ Having to handle ECCs is a time consuming & frustrating exercise that often leads to cancelled orders and frustrated customers. Moving away from ECCs to a known cost upfront will be a big step forward.”*
- 3.6 MBNL supported the aim of reducing delays in the provision of EAD services, while Vodafone agreed generally that the change would benefit the provisioning process and reduce its complexity.
- 3.7 In their joint response, BT Global Services and BT Wholesale similarly highlighted the benefits of reduced lead-times, greater price certainty and lower administrative costs. They also thought that the proposal could improve the competitive bidding process, by simplifying pricing and hence enabling customers to compare offers from different providers more easily. In a separate response, Openreach said that 22% of EAD orders would no longer be delayed awaiting approval of ECCs, order handling costs would be reduced and that further costs would be saved because the number of cancellations would be reduced.
- 3.8 Verizon, on the other hand, whilst not disagreeing with the assessment of the magnitude of the reduction in lead-time which we assessed in the Consultation, thought that the benefit of that reduction would be minimal, and would not lead to material benefits in CPs' overall provision time.
- 3.9 Virgin Media cautioned that the benefit of reduced lead-times would only relate to a minority of circuits, and even for those circuits the time to carry out planning, survey, engineering and fit and test cycles would not change.

## Ofcom's considerations

- 3.10 We note that there was no disagreement with our assessment of the likely magnitude in the reduction of lead-time which we presented in the Consultation. If Openreach were to implement the proposed change, then 22% of EAD orders would benefit from a reduction in lead times which we calculated as 16.6 calendar days on average. This reduction in time relates to the average time between when Openreach quotes the value of ECCs for a particular order and when Openreach is notified that the ECCs are accepted. While two respondents saw little benefit in this potential reduction, most considered it attractive and valuable.
- 3.11 We consider that the expected average reduction in lead-time of around two weeks is likely to be a valuable benefit to the customers whose orders would be exempted from ECCs as a result of the proposed change. In our view, the material improvement in lead-time that customers would experience in the delivery of those orders, which would account for around 22% of all EAD orders, is a more relevant consideration than the diluted effect on the average lead-time of all EAD orders.
- 3.12 In addition, we agree with stakeholder responses that increased certainty of prices, improvements in customers' experience, reduced costs of order handling and a reduction of the number of EAD orders which CPs cancel because of unexpected charges, are also likely to be beneficial improvements that would result from the change.

## **Allocative efficiency**

### Stakeholders' views

- 3.13 TalkTalk, whilst broadly agreeing with our proposal, believed nevertheless that the change "*will definitely result in some degree of consumer harm as a result of inefficiencies and competitive distortions*". It said that "*the change will lead to a large degree of price averaging meaning that prices become less reflective of costs*" leading to allocative inefficiency which would result, in effect, in cross subsidies between consumers.

### Ofcom's considerations

- 3.14 In addressing Talk Talk's comment we consider that practicality considerations, including uncertainty over prices, delays and transaction costs, are relevant as well as allocative efficiency. We also consider it important to bear in mind that current charges for EAD services are themselves averages as even where two customers purchase the same product, the actual cost of supply to each customer may differ depending, for example, on the distance of the served premises from the exchange.
- 3.15 In the present case, although invoicing ECCs to an individual customer based directly on the actual costs of excess construction relating to that customer may align with allocative efficiency, doing so comes with practical implications.<sup>12</sup> In our view, our decision achieves the appropriate balance between allocative efficiency and practicality considerations, including uncertainty over prices, delays and transaction costs.

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<sup>12</sup> We consider that the change would bring EAD circuits into line with the precedents of PSTN, for which BT exempts the first £3,400 of ECCs, and ISDN2/2e, for which BT exempts the first £1,000 of ECCs.

## Financial gains to BT Group

- 3.16 Openreach proposes to exempt the first £2,800 of itemised ECCs from all orders for certain EAD services, while offsetting the ECC revenue it would lose by adding a £548 balancing charge to the connection charge for those services. According to Openreach, the balancing charge had been calculated with the aim of neutralising the effect of the exempted amount of ECCs on Openreach's revenue.
- 3.17 We calculated the appropriate level of the balancing charge, using historical data on all completed orders for the financial years 2011/12, 2012/13 and 2013/14. In each year, we calculated by how much EAD connection charges would need to increase in order for the exemption of £2,800 of ECCs (at 2014/15 prices) to have a neutral effect on Openreach's revenues.
- 3.18 In calculating the appropriate level of the balancing charge, we needed to adjust ECC revenues to reflect the level of ECC charges in 2014/15. We made two adjustments:
- We applied a 29% reduction to the total ECCs for the 2011/12 and 2012/13 financial years to take into account the one-off reduction the LLCC imposed in March 2013.
  - We increased the revenues for each year by 1.25% as the LLCC also allowed Openreach to increase its ECCs by up to the same amount in April 2014.
- 3.19 In the Consultation, given our calculations, we found that an increase in the EAD connection charge of £548 per order would have been revenue-neutral for Openreach over the three year period. We also noted that there was relatively little variability in the required level of the balancing charge in each year.

## Stakeholders' views

- 3.20 Verizon agreed that the proposal would be revenue-neutral for Openreach, however it thought that "it could well be revenue positive for BT Group, and therefore overall negative for the rest of industry combined and therefore detrimental to competition as a result."
- 3.21 It also argued that we needed to "revisit [our] impact assessment" as Verizon feared we had only focused on Openreach. Verizon invited us to check that "the proposal would not disproportionately favour BT as whole".
- 3.22 Talk Talk also referred to BT Group's economic interests. It believed "that BT's downstream activities [did] not face (or pay) wholesale charges. Instead they face[d] the (incremental) costs incurred since BT is vertically integrated."

## Ofcom's considerations

- 3.23 In the Consultation, we considered that the Directions would ensure the charge controls on BT would 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.
- 3.24 We based these considerations on our initial assessment which showed that the proposal would:
- not increase Openreach's margins;

- enable Openreach to recoup the same ECCs costs as it would otherwise have been allowed under the charge control.
- 3.25 Verizon's concerns relate to the possibility that BT Group could derive financial benefits by increasing its margins. We understand that Talk Talk to be making a similar point.
- 3.26 To address Verizon's concerns, we gave further consideration to ensuring that, on the basis Openreach were to proceed with the proposal:
- the balancing charge should not allow BT to earn higher margins than it would otherwise have earned under the LLCC; and
  - BT should be able to recoup the costs of excess construction, as it would otherwise have been able to do under the LLCC.
- 3.27 For the reasons set out below, we remain of the view that both points above are satisfied when the calculation of the balancing charge is based on all EAD orders, both internal and external to BT (i.e. £548).
- 3.28 We acknowledge that BT Group operations downstream of Openreach currently pay higher ECCs related to EAD orders than the average ECCs related to such orders across the industry. Consequently, Openreach's overall charges to BT Group's downstream operations may reduce as a result of the proposed change.
- 3.29 However, we consider that BT Group would not be able to retain the benefit of this reduction, and would be likely to pass on the benefit of reduced ECCs to end customers.
- 3.30 This is for three reasons:
- Openreach is required to provide EAD circuits on the basis of equivalence of inputs (EOI). Therefore, Openreach would charge the same ECCs for a given circuit regardless of whether the circuit is purchased by BT or another CP;
  - By purchasing EAD circuits from Openreach, CPs can compete with BT Group to provide most of the services which it provides in consuming EAD. BT Group uses most of the EAD circuits it consumes from Openreach to provide leased line access services directly to customers' sites. We have verified this by requesting from BT a breakdown of its internal purchases of EAD circuits distinguishing between those used to provide end customers with access and those used for backhaul in BT's network (i.e. connecting two network nodes). In FY2012/2013, over 90% of EAD circuits purchased by BT were used to provide access to customers' sites<sup>13</sup>. We conclude that BT's downstream divisions supply circuits mostly to end-customers where they compete with other CPs on an EOI basis. As both EAD circuits and the corresponding ECCs are supplied on an EOI basis, both BT's downstream operations and external CPs face identical prices for supplying the same circuit to the same end customer. This means that if BT's downstream divisions did not pass a reduction in the ECC bill on to their customers, they would risk losing the business to an external CP. The competitor could purchase the EAD circuits from Openreach at the same price and on the

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<sup>13</sup> We also noted that if we were to exclude BT's purchases of circuits for backhaul use from the calculation of the balancing charge, then the level of the balancing charge would increase.

same terms and conditions offered to BT's downstream division. The competitor would then benefit from a lower ECC bill, and could pass the savings to its customers;

- We understand that several large CPs pass ECCs on in full to end customers, with the result that CPs' margins would remain unaffected by the level of ECCs. This is highlighted by the fact that some of the delay caused by ECCs is due to end-customers considering whether or not to agree to pay the ECCs on top of the price they expected to pay for their original order.<sup>14</sup>

3.31 The combination of these three factors leads us to consider that for the great majority of EAD orders, BT Group will pass on the benefit of the reduction in ECCs to end customers, as otherwise it would risk losing business to other CPs. Therefore, in calculating the balancing charge based on Openreach's revenues (both internal and external orders), we do not believe BT Group could increase its margins.

## Impacts on infrastructure competition

### Stakeholders' views

3.32 Virgin Media noted that we did not assess the impact of the proposal on infrastructure competition. It believed the proposal "w[ould] change the 'make or buy' decision for the infrastructure owning CP and potentially create a situation where inefficient buy decisions [...] are made in order to compete". Virgin Media also suggested that the impact would differ depending on the local degree of competition.

3.33 Talk Talk also mentioned that a competitive distortion may arise from the proposal. "It might mean that over time Openreach (and its customers) gain a relatively high share of customers with high excess construction costs which will increase the flat ECC. In effect there will be arbitrage between different networks, caused by price averaging."

### Ofcom's considerations

3.34 We recognise that after the proposal is implemented, Openreach's prices will be less cost-reflective. The cost of all EAD circuits will increase by £548 and, at the same time, ECCs for the 30% of EAD orders which require ECCs will be reduced by up to £2,800.

3.35 We have then sought to identify the relative impact of this change in ECC price structure on infrastructure competition. Table 2 below presents the distribution of ECCs across all EAD orders completed in FY 2012-2013. It shows the frequencies of completed orders in absolute and relative terms for different ranges of ECCs.

**Table 2: Distribution of ECCs for FY2012/2013**

	ECC=0	0 < ECC < £548	£548 < ECC < £2800	£2,800 < ECC	Total
Total	20,862	1,350	5,603	2,801	30,616
Total in %	68%	4%	18%	9%	100%

<sup>14</sup> In its response to our second Information Request, Openreach described BT's normal ECC charging practice. For access orders, BT's downstream divisions pass on Openreach's ECCs in full directly to the individual end customer whose request for access has caused the ECCs.

Source: Openreach's response to first S.135

3.36 In the Consultation we noted at paragraph 4.15 that there was relatively little variability in the required level of the balancing charge in each of the financial years 2011/12, 2012/13 and 2013/14 and that the incidence and level of ECCs had been relatively stable over time. Assuming that the distribution of ECCs continues to be stable over time, the proposal will lead to a net increase of up to £548 in Openreach's charge for 72% of all EAD orders. These orders would otherwise have incurred either no ECCs, or ECCs less than the £548. All else being equal, infrastructure competitors will find it easier to compete for these orders, as Openreach's prices for these orders will increase. Conversely, for the remaining 28% of orders prices will fall by up to £2,252 (i.e. £2,800-£548). In such a context, competitors may find it more difficult to compete.

3.37 While no data is available to enable us to assess quantitatively whether the net overall effect on infrastructure competitors would be positive or negative, we think it is modest because:

- i) Principally, the greatest impact of net reductions will fall in areas where there is little alternative infrastructure; and
- ii) In addition, ECCs are just one element in the overall price paid by the end-user, which also often includes added value services.

3.38 Regarding 3.37i), we believe the major net reductions will predominantly occur in areas where there is little alternative infrastructure. To assess this point, we looked at:

- the geographic distribution of ECCs; and
- the network reach analysis we carried out in the BCMR 2013.

3.39 Table 3 below shows the distribution of ECCs for all completed orders in FY 2012/2013 in London and in the rest of the UK.

**Table 3: Geographic distribution of ECCs in the UK for FY2012/2013**

	ECC=0	0 < ECC < £548	£548 < ECC < £2800	ECC > £2,800	Total
London	4,082	480	1,246	318	6,126
London in %	67%	8%	20%	5%	100%
UK excluding London	16,780	870	4,357	2,483	24,490
UK excluding London %	69%	4%	18%	10%	100%

Source: Openreach's response to first S.135

3.40 In Table 3, we observe that the proportion of orders requiring ECCs in excess of £2,800 outside London was twice that in London. The absolute number of such orders outside London (2,483) was much larger than in London (318).

- 3.41 We reported in the BCMR Statement that that there has been more investment in infrastructure by CPs other than BT in the London area than in the rest of the UK.<sup>15</sup> The data in Table 3 suggests that the exemption would have a greater impact outside London. Therefore it is likely to have a greater impact in areas where there is relatively little alternative infrastructure. EAD circuits benefiting from the exemption may be ordered in locations which do not currently attract any infrastructure competition. In those locations, we consider it reasonable to conclude any impact on competition would be negligible.
- 3.42 Regarding 3.37ii), EAD circuit costs and ECCs are usually one element in the service overall price. Prices also include the added value of a service. The maximum change in charges payable for an EAD order of £2,252 (i.e. £2,800 - £548) is therefore likely to be small in comparison to the overall service price.
- 3.43 To assess this point, we compared the maximum impact of the change on the total charges payable for an EAD order (i.e. £2,252) with the most recent estimates of firms' yearly spend on business connectivity, as used in the BCMR 2013.
- 3.44 For the BCMR 2013, Jigsaw Research estimated how much firms spend on business connectivity.<sup>16</sup> Jigsaw found that the average annual spend was £445,000, but this was highly variable across different sizes of business. If we focus on the smaller firms, 85% of companies with 10 or more employees with turnover less than £2.5m spent less than £50,000 on business connectivity in the year. The average spend was £33,000.
- 3.45 The maximum one-off impact which the change could have on the charges payable for an EAD order (£2,252) represents only 6.8% of what smaller firms spent on average in a single year (£33,000). We note that the ECCs are a one-off cost for a circuit which would normally be used for several years. Therefore, we believe the maximum impact of the change on the price paid by an end-user for an individual order is likely to be small in comparison to the amount paid for business connectivity overall.
- 3.46 In conclusion, we consider our analysis does not lead us to conclude there will be a material detrimental impact on infrastructure competition. CPs will find it easier to compete with around 72% of Openreach's EAD circuits, and find it more difficult to compete for 28% of circuits. With regard to the latter, the evidence suggests that the circuits where CPs will find it harder to compete are predominantly outside London, where CPs network coverage is significantly lower, and thus it is relevant to bear in mind that any impact on infrastructure competition (which competition we did not find in the BCMR 2013 to be effective) would, in our view, be comparatively muted.

## Transparency

### Stakeholders' views

- 3.47 Level 3 asked that we should help to ensure that Openreach keep detailed accounting information, which could show the relationship between costs and charges in due course, particularly, the accounting for Openreach's use of third party

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<sup>15</sup> We referred to this area in the BCMR 2013 as the Western, Eastern and Central London Area (WECLA)

<sup>16</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/business-connectivity/annexes/business-review.pdf>

contractors. Level 3 also sought publication of meaningful and helpful operational statistics.

- 3.48 MBNL was concerned that, as a result of the proposed change, CPs would lose all visibility of ECCs that would have been incurred if they fall below the proposed exempted amount of £2,800. It proposed that we should require Openreach to give CPs visibility of the ECCs that would have been incurred.
- 3.49 Vodafone warned of a risk that BT will seek significant increases to the balancing charge in the future if costs and charges are not provided with sufficient transparency. It thought that CPs should be able to monitor the occasions in which ECCs arise, because this is important information in its “build or buy” decision processes.

### Ofcom’s considerations

- 3.50 We will consider what accounting obligations, if any, we should impose on BT in the course of our current Business Connectivity Market Review.
- 3.51 We consider that it would be helpful if Openreach was to give CPs visibility of the ECCs which would have been incurred even if they are exempted. We understand that Openreach is currently considering doing so, and is discussing this with CPs.

### **Other points raised**

- 3.52 In their replies to our consultation, CPs also raised a number of additional points dealing with:
- Level of the balancing charge
  - BT could “game” the data it provided
  - Calculation of the hypothetical loss
  - Migration from WES/BES to EAD

### *Level of the balancing charge*

### Stakeholders’ views

- 3.53 Vodafone considers that level of the charge is not correct because Ofcom’s “approach under-estimates the reduction in revenues for ECCs”. It should be £526.
- 3.54 It stated that Ofcom reduced total ECC revenues by 29% “to take into account the changes that came into effect on the 1st April 2014”. Vodafone’s own estimates “show that a 33% cost reduction occurred and therefore 33% should be [the] factor used to create the charge”.

### Ofcom’s considerations

- 3.55 Following Vodafone’s comments, in addition to the calculation of the balancing charge which we reported in the Consultation<sup>17</sup>, we have now carried out an

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<sup>17</sup> In this respect, see 3.16 – 3.19 above.

additional check of the actual reduction in Openreach's ECCs. As there are many different specific items of ECCs, in order to do this we need to estimate the relative proportions of different ECCs. To do so, we have looked at a sample of all EAD orders which incurred ECCs during a week in September 2011, broken down by specific type of chargeable item.

- 3.56 In that week, 203 EAD orders incurred ECCs. These orders attracted total ECCs of £794,966. If we had applied the prices communicated by Openreach on its website applicable from April 2014, they would have attracted £577,661. This represents a total reduction of 27.4% as compared to prices prevailing before LLCC 2013, and so is a smaller reduction than the 33% claimed by Vodafone.
- 3.57 We have also compared this estimate to the net adjustments we applied to the total ECCs for FY 2012/2013. In calculating the level of ECCs for the balancing charge, we have taken into account a 29% reduction in ECC charges which came into effect on 1st April 2013, and a 1.25% price increase that came into effect on 1st April 2014. The net effect of these adjustments is a reduction of 28.1% on Openreach's charges for ECCs in 2011/12 and so is close to the 27.4% estimated above.
- 3.58 We recognise that the mix of ECCs in Vodafone's orders may differ from those of the market as a whole. However, we consider that the balancing charge should be based on the level of ECCs for the entire market, because, as we explained above, the balancing charge should both not allow BT to earn higher margins than it would otherwise have earned under the LLCC, and, at the same time, allow BT to recoup the same ECCs costs as it would have been allowed under the LLCC had the change not been implemented. Based on our estimates across orders placed by all CPs, we believe the level of the balancing charge of £548 is correct.

*BT could "game" the data it provided*

#### Stakeholders' views

- 3.59 TalkTalk thought we should guard against BT having gamed the data, and that it could inflate estimated ECCs to levy more revenues with the balancing charge than what it would have done under the LLCC.

#### Ofcom's considerations

- 3.60 These concerns relate to whether the data we have used to calculate the balancing charge is robust. We are confident that the data is robust for three reasons.
- 3.61 First, the calculations of the balancing charge were based on a very large sample of data. We requested Openreach to supply data on all EAD orders they completed in the period from April 2011 to 28 January 2014. In total, this comprised 71,245 EAD orders.
- 3.62 Second, we requested this data on completed orders using our formal information gathering powers under the Act. The consequences of supplying false or misleading information could be serious. As we have no other information which causes us to question the reliability of the data which we have received from BT, it is reasonable for us to accept the figures we have seen.
- 3.63 Third, the data on completed EAD orders for the 2011/12 financial year had already been supplied to Ofcom as part of the BCMR 2013. As set out in the Consultation,

there was minimal difference between the level of the balancing charge calculated using 2011/12 data compared to that in the other two years.<sup>18</sup>

### *Hypothetical loss*

3.64 In assessing the proposal's distributional impact, we referred in the Consultation to the average hypothetical loss CPs would have made had the proposal been implemented in FY2012/2013. We calculated this hypothetical loss as the weighted average per EAD order of the individual losses which those CPs which would have been "losers" from the change would have made (based on 2012/13 data) had the change been implemented in 2012/13. The "loss" is hypothetical because it would not constitute a real loss to CPs, as in most cases they would have passed on the additional costs to their customers. We estimated it as £115.

### Stakeholders' views

3.65 Virgin Media challenged our assessment of the distributional impact on the basis that we did not sufficiently explain the figure we calculated for hypothetical loss. According to Virgin Media "it appears to be unsupported and [Virgin Media] do[es] not understand how Ofcom has arrived at its assessment".

### Ofcom's considerations

- 3.66 In the Consultation we compared specifically, for each CP which placed an order in FY2012/2013, the actual ECCs incurred to the ECCs they would have incurred had the proposal been implemented.
- 3.67 There were 92 CPs for which the proposal would eventually increase the overall ECC bill they incur. The total increment in ECCs would have been £1,207,002 for FY2012/2013.
- 3.68 Spread over the 10,466 orders these 92 CPs placed in FY2012/2013, the hypothetical average increment in charges CPs would have incurred had the proposal been implemented is £115. This is summarized in the following table.

**Table 4: Calculation of the hypothetical average loss in FY2012-2013**

Number of CPs losing from the proposal	92
Number of orders	10,466
Increment in ECCs following the proposal	£1,207,002
Proportion of backhaul circuits	£115

### *Migration of WES/BES to EAD*

### Stakeholders' views

3.69 Virgin Media pointed out that many CPs have legacy estates of older Openreach Ethernet products (WES and BES), and will from time to time seek to migrate these circuits to EAD. Virgin Media argued that migration would not require new physical construction, and that it would therefore be inappropriate for Openreach to levy the

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<sup>18</sup> See Ofcom, *Excess Construction Charges for Openreach Ethernet Access Direct*, Table 2. The document is available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/excess-construction-charges/summary/excess-construction-charges.pdf>

proposed balancing charge in such circumstances. In its view, the proposal would reduce benefits to consumers by discouraging CPs from modernising their Ethernet estate.

### Ofcom's considerations

- 3.70 We note that CPs who wish to migrate a WES or BES circuit to an EAD circuit are able to purchase a migration product<sup>19</sup>. This product is not subject to the balancing charge, so CPs who wish to follow this migration route would not be impacted by the proposed change.
- 3.71 We acknowledge that some CPs may choose not to purchase the migration product as it may involve a short disruption to the service. Such CPs may instead purchase a new EAD circuit which would run in parallel with the WES or BES circuit. As this is a new circuit order, some ECCs may be involved although these are likely to be low (in this respect we note that some 68% of all EAD orders do not incur ECCs). It is not clear that the provision of a new EAD circuit in the particular circumstances of parallel running with a legacy Ethernet service should be treated differently from provision in any other circumstances.

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<http://www.openreach.co.uk/orpg/home/products/ethernetservices/legacymigrations/specialmigrationconnectionoffer/specialmigrationconnectionoffer.do>

## Section 4

# Conclusions

- 4.1 On the basis of our assessment set out above, including assessing stakeholder comments, we have decided to issue the Directions.
- 4.2 We remain of the view that issuing the Directions is objectively justifiable because it enables Openreach to improve the provision process of EAD services to the benefit of CPs, and ultimately end-users, without increasing Openreach's recovery of the unit costs associated with ECCs materially. In particular, we consider that the Directions 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 orders which CPs cancel because of unexpected charges, and enable CPs to reduce costs in managing the ordering process for the EAD services they purchase.
- 4.3 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. We remain of the view that the Directions ensure that 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<sup>20</sup>.
- 4.4 We consider that the Directions are not unduly discriminatory. Whilst our assessment has identified distributional impacts, we remain of the view that they are likely to be modest relative to the benefits of streamlining the provision process for EAD.
- 4.5 We also remain of the view that the Directions are proportionate because:
- they are effective in enabling Openreach to achieve the improvements in the provision process for EAD which it proposes;
  - they impose no requirements on Openreach beyond those needed to ensure that it complies with the LLCC in achieving those improvements; and
  - in line with our assessment above, they are 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.
- 4.6 We consider that the Directions are transparent in relation to the purpose that they are intended to achieve as set out in this document, and the text of the Directions at Annex 1 secures that purpose.
- 4.7 Finally, on the basis of our assessment set in this document, we consider that in giving these Directions we are 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

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<sup>20</sup> Those specific policy objectives are set out in the BCMR Statement at paragraph 2.52.

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 issuing the Directions, we consider it particularly relevant to have had 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 issuing these Directions we have acted in accordance with the six Community requirements set out in section 4 of the Act, in particular the first<sup>21</sup>, fourth<sup>22</sup> and fifth<sup>23</sup> Community requirements.

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<sup>21</sup> 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.

<sup>22</sup> 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.

<sup>23</sup> 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.

# Directions

## **Direction pursuant to sections 49 and 49A of the Communications Act 2003 and to paragraph (e) of SMP services Condition 5.2**

### **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 2003 ("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, 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.
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.
4. On 14 February 2013 Ofcom published a Notification, under sections 49 and 49A of the Act, in which Ofcom proposed, in accordance with section 49A of the Act, to give amongst other things a Direction 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.
5. The proposed Direction was set out in the Schedules to the Notification.
6. The effect of, and reasons for giving, the proposed Direction was set out in the document entitled "Excess Construction Charges for Openreach Ethernet Access Direct, Proposed Directions in relation to the Leased Lines Charge Control", to which the Notification was attached at Annex 4.
7. The period within which representations could be made to Ofcom about the proposal set out in the Notification, and in the document accompanying the Notification, was by no later than 14 March 2014.

**Ofcom is now giving effect to the proposal set out in the Notification**

8. 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.
9. Ofcom has considered every representation about the proposal made to Ofcom during the period during which representations could be made.
10. Ofcom has had 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.
11. Ofcom is satisfied that, in accordance with section 49(2) of the Act, giving this Direction for the purpose of paragraph (e) of SMP services Condition 5.2 is:
  - a. Objectively justifiable;
  - b. Not unduly discriminatory;
  - c. Proportionate; and
  - d. Transparent.
12. The effect of, and reasons for, giving this Direction are set out in the accompanying document to this Direction, which is entitled “Excess Construction Charges for Openreach Ethernet Access Direct, Directions affecting the operation of the Leased Lines Charge Control”.

#### **Delivery of copies of Directions**

13. In accordance with section 49C(1)(b) and (2)(a) of the Act, a copy of this Direction, together with the Schedule, has been sent to the Secretary of State and to the European Commission respectively.

#### **Interpretation**

14. For the purpose of interpreting this Direction, which includes these recitals 1 to 14 and the Schedule:
  - a. except as otherwise defined in this Direction, terms used in this Direction have the same definitions as those set out in the BCMR Notification;
  - b. the Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament; and
  - c. headings and titles shall be disregarded.

**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  $p_0$  (but excluding  $p_0$  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 this Direction did not apply for the year 13/14.

- (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 of £2,800 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.

**General**

- (4) This Direction shall take effect on the day it is published.

*M. Gibbs*

**Competition Policy Director**

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

**16 May 2014**

## **Schedule to Direction pursuant to paragraph (e) of SMP services Condition 5.2**

As per, and consistent with the construction of, the relevant list in the Annex to Condition 5.2, 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 Direction 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
- 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

## **Direction pursuant to sections 49 and 49A of the Communications Act 2003 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 2003 ("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, 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 (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.
4. On 14 February 2013 Ofcom published a Notification, under sections 49 and 49A of the Act, in which Ofcom proposed, in accordance with section 49A of the Act, to give amongst other things a Direction pursuant to (o) of SMP services Condition 5.3, disapplying certain paragraphs of this Condition to the extent set out in the Direction below.
5. The propose Direction was set out in the Schedules to the Notification.
6. The effect of, and reasons for giving, the proposed Direction was set out in the document entitled "Excess Construction Charges for Openreach Ethernet Access Direct, Proposed Directions in relation to the Leased Lines Charge Control", to which the Notification was attached at Annex 4.
7. The period within which representations could be made to Ofcom about the proposal set out in the Notification, and in the document accompanying the Notification, was by no later than 14 March 2014.

### **Ofcom is now giving effect to the proposal set out in the Notification**

8. 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.

9. Ofcom has considered every representation about the proposal made to Ofcom during the period during which representations could be made.
10. Ofcom has had 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.
11. Ofcom is satisfied that, in accordance with section 49(2) of the Act, giving this Direction for the purpose of paragraph (o) of SMP services Condition 5.3 is:
  - a. Objectively justifiable;
  - b. Not unduly discriminatory;
  - c. Proportionate; and
  - d. Transparent.
12. The effect of, and reasons for, giving this Direction are set out in the accompanying document to this Direction, which is entitled “Excess Construction Charges for Openreach Ethernet Access Direct, Directions affecting the operation of the Leased Lines Charge Control”.

#### **Delivery of copies of Directions**

13. In accordance with section 49C(1)(b) and (2)(a) of the Act, a copy of this Direction, together with the Schedule, has been sent to the Secretary of State and to the European Commission respectively.

#### **Interpretation**

14. For the purpose of interpreting this Direction, which includes these recitals 1 to 14 and the Schedule:
  - a. except as otherwise defined in this Direction, terms used in this Direction have the same definitions as those set out in the BCMR Notification;
  - b. the Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament; and
  - c. headings and titles shall be disregarded.

**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  $p_0$  (but excluding  $p_0$  where the Relevant Year is the First Relevant Year),  $p_1$  and  $p_t$ .

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 this Direction did not apply for the year 13/14.

- (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 of £2,800 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.

**General**

- (6) This Direction shall take effect on the day it is published.

M. Gibbs

**Competition Policy Director**

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

**16 May 2014**

### **Schedule to 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 5.3, 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 Direction referred to above**

- EAD 1000 connection
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- 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
- 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