

Reference: 00366397

28 December 2016

[Name and postal address, as received by post]

Information Requests
Secretariat

information.requests@ofcom.org.uk

Dear [Name]

Freedom of Information: Right to know request

Thank you for your request for information.

Ofcom received this on 23 November 2016 and has considered it under the Freedom of Information Act 2000 (“**the Act**”). I am writing to advise you that, apart from publicly available information that responds to some of your request, Ofcom cannot disclose the information you requested.

You identified six specific pieces of information that you requested under the Act. I have addressed each of these below:

1. *The confirmation that Ofcom has determined that BT would be treated more favourably than other Communications Providers (“CPs”) in respect of the rates borne by each in using or “lighting” BT fibre used in the EAD services it provides.*

Ofcom considered non-domestic business rates (“**NDRs**”) as part of its calculation of the approach to pricing the dark fibre remedy at paragraphs A23.92 *et seq.*¹ of the Final Statement (“**FS**”) of Ofcom’s 2016 Business Connectivity Market Review (“**2016 BCMR**”).

At paragraphs A23.97 to A23.103 of the FS, Ofcom set out a general background to non-domestic rates and BT’s cumulo rates costs. At paragraph A23.104 of the FS, Ofcom noted that the approach taken by the Valuation Office Agency (“**VOA**”) to calculating the NDR bill for different CPs may vary, based on a number of different factors.

2. *That Ofcom has proposed that, like the treatment of unbundled local loops, BT stays in rateable occupation of BT fibre used by other CPs.*

¹ See: <https://www.ofcom.org.uk/consultations-and-statements/category-1/business-connectivity-market-review-2015/>;

Annex 23 of the Final Statement can be found here:

https://www.ofcom.org.uk/data/assets/pdf_file/0022/55462/final-annexes-14-25.pdf

At paragraph A23.102 of the FS, Ofcom noted that in relation to dark fibre, the rating authorities have determined that *“as a general rule of thumb, the person who lights the fibre is considered to be in rateable occupation”*.

At paragraph A23.111, Ofcom noted that although the setting of NDRs is a matter for Government, and not for Ofcom, Ofcom nevertheless asked Government to consider ways to ensure that current rules for levying NDRs do not frustrate Ofcom’s design of regulated dark fibre access. Ofcom’s recommendation is that the rating rules be amended so that BT would pay the rates for the dark fibre circuits which it provides to other CPs under Ofcom’s regulations. Ofcom has made this recommendation to Government.

3. *That the reason for proposing 2 was that if not implemented, the dark fibre remedy would be rendered ineffective as the tax applied to other CPs is greater than the difference between BT’s dark fibre costs alone, and the total costs of the lit service that the remedy is intended to constrain.*

See response to Question 2 above.

Moreover, at paragraphs A23.104 to A23.116 of the FS, Ofcom addressed which NDRs should be used in calculating the price of the dark fibre remedy. Ofcom considered whether the appropriate amount of NDR costs to be included in the active differential should be based either on the likely costs to an access seeker or the likely cost to BT.

Having considered a number of factors, including certain advantages and disadvantages associated with each approach, Ofcom concluded that in the event that access-seeking CPs are liable for business rates when using dark fibre, the NDRs deducted from the dark fibre charge should be based on the average attribution of BT’s of BT’s cumulo ratings costs to the corresponding active service based on an average across internal and external volumes.

4. *The cash rates payment per annum that Ofcom has calculated in respect of BT’s fibre services termed EAD-LA 1000 (for the avoidance of doubt a 1 Gbps point-to-point connection), together with an estimate of the average length of an EAD-LA.*

Ofcom does not hold the annual cash rates payment in respect of BT’s EAD-LA 1000 product. As you know, Ofcom has calculated an attribution of BT’s rates liability, however that is withheld (as is Ofcom’s estimate of the average length of an EAD-LA) as it falls under the exemption in section 44 of the Act. Under this section information which we hold on this subject is exempt from disclosure since it relates to a particular business and was obtained in exercise of a statutory power, disclosure is therefore prohibited under section 393(1) of the Communications Act 2003. Section 44 is an absolute exemption under the Act and does not require a public interest test.

5. *The cash rates payment per kilometre attributable to the EAD 1000 main link charge, and that this link length is radial, and not actual.*

Ofcom does not hold the cash rates payment per kilometre that is linked to the EAD 1000 main link charge. Ofcom has calculated an attribution of BT's rates liability per kilometre, however that is withheld as it falls under the exemption in section 44 of the Act. Under this section information which we hold on this subject is exempt from disclosure since it relates to a particular business and was obtained in exercise of a statutory power, disclosure is prohibited under section 393(1) of the Communications Act 2003. Section 44 is an absolute exemption under the Act and does not require a public interest test.

6. *The number of 1Gbps or greater EAD circuits that Ofcom believes BT currently operates.*

Section 8 of BT's Regulatory Financial Statements for 2016 provides details on the volumes of 1Gbps EAD circuits, as at March 2016. The document is available at:

<http://www.btplc.com/Thegroup/RegulatoryandPublicaffairs/Financialstatements/2016/CurrentCostFinancialStatements2016.pdf>.

In your letter, you also asked, as a separate matter, whether Ofcom agrees with the following statement made pursuant to an investigation under section 6(1) of the Prosecution of Offences Act:

"[I]t is simply not possible, practical or sensible to attempt to isolate the [Non Domestic Rates burden] of components parts in BT's valuation."

We refer to the sections of the FS referred to above in relation to NDRs. We are not in a position to comment on the statement referred to above as Ofcom is not party to the relevant proceedings.

It is likely that other exemptions will apply to your request for disclosure.

Yours sincerely

[Name]

If you are unhappy with the response or level of service you have received in relation to your request from Ofcom, you may ask for an internal review. If you ask us for an internal review of our decision, it will be treated as a formal complaint and will be subject to an independent review within Ofcom. We will acknowledge the complaint and inform you of the date by which you might expect to be told the outcome.

The following outcomes are possible:

- the original decision is upheld; or
- the original decision is reversed or modified.

Timing

If you wish to exercise your right to an internal review **you should contact us within two months of the date of this letter**. There is no statutory deadline for undertaking internal reviews and it will depend upon the complexity of the case. However, we aim to conclude all such reviews within 20 working days, and up to 40 working days in exceptional cases. We will keep you informed of the progress of any such review. If you wish to request an internal review, you should contact:

Steve Gettings
The Secretary to the Corporation
Ofcom
Riverside House

2a Southwark Bridge Road
London SE1 9HA

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF