



Request from BT for exemption from the Undertakings under the Enterprise Act 2002 for certain high bandwidth services

Statement

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Section 1

Summary

- 1.1 This Statement sets out Ofcom's conclusions in relation to a request by BT for an exemption from a requirement in the Undertakings to provide high bandwidth (i.e. bandwidths above 1Gbit/s) Ethernet access services and optical spectrum access services in the geographic markets in which BT does not have significant market power (SMP). As set out below, this affects an area known as the West, East and Central London Area (WECLA).
- 1.2 On 22 September 2005 British Telecommunications plc (BT) offered, and Ofcom accepted, a set of undertakings pursuant to section 154 of the Enterprise Act 2002 (the "Undertakings"). The Undertakings include mechanisms to allow BT and Ofcom to agree exemptions from the Undertakings.
- 1.3 BT originally made an exemption request in May 2011 that was different in scope to its final request. We consulted on the original exemption request on 31 May 2011 proposing to grant a temporary exemption to Openreach.¹ We did not perform a detailed market assessment but relied on information contained within the Business Connectivity Market Review (BCMR) conducted in 2007/8. Given that there were a number of stakeholders that opposed our proposal to grant the exemption in advance of the next BCMR and that we had recently commenced this work, we decided to postpone making a decision on the exemption until the results of the new BCMR (the BCMR 2012/13) were available.
- 1.4 On 18 July 2012, BT submitted a revised exemption request (set out at Annex 1) for current and potential high bandwidth fibre based services that is geographically limited to the markets in which BT does not have SMP, as would be ultimately defined in the BCMR 2012/13.
- 1.5 On 25 July 2012, we published a further consultation on BT's revised exemption request and received six responses from stakeholders.²
- 1.6 We have now completed the BCMR 2012/13 and published a Statement (the BCMR 2012/13 Statement) on our findings and decisions on 28 March 2012³. The BCMR 2012/13 Statement⁴ includes a detailed assessment of the competitive conditions in the supply of the services relevant to this exemption.
- 1.7 In the BCMR 2012/13 Statement we set out our finding that BT has significant market power (SMP) in the provision of these high bandwidth services in the UK excluding a

¹ The consultation on high bandwidth access exemption was published on 31 May 2011 and is available at: <http://stakeholders.ofcom.org.uk/consultations/high-bandwidth-exemption/>

² The second consultation and non-confidential stakeholder responses are available at: <http://stakeholders.ofcom.org.uk/consultations/above-1gb/>

³ <http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/final-statement>

⁴ And the consultative process which preceded its publication including the Call for Inputs (published on 21 April 2011 at http://stakeholders.ofcom.org.uk/binaries/consultations/bcmr-inputs/summary/BCMR_Call_for_Inputs.pdf); the June BCMR Consultation (published on 18 June 2012 at <http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/>) and the November BCMR Consultation (published on 15 November 2012 at http://stakeholders.ofcom.org.uk/binaries/consultations/bcmr-reconsultation/summary/BCMR_Nov_2012.pdf).

geographic area defined as the WECLA⁵ and also excluding the Hull area. We define this market in the BCMR 2012/13 as the “wholesale market for Multiple Interface Symmetric Broadband Origination (MISBO) in the UK excluding the Hull Area and the WECLA”.

- 1.8 Having considered the findings of the analysis undertaken by the BCMR 2012/13 that the market for relevant services within the WECLA is competitive with a choice of suppliers and that no CP has been found with SMP, our conclusion is that this exemption is unlikely to have a significant impact on the ability of other CPs to compete in this market or on end-users.
- 1.9 In addition, our conclusion is that the exemption is unlikely to have an adverse impact on the overall operation of the Undertakings. However, the Equality of Access Board (EAB) will have an additional monitoring role to give added assurance that this exemption does not undermine the delivery of services on an EOI basis outside the WECLA.
- 1.10 Having taken account of all representations made during the consultation, we have concluded that it is appropriate to grant BT’s exemption request.
- 1.11 We remain of the view that the absence of a finding of SMP does not mean that we should automatically relieve BT of its obligations under the Undertakings. The granting of an exemption requires careful consideration of the matters on a case-by-case basis and particularly whether the exemption will have an impact on the overall operation of the Undertakings.
- 1.12 The legal text of the exemption is set out at Annex 2.

⁵ For clarity, it is noted that this area differs slightly from the proposal in the June BCMR Consultation, reflecting the inclusion of part of Slough as set out in the November BCMR Consultation and other minor adjustments as set out in the BCMR 2012/13 Statement.

Section 2

Background and introduction

- 2.1 On 22 September 2005 BT offered, and Ofcom accepted, the Undertakings pursuant to section 154 of the Enterprise Act 2002. These addressed issues raised by Ofcom as it considered whether to refer certain markets to the Competition Commission in relation to the provision of fixed telecommunications. The Undertakings were accepted by Ofcom in lieu of making such a reference. Ofcom's reasons for accepting the Undertakings, together with the Undertakings themselves, are set out in the document entitled *Final statements on the Strategic Review of Telecommunications, and undertakings in lieu of a reference under the Enterprise Act 2002*.⁶ The Undertakings include mechanisms for BT and Ofcom to agree exemptions from the Undertakings and the process for this is set out in more detail below.
- 2.2 The Undertakings established the principle of Equivalence of Inputs (EOI), which means that BT provides, in respect of a particular product or service, the same product or service to all CPs (including BT) on the same timescales, terms and conditions (including price and service levels) by means of the same systems and processes, and includes the provision to all CPs (including BT) of the same commercial information about such products, services, systems and processes. In particular, it includes the use by BT of such systems and processes in the same way as other CPs and with the same degree of reliability and performance as experienced by other CPs.⁷
- 2.3 BT's commitments in the Undertakings require certain high bandwidth services to be supplied by Openreach on the basis of EOI.
- 2.4 BT originally requested an exemption from these requirements for high bandwidth Ethernet access services and optical spectrum access services. BT's original exemption request did not include backhaul services and was not limited in its geographic scope.
- 2.5 We consulted on the original exemption request on 31 May 2011 proposing to grant a temporary exemption to Openreach.⁸ We did not perform a detailed market assessment but relied on information contained within the BCMR conducted in 2007/8. Given that a number of stakeholders opposed our proposal to grant the exemption in advance of the next BCMR and that we had in fact recently commenced work on the next BCMR, we decided to postpone a decision on the exemption until the results of the new BCMR (the BCMR 2012/13) were available.
- 2.6 On 18 July we received a revised exemption request from BT, which took account of the provisional conclusions of the BCMR published in June 2012. This revised exemption request included a wider set of products. In particular, the specified list of products and services covered included backhaul services that were excluded from the original request, as well as any new high bandwidth Ethernet and optical products that BT might introduce in future. Unlike the 31 May 2011 request, the request was limited to the geographic market(s) in which BT does not have SMP, as would be

⁶ This document is available at: http://www.ofcom.org.uk/consult/condocs/statement_tsr/

⁷ Section 2.1 of the Undertakings.

⁸ The consultation on high bandwidth access exemption was published on 31 May 2011 and is available at: <http://stakeholders.ofcom.org.uk/consultations/high-bandwidth-exemption/>

ultimately defined in the BCMR 2012/13. In the context of the conclusions set out in the BCMR 2012/13 Statement, that means the WECLA as defined in that Statement.

- 2.7 BT's revised exemption request and its reasoning for that request are outlined briefly in Section 3 (and set out in full at Annex 1). Stakeholders' responses to the second consultation are summarised and our views on those responses explained, in Section 4. The legal text of the exemption is at Annex 2.

The process for considering BT's request for exemption

- 2.8 Section 5.46.1 of the Undertakings requires that Openreach will not supply any service to any other part of BT unless it also offers that service to other CPs on an EOI basis. Products within the wholesale markets for MISBO as we define it in the BCMR 2012/13 fall within the scope of this obligation.
- 2.9 In addition to setting out the general principle governing EOI, Section 5.46.1 of the Undertakings provides for certain specified exceptions. Openreach has requested an exemption under one of these exceptions, paragraph 5.46.1(c), which provides that Openreach is not required to apply the principle of EOI to products where we agree that EOI is not required for reasons of practicability or otherwise.
- 2.10 Section 155 of the Enterprise Act 2002 requires that Ofcom consults where it proposes to amend the Undertakings in any material respect. Ofcom is not obliged to consult on non-material changes to the Undertakings. However, we stated in our statement entitled "Requests from BT for specified exemptions and agreements to its Undertakings under the Enterprise Act 2002 – part 1",⁹ that we would decide whether or not to consult on any such changes on a case-by-case basis.
- 2.11 As set out in Section 4, we do not consider that this exemption would be likely to have a material impact on CPs and end-users. Nor do we expect it to have a material effect on the comprehensive solution that the Undertakings aim to achieve. However, we consulted on this exemption request because we wanted to consider the views of CPs and end-users, in particular on the impact of the proposed exemption on them, before we reached a conclusion. This was particularly the case because several respondents objected to our initial proposal to grant the original exemption based on BT's previous exemption request in May 2011.

⁹ We stated this in the statement available at:

<http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/bt/statement.pdf>

Section 3

BT's revised exemption request

- 3.1 In this section we set out BT's revised exemption request and its reasoning for requesting the exemption.
- 3.2 BT's revised exemption request relates to high bandwidth fibre-based services that fall within the wholesale MISBO market in the WECLA. In our BCMR 2012/13 Statement published on 28 March 2013 we conclude that BT does not have SMP in this market. This market encompasses high bandwidth Ethernet services (bandwidths above 1Gbit/s) and services of any bandwidth delivered with WDM equipment at customers' premises. The exemption request covers services within this market that are currently offered by Openreach, as well as products introduced in the same market in the future.
- 3.3 The current services within the scope of the revised exemption are¹⁰:
- 3.3.1 Ethernet access services providing bandwidths above 1Gbit/s. These services include:
 - Wholesale Extension Services ("WES") at 2.5Gbit/s and 10Gbit/s; and
 - Wholesale End-to-End Services ("WEES") at 2.5Gbit/s and 10Gbit/s.
 - 3.3.2 Optical spectrum access services at any bandwidth that are based on WDM technology.¹¹ These include:
 - Optical Spectrum Access ("OSA") bearers and wavelengths;¹² and
 - Optical Spectrum Extension Access ("OSEA") bearers and wavelengths.
 - 3.3.3 Backhaul services providing bandwidths above 1Gbit/s:
 - Backhaul Extension Services ("BES"), including BES Daisy Chain at 2.5 Gbit/s and 10Gbit/s;
 - Openreach Backhaul Network Service ("ONBS") at 10Gbit/s;
 - Ethernet Backhaul Direct ("EBD") at 10Gbit/s; and
 - Bulk Transport Link ("BTL").
- 3.4 Subsequent to our second consultation in July 2012, BT has indicated that it believes that the TDM access and backhaul products with interfaces of 2.5Gbit/s and 10Gbit/s

¹⁰ The 2.5Gbit/s and 10Gbit/s versions of WES, WEES and BES are still available for new supply although BT has subsequently notified industry of its intention to withdraw these remaining services from new supply in 2013.

¹¹ Note that some of BT's optical products, i.e. Wavestream National products, are currently subject to an exemption from EoI obligations in the Undertakings granted in December 2010. Wavestream National services are therefore not required to consume any EoI optical input supplied by Openreach. Consultation and Statement are available at <http://stakeholders.ofcom.org.uk/consultations/bt-wavestream/>

¹² OSA and OSEA bearers enable wavelength services but do not carry traffic themselves.

which it launched in June 2012 fall into the MISBO market. We have considered these products and have concluded that they are part of the MISBO market. Given that BT's exemption request was for all current products falling within the MISBO market and our intention at the time of consultation was that the exemption would cover all relevant services falling within this market, we have therefore included these products in our consideration of whether or not to grant this exemption.

- 3.5 Further details of these services can be found at Annex 3.
- 3.6 BT considers that EOI obligations are restricting its ability to compete effectively in the supply of these services in the WECLA. BT notes that the analysis undertaken as part of the BCMR 2012/13 has found no operator to have SMP in the supply of such services in the WECLA.
- 3.7 BT sets out that a number of CPs are providing Ethernet and optical access services using their own extensive network infrastructure and BT claims it has no particular competitive advantage in the supply of these services.¹³
- 3.8 BT has requested that we agree to this exemption as soon as possible, as any delay in lifting the relevant EOI obligations would significantly hamper its ability to compete in a high growth market.

¹³ Research by Prodata for Openreach in Mar-Apr 2011 showed access connectivity circuits were purchased on price and service factors with service factors becoming more important over time.

Section 4

Responses to the second consultation and our views

- 4.1 In this section we summarise the responses received from stakeholders and our views on the points they have raised.

Stakeholders' responses

- 4.2 Six stakeholders responded to the second consultation: BT, CWW, UKCTA, Virgin Media, a combined response from EE and MBNL and one confidential respondent. The non-confidential responses are published on our website.¹⁴
- 4.3 In general, none of the stakeholders were against the principle of granting the exemption on the basis of a no SMP finding that would be determined in the BCMR 2012/13. The specific comments made by respondents are set out below.

Timing of the consultation

- 4.4 Virgin Media, UKCTA, CWW all considered that as the level of competition was central to BT's exemption request, the consultation in relation to the exemption was premature and should not commence until the conclusion of the BCMR 2012/13.
- 4.5 Additionally, Virgin anticipated that the significant debate over the proposals put forward within the BCMR 2012/13, would mean that it would be difficult to make meaningful comments in relation to the exemption request.

Our considerations

- 4.6 We delayed our decision on BT's original exemption request in order to align our consideration with the BCMR 2012/13. The June BCMR consultation included substantial analysis of levels of competition, and given that it was available at the time we consulted on BT's revised exemption request, we did not consider that there was any reason to delay our consultation. We stated in that consultation that, should additional information come to light following the June BCMR consultation that would significantly impact the substantive results of the analysis of the relevant market, then there may be a need to revisit our proposals in relation to the exemption. We also indicated that as the BCMR 2012/13 was still at consultation stage we did not intend to make a final decision on whether or not to grant BTs exemption until that review had been completed.
- 4.7 Now that the BCMR 2012/13 Statement has been published, we consider it appropriate to conclude on this exemption.

Differences in characteristics between access and backhaul services

- 4.8 CWW and UKCTA expressed concerns regarding the application of the exemption to backhaul services for MISBO in the WECLA. They considered that there are important differences between access and backhaul services and in particular

¹⁴ The second consultation and non-confidential stakeholder responses are available at: <http://stakeholders.ofcom.org.uk/consultations/above-1gb/>

differences in the characteristics of demand – where backhaul services require resilient supply –and differences in purchasing patterns – where CPs and BT purchase different backhaul products to meet their backhaul requirements. They suggested that we should conduct a specific analysis for backhaul to ensure that all the affected exchanges in the WECLA are subject to effective competition.

- 4.9 In their joint response EE/MBNL did not consider that the proposed extension of the London geographic market definition was soundly based and did not consider that the market definition was applicable to the mobile backhaul services purchased by them.
- 4.10 EE/MBNL also noted that they considered BT's enduring market power in relation to the provision of mobile backhaul products and the increasing importance of ever higher bandwidths for such products to be valid reasons why we should not agree to BT's exemption request.

Our considerations

- 4.11 As set out in the second consultation, our intention is to rely on the extensive analysis of the business connectivity markets conducted in the BCMR 2012/13.
- 4.12 In relation to the concerns raised, we refer, in particular, to Section 4 (Wholesale product market definition) of the BCMR 2012/13 Statement in which we consider *inter alia* whether a separate market exists for access and backhaul or whether it is appropriate to base our analysis on the supply of access and backhaul combined.¹⁵ We conclude that there is a combined market on the basis of sufficiently similar competitive conditions for access and backhaul. Similarly the BCMR 2012/13 looked at the provision of mobile backhaul in terms of wholesale product market definition, geographic markets and remedies for wholesale business connectivity markets. We conclude that mobile backhaul is not a separate market.
- 4.13 We also refer to our analysis and conclusions in Section 5 (Geographic market definition) in which we have conducted an extensive further analysis of MISBO services (over and above that which we had set out in the June BCMR consultation) in light of stakeholder comments. Having considered consultation responses, and our further analysis, we conclude that the evidence continues to support the finding of two geographic markets for MISBO:
- the WECLA (extended to include Slough following further analysis and consultation); and
 - the rest of the UK (excluding the WECLA and the Hull area).
- 4.14 In Section 7 (SMP Assessment) of the BCMR 2012/13 Statement we set out our analysis, reasoning and conclusions on whether any CP has SMP in the markets we identify. In relation to MISBO in the WECLA, we conclude that our initial assessment in the June BCMR consultation remains valid. Our network reach analysis shows there is extensive alternative infrastructure in the WECLA that is close to large businesses, existing MISBO users and BT exchanges that are likely to require MISBO services for backhaul. BT's market share in this area is less than 30 per cent.

¹⁵ We refer specifically to Issue 3 of Section 4 of the BCMR 2012/13 Statement.

- 4.15 Based on the detailed analysis and findings set out in the BCMR 2012/13 Statement, we do not consider it necessary to conduct a further assessment of the competitive supply of backhaul at exchanges in the WECLA. Further, we disagree, in light of our extensive BCMR analysis, with EE/MBNL's view regarding the extent of the London geographic market and BT's market power in relation to the provision of mobile backhaul in the WECLA.

Circuits spanning the WECLA boundary

- 4.16 BT argued for further clarification in relation to circuits that cross the WECLA boundary.
- 4.17 BT believed that the scope of the exemption should match the extent of relevant product markets where we find BT with no SMP in the BCMR 2012/13. Under our proposal, circuits with any end outside the WECLA should be treated as if they are SMP and EOI. BT believed that this approach overlooked a particular class of circuit – i.e. circuits provided as “terminating segments” connecting a CP's point of network presence with a business customer site. For circuits of this type BT believed we should consider the location of the business customer end-user site as defining the relevant geographic market for the whole circuit. Therefore, a circuit with a business customer end inside the WECLA and a network node end outside the WECLA, should be covered by this exemption – whereas a circuit with a business customer end outside the WECLA should not.
- 4.18 BT acknowledged that many circuits do have a business customer site at each end, and in this case only circuits with both ends in the WECLA would be covered by this exemption.
- 4.19 Both CWW and Virgin Media highlighted the need for clear rules to be established for instances where one end of a circuit was in WECLA and the other was outside. Both companies considered that the rule should be consistent with the final BCMR statement.

Our considerations

- 4.20 We agree with CWW and Virgin Media that our position in respect of the scope of this exemption to circuits spanning the WECLA boundary should be consistent with our conclusions in the BCMR 2012/13 Statement.
- 4.21 The practical implementation of remedies across separate wholesale MISBO markets was specifically considered in the BCMR 2012/13 and our conclusions are detailed in Section 13¹⁶ (Remedies for the wholesale MI markets) of the BCMR 2012/13 Statement. In this statement we conclude, following similar representations from BT regarding its views on the treatment of terminating segments (i.e. circuits between an end-user site and a network node or between network nodes), that wholesale MISBO circuits that cross the WECLA boundary should be classified as follows:
- Wholesale end to end MISBO services (i.e. circuits between two end-user sites) – should be classified as inside the WECLA only if both end-users sites are in the WECLA and other circuits should be classified as outside the WECLA (i.e. if one or more sites are outside the WECLA); and

¹⁶ Paragraphs 13.205 – 207.

- Other wholesale MISBO services (i.e. circuits between an end-user site and a network node or between network nodes) – should be classified as being in the WECLA if the end-user site is within the WECLA or in the case of backhaul circuits if the remote end of a backhaul circuit is within the WECLA.

4.22 We therefore consider it appropriate that the exemption applies to both classes of circuits that are considered in the WECLA.

Safeguards

4.23 UKCTA, CWW, Virgin Media shared our concerns in relation to Openreach supplying products on an EOI basis in one geographic area and on a non-EOI basis in another. They supported the need that we had identified in our second consultation for safeguards to be put in place to ensure that no improper sharing of confidential information could take place.

Our considerations

4.24 As set out in the second consultation and confirmed below, we consider that the current Undertakings obligations are likely to be sufficient to address any concerns about the improper sharing of confidential information and the additional monitoring by the EAO will provide an appropriate level of scrutiny to ensure that this is the case.

Temporary exemption

4.25 UKCTA and Virgin Media urged us to approve the exemption on a temporary basis only (12 months), to allow both us and the industry the opportunity to assess the practical effect of the exemption in what they perceived as a newly regulated and developing market. UKCTA highlighted that this would be in line with the exemption we granted in relation to BT's Wavestream service.

Our considerations

4.26 We believe that the safeguards discussed above are proportionate to the risks involved with granting this exemption. Should the EAB identify that the EOI rules are not being followed within the area where BT has been designated with SMP they will be able to take such action, as is appropriate depending on the nature and seriousness of the breach.

Relationship between EOI and SMP

4.27 CWW, EE/MBNL and UKCTA agreed with our view that the absence of SMP does not automatically relieve BT of its obligation under the Undertakings and considered that it was important that any exemptions from the Undertakings were carefully considered on a case by case basis.

Our Considerations

4.28 The Undertakings commitments and SMP obligations are distinct and the absence of a finding of SMP does not automatically relieve BT of its obligations under the Undertakings. We agree that the granting of an exemption requires careful consideration of the matters on a case by case basis and particularly whether the exemption may have an impact of the overall operation of the Undertakings.

Assessment of BTs request

4.29 As set out in the second consultation, in reaching our view on whether or not to agree to BT's exemption request, we have considered the following factors, as appropriate:

- whether there is likely to be a negative impact on CPs if the exemption was accepted or not accepted due to, for instance, a reduction in effective competition;
- whether there is likely to be harm to end-users if the exemption was accepted or not accepted due to, for instance, disruption to the services customers receive, lower quality or an increase in retail prices; and
- the impact on the overall operation of the Undertakings.

Our views on BT's revised exemption request

4.30 Our consideration of the impact of the exemption on CPs and end-customers relies significantly on the competition analysis set out in the BCMR 2012/13 Statement.

BCMR 2012/13

4.31 We published the BCMR Consultation on 18 June 2012 and sought the views of stakeholders in relation to the proposals therein by 24 August 2012. We published a further consultation on our BCMR proposals on 15 November 2012¹⁷. We published the BCMR 2012/13 Statement on 28 March 2013.

4.32 The BCMR 2012/13 defines the wholesale product markets that relate to very high bandwidth services known as MISBO, which captures the services that are the subject of this exemption. The BCMR 2012/13 defines three distinct geographic MISBO markets covering the following areas.

- the WECLA;
- the UK excluding the Hull area and the WECLA; and
- the Hull area.¹⁸

4.33 In our further consultation of 15 November 2012 we sought views on revisions to our proposals regarding the geographic market in the London area. In particular, we proposed that the definition of the WECLA should also include some postcode sectors in Slough.

4.34 In our BCMR 2012/13 Statement we conclude that no CP has SMP in the wholesale market for MISBO in the WECLA (as extended), and that this position is not expected to change over the next three years. In other words, we found that the market is effectively competitive, with no CP able to behave to an appreciable extent independently of its competitors, customers and consumers.

¹⁷ 'Business Connectivity Market Review, Further Consultation' published by Ofcom on 15 November 2012 – see http://stakeholders.ofcom.org.uk/binaries/consultations/bcmr-reconsultation/summary/BCMR_Nov_2012.pdf

¹⁸ The BCMR 2012/13 Statement found no MISBO services currently sold in the Hull area and therefore concluded a no SMP finding.

- 4.35 Our conclusions, set out in our BCMR 2012/13 Statement are based on a forward looking analysis of the economic characteristics of the market. Full details of this analysis are presented in Section 7 of the BCMR 2012/13 Statement and a summary of this analysis is set out below.

Market share and market share trends

- 4.36 The market shares in the MISBO market inside the WECLA are very different from those in the rest of the UK. As shown in Table 1 below, BT has the second largest share after COLT.¹⁹

Table 1 - Volume shares in the MISBO market in the WECLA

	Volume share in 2011
CP	
Colt	38%
GEO	6%
BT	24%
Level 3 and GC	11%
Verizon	14%
Other	7%

- 4.37 The analysis indicates that BT has 24% market share in the WECLA region for these services, compared with a 57% share of the market in the rest of the UK (excluding the Hull area). Whilst competitive infrastructure is present in a number of other locations outside WECLA, our analysis in the BCMR suggests that the WECLA is the only area (other than the Hull area) where competitive conditions are sufficiently different to justify defining a separate geographic market.
- 4.38 The evidence indicates that the market is not highly concentrated, with the supply of MISBO services within the WECLA contested by many CPs - both small and large.

Competition in infrastructure in the WECLA

- 4.39 The network reach analysis within the BCMR 2012/13 Statement finds that there is a considerable amount of alternative network infrastructure in the WECLA, and significantly more than other metropolitan areas in the UK. In addition, there are several smaller CPs who also have network infrastructure within the WECLA.
- 4.40 BT has more extensive physical network infrastructure than its competitors even in the WECLA, but as is clear from the market shares, it does not appear to derive a material competitive advantage from this. The demand for MISBO services often comes from sites where there is a real prospect of continued and growing demand, such as data centres and multi-tenanted offices. This, combined with the high value of MISBO services, means that CPs are better able to justify the investments required to extend their networks to reach new sites, and therefore contest the supply of connectivity to these sites.

¹⁹ These market share figures are based on the number of circuit- or wavelength-ends supplied by each CP. See the BCMR 2012/13 Statement and annexes for full details of how market shares were calculated.

Economies of scale and scope

- 4.41 The BCMR 2012/13 Statement notes that BT has the greatest potential to benefit from economies of scale and scope. However, given its relatively low share, it appears that BT does not gain a material competitive advantage from its scale and scope in the WECLA.

Barriers to entry and expansion

- 4.42 Although there are considerable barriers to entry and expansion in this market caused by the high sunk costs required to build network infrastructure, the BCMR 2012/13 Statement notes that these costs are offset to a degree by the high value of MISBO services. Also, we know from the network reach analysis that a number of CPs have already developed extensive network infrastructure within the WECLA.

Prospects for competition

- 4.43 The BCMR 2012/13 Statement sets out our view that demand for MISBO services is likely to continue its very rapid growth over the course of the review period of three years. Given the high value of the services, and the number of CPs with extensive network infrastructure within the WECLA, we consider the prospects for competition in this market are good. In these circumstances, we do not consider it is likely that any CP will gain a position of strength that would afford them the ability to act to an appreciable extent independently of its competitors, customers and ultimately consumers.
- 4.44 One caveat, however, is that BT has a potential advantage over its competitors in relation to sales of MISBO services which span the WECLA boundary. Specifically, BT's extensive network coverage outside the WECLA may give BT an advantage over its competitors in terms of selling MISBO services across the two areas.
- 4.45 In the BCMR 2012/13 Statement we impose remedies in the market for MISBO services in the rest of the UK excluding the Hull area and clarify how the remedies apply to circuits which span different geographic market boundaries.²⁰ In particular, MISBO circuits that cross the WECLA boundary should be classified as follows:
- Wholesale end to end MISBO services (i.e. circuits between two end-user sites) – should be classified as inside the WECLA only if both end-users sites are in the WECLA and other circuits should be classified as outside the WECLA (i.e. if one or more sites are outside the WECLA); and
 - Other wholesale MISBO services (i.e. circuits between an end-user site and a network node or between network nodes) – should be classified as being in the WECLA if the end-user site is within the WECLA or, in the case of backhaul circuits, if the remote end of a backhaul circuit is within the WECLA.

Impact on CPs

- 4.46 Given that the analysis undertaken in the BCMR 2012/13 Statement finds that no operator has SMP in the WECLA in the wholesale market for MISBO, the removal of EOI obligations from BT's MISBO services supplied in the WECLA is unlikely to have a material adverse impact on competition in itself. However, we have considered

²⁰ As set out in section 13 of the BCMR 2012/13 statement.

more specifically whether the removal of EOI obligations could have an adverse impact on BT's competitors in the supply of high-bandwidth fibre products.

- 4.47 In the absence of EOI obligations, Openreach would be able to discriminate in favour of BT's downstream divisions. This could result, for example, in the setting of higher wholesale prices to other CPs, selling products on different terms and conditions, and offering services on a lower-quality basis, such as with longer provision and fault-repair times. BT could also decide to withdraw these services from the wholesale market.
- 4.48 Due to the competitive conditions identified in the WECLA, we do not believe that these are likely outcomes. BT's commercial decisions and actions should be constrained by the behaviour and the commercial initiatives of its competitors, where CPs can benefit from the presence of alternative network infrastructure and can obtain similar services from a sufficient number of alternative suppliers. Furthermore, these services are in a high-revenue and fast growing market, where BT, subject to the same commercial pressure as its competitors, should be driven to sell more of these services (both at the wholesale and retail level) to satisfy the increasing demand for high bandwidth services. Excessive pricing, product withdrawal or degradation should be unlikely in these circumstances.
- 4.49 Even if BT decided to discriminate in favour of its downstream business, the presence of alternative wholesale providers should mean that the market remains competitive and consumers continue to benefit from a healthy competitive environment.
- 4.50 Overall, we consider that BT will be effectively constrained by its competitors, and that there is sufficient competitive supply such that the market will continue to be effectively competitive in the absence of the relevant EOI obligations. We consider this applies both to existing products listed by BT and further products within the defined wholesale market for MISBO in the WECLA, which would be introduced into a market that is effectively competitive.
- 4.51 In its request, BT also notes that the absence of EOI obligations will allow it greater flexibility in the supply of these services, i.e. BT will be able to meet its customers' technical and economic requirements more effectively. BT notes that unlike other connectivity services, high-bandwidth fibre products are bespoke services, which require different network designs and are typically sold as a result of competitive bids. BT maintains that EOI obligations constrain BT's ability to offer bespoke pricing and non-price terms and conditions. Given the competitive conditions in this market, we therefore consider that it is appropriate that BT is provided with sufficient flexibility, including the ability to apply bespoke pricing and non-price terms and conditions, when competing in the supply of the relevant services in the WECLA and that this may have a positive impact on CPs.
- 4.52 As set out above, the BCMR 2012/13 Statement has identified that BT has a potential advantage over its competitors in relation to MISBO services that span the WECLA boundary. As a result the BCMR 2012/13 Statement has clarified how MISBO circuits that cross the WECLA boundary should be classified as set out in paragraph 4.45 above. For the same reasons, we consider that a similar approach should be taken in relation to this exemption and that this exemption should only apply where:
- i) in the case of Wholesale End-to-End Services, both end-user premises are in the WECLA;

- ii) in the case of Access Segments, the end-user premise is in the WECLA; and
- iii) in the case of Backhaul Segments, the operational building connected by the Backhaul Segment which is closest to the end-user premise is in the WECLA.

4.53 This specific requirement is reflected in paragraph 2 of the exemption legal text set out in Annex 2.

Impact on consumers

4.54 Our view is that granting the exemption is likely to have no material impact on consumers in the WECLA. The analysis set out in the BCMR 2012/13 Statement shows that the WECLA is effectively competitive in respect of the wholesale market for MISBO and that no CP has been found with SMP. On this basis, consumers will continue to be able to choose their supplier from a number of CPs and to consume products that are competitively priced.

4.55 In addition, we consider that consumers may gain positive benefit from the granting of the exemption as it will provide BT with the flexibility to better meet the needs of its wholesale customers and therefore consumers generally.

Impact on the overall operation of the Undertakings

4.56 The Undertakings were designed to achieve a comprehensive solution in areas where effective and sustainable competition had not developed. Therefore, removing certain requirements arising from the Undertakings in the provision of some services in markets where such competition has developed may, but does not necessarily, impact the overall operation of the Undertakings.

4.57 As set out in our second consultation, this exemption request creates the unusual situation where the same products supplied by Openreach in different geographic areas will be subject to differing regulatory obligations. Openreach product teams will be managing both EOI and non-EOI products and whilst this happens currently, it is restricted to legacy and niche product sets such as LAN Extension Services (“LES 2”) and the Fibre Integrated Reception System (FIRS) at Ebbsfleet, rather than core products such as those covered by this exemption request.

4.58 BT’s exemption request sets out the difficulties with moving the products covered by the exemption out of Openreach and refers to the technical complexity of the products, the relatively small volumes of circuits involved and the operational aspects of re-engineering operational processes. Therefore, when this exemption is granted Openreach will still manage the products covered by this exemption, on a non-EOI basis, within existing product management teams. We accept that there may be operational difficulties with moving these products out of Openreach and that continuing to provide them out of Openreach is likely to be a reasonable approach.

4.59 Where the same product teams deal with EOI and non-EOI products there may be a risk from an information sharing and behavioural perspective e.g. the transfer of inappropriate information or a preference towards BT’s downstream businesses. BT sets out in its request that no downstream functions of BT will be able to gain access to protected confidential regulated product information (other than as permitted under the information sharing rules in the Undertakings) and similarly, the commercial policy regarding the SMP product (within the SMP geographic area) will remain

subject to all existing processes which do not allow inappropriate influencing of commercial policy by downstream functions.

- 4.60 We consider that these existing Undertakings obligations in the context of this particular exemption request are likely to be sufficient to address any concerns and that the overall operation of the Undertakings, and in particular the integrity of functional separation, will be largely unaffected. However, we recognise that this exemption will create a new situation within Openreach and that it is important to be certain of the impact of this exemption, therefore, we have agreed with BT that the Equality of Access Board (EAB) will carry out additional monitoring to ensure compliance with the Undertakings.
- 4.61 We have agreed with BT and the EAB additional monitoring arrangements to confirm BT is continuing to deliver services outside the WECLA on an EOI basis. These will be as follows:
- The Equality of Access Office (EAO) will select and review a sample of bids from BT's downstream businesses (BT Global Services, BT Retail) and CPs that include the relevant Openreach products covered by the exemption. Particular focus will be placed on bids which require orders to be delivered in both the WECLA area and non-WECLA area(s) and/or where one end of an order is in the WECLA area and one end is not.
 - The EAO will review whether the relevant products which are subject to EOI obligations are indeed offered and delivered by Openreach on an EOI basis.
 - The EAO will visit and monitor the activity of Openreach team(s) responsible for processing orders in the WECLA and non-WECLA areas to verify that appropriate controls are in place to ensure bids and orders for the non-WECLA area continue to be processed in an EOI manner.
- 4.62 We consider that these arrangements will provide an appropriate level of scrutiny in relation to the management of relevant EOI and non-EOI products within Openreach. Clearly, if the EAB find that BT is in breach of its EOI requirements then it will have to take such action as it considers appropriate.

Section 5

Conclusion

- 5.1 The conclusions of the BCMR 2012/13 Statement find that the WECLA is effectively competitive in relation to the supply of wholesale MISBO services with no CP having SMP. Given that this is the case, we consider that this exemption will not have a detrimental effect on end-customers and competition in the WECLA.
- 5.2 Given that no downstream functions of BT will be able to gain access to protected confidential regulated product information (other than as permitted under the information sharing rules in the Undertakings) and the commercial policy regarding the SMP product (within the SMP geographic area) will remain subject to all existing processes which do not allow inappropriate influencing of commercial policy by downstream functions, we consider that the overall operation of the Undertakings, and in particular the integrity of functional separation will be largely unaffected. The additional monitoring that will be conducted by the EAB will ensure that BT continues to deliver services outside the WECLA on an EOI basis.
- 5.3 We remain of the view that the absence of a finding of SMP does not automatically relieve BT of its obligations under the Undertakings. The granting of an exemption therefore requires careful consideration of the matters on a case-by-case basis – and particularly whether the exemption might have an impact on the overall operation of the Undertakings.
- 5.4 In the rest of the UK, BT's obligations specified in the Undertakings in relation to the services detailed in BT's exemption request, remain in place.
- 5.5 In the light of the consultation responses received, our responses to them and for the reasons stated above we agree to BT's request and grant the exemption.
- 5.6 The legal text of the exemption is set out at Annex 2.

Annex 1

BT's exemption request

BT's Undertakings under the Enterprise Act 2002:

Request for agreement for Equivalence of Inputs (EOI) to not apply to certain High bandwidth fibre-based services offering dedicated bandwidth above 1Gbit/s

PRODUCT: HIGH BANDWIDTH ETHERNET AND OPTICAL SPECTRUM SERVICES ABOVE 1 GBIT/S

Legal basis: 5.46.1 (c)

1. Product description and reasons for request

BT requests an exemption from any obligation requiring Openreach to provide certain high bandwidth fibre-based services offering dedicated bandwidth above 1Gbit/s and for optical spectrum products providing services at any bandwidth on an Equivalence of Inputs (EOI) basis, in the geographic markets in which BT does not have SMP.

This request is made on the basis of Ofcom's proposals in the Business Connectivity Market Review (BCMR) consultation which was published on 18 June 2012 (the Consultation) and is without prejudice to any future BT responses to the Consultation (and any further consultations and/or subsequent legal action in relation to the BCMR).

The products within the scope of this request fall into the following two product categories:

- High bandwidth Ethernet products at speeds above 1 Gbit/s
- Optical spectrum products providing services at any bandwidth.

A list of products within the scope of this request is listed in section 2 of this request.

The reason for this request is that in the Consultation, Ofcom is currently consulting on proposals that it should find that these types of service are competitively supplied and that BT does not have SMP in the supply of them in an area which Ofcom defines as the west, east and central London area (WECLA). BT supports the finding of no SMP. BT considers that if such services are competitively supplied, it is reasonable for BT not to have to supply them on an EOI basis. BT seeks this exemption to give specific benefits such as increased pricing freedom and increased flexibility to respond to customers' needs (for example in respect of payment terms and conditions, etc.).

One possible alternative option might be to move the responsibility for management of Openreach products in markets where Ofcom find no SMP into other BT divisions. In some situations this may indeed be the most appropriate way forward. However, in this particular case, given that we see continued demand from Openreach's Communications Provider (CP) customers for the unregulated services, it will make more sense from an operational viewpoint to continue to offer the services from the existing Openreach product management and market channels and service systems. The services in question are relatively small volume and highly technically complex, and the prospect of re-engineering the supply chains and associated product management processes to provide the unregulated services from

another BT division would introduce additional risks to customer service. Therefore, we wish to ensure through this exemption request that the services can continue to be offered via Openreach without an expectation of EOI obligations applying.

The current state of the market, and the detrimental consequences of continuing to require BT to supply such services on an EOI basis in markets which are competitively supplied, are described below.

In short, it will benefit customers and competition for the high bandwidth products and optical products to be offered on a non EOI basis so that customers have more choice about how to fulfil their high speed point to point connectivity requirements.

Please note that BT considers that Section 19(2) of the Undertakings may already have relieved BT of the EOI obligation in relation to Ethernet services above 1 Gbit/s and optical services provided at any bandwidth, but understands that Ofcom considers that Section 19(2) should not be interpreted in this way. This application for an exemption is therefore made without prejudice to BT's rights in future to make further submissions either to Ofcom or in other fora on the correct meaning of Section 19(2).

2. Product description

This exemption application applies to the products offered by Openreach at the date this exemption is made, or which are subsequently to be offered by Openreach, by the names shown below and as they may evolve, be developed or replaced (whether under the names below or a new name) from time to time, or new products are introduced – to the extent that the products are within the wholesale MISBO markets and within specified geographic markets where BT is found by Ofcom in the BCMR to not have SMP. These products are:

- a) WES/WEES 2500; WES/WEES 10000 (or any product subsequently launched providing service at above 1 Gbit/s)
Point to Point services using dedicated NTE and fibre per circuit operating at 2.5 Gbit/s and 10 Gbit/s presented to the customer as Ethernet.
- b) Ethernet Backhaul Direct 10 Gbit/s (or any above 1Gbit/s bandwidth EBD variants launched during the period of this exemption), BES/BES Daisy Chain 2500, BES/BES Daisy Chain 10000, ONBS 10Gbit/s and their successor products.
- c) OSA Bearers; OSEA Bearers
Point to Point DWDM systems using a dedicated fibre. These systems enable the wavelength services listed below but do not carry traffic themselves.
- d) All OSA and OSEA wavelength services, delivered with any service interface type.
- e) Bulk Transport Link (BTL)

The application also applies to other Openreach products, including ancillary products, which are or will be supplied in the relevant wholesale market as identified by Ofcom in its BCMR as being competitively supplied.

More detail plus schematics of the products concerned can be found at:

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

3. The proposed exemption

The exemption requested would relieve BT of any obligation to supply the services listed in section 2 on an EOI basis.

This application is solely concerned with EOI for the relevant product set. Other features of the Undertakings, including in relation to systems separation would continue to apply to these products. Similarly, the functional separation obligations in relation to Openreach would continue.

4. Legal basis, scope and duration

4.1 Basis

Sub-paragraph (c) of section 5.46.1 of the Undertakings allows Ofcom and BT to agree that BT shall not be required to supply any product on an EOI basis for reasons of practicability or otherwise. This application for an exemption relies on the “or otherwise” provision; the “or otherwise” in this case being the fact that the relevant market is competitively supplied.

4.2 Scope

The scope of the exemption request is specifically in relation to the non-SMP high bandwidth fibre-based services which are listed in section 2.

4.3 Duration

Permanent.

5. Justification for the exemption

As outlined in section 1 above, the key justification for this exemption is that Ofcom has found these services to be competitively supplied and specifically that:

- There are many alternative suppliers of these products;
- Furthermore, entry barriers for other CPs wishing to offer competing services are relatively low;
- Customers are sophisticated buyers of such services, require bespoke services which are tailored to meet their specific needs and have countervailing buyer power;
- These factors evidence that the market in which these products are offered is one which is competitively supplied;
- Ofcom’s proposed finding that BT does not have SMP in the provision of the services covered by this request indicates that Ofcom supports these conclusions.

Having regard to the above, BT believes that it is inequitable and liable to distort competition (because BT cannot compete effectively and with appropriate commercial flexibility), to continue to require BT to provide the services on an EOI basis.

We expand on some of these key points below:-

Alternative supply to Openreach of Optical services and Ethernet services above 1Gbit/s already exists

There are a number of operators who have invested in their own networks to serve this market. These include Virgin Media, C&W Worldwide, Colt, Global Crossing and

Geo. All of these CPs have extensive networks and will extend their networks and supply services of this nature where it is economic to do so - e.g. to win a bid or on a circuit by circuit basis. To the extent that Ofcom finds that BT has no SMP in the relevant product markets (whether for the whole UK or for a geographically defined subnational market) then BT has no particular advantage in the provision of these services and, in common with other CPs, supplies services where it is economic.

Customers are seeking tailored offerings – but BT cannot meet their needs

The application of strict EOI tends to make it harder for Openreach to provide its CP customers with the flexibility they have asked for, especially in relation to the kinds of flexibility which are particularly critical to individual bids, whether this relates to specific pricing, discounting or other terms and conditions. It should be noted that these types of very high bandwidth connectivity services are often procured via major bid processes, where customers almost always have specific bespoke requirements especially in respect of commercial terms.

6. Safeguards against inappropriate use of regulatory freedom

BT considers Section 19 of the Undertakings (which already addresses the issue of loss of SMP in a particular geography) and Section 5.46 as already foreseeing and allowing for a differential approach to EOI between services; with all other aspects of the Undertakings remaining in place and their associated protections for CPs. Notwithstanding this we address the issue of safeguards further below.

It has been suggested that the Undertakings require the continued operation of EOI as part of the general functional separation of Openreach from the rest of BT – to provide assurance that inappropriate sharing of information, etc. does not take place between regulated upstream activities and downstream competitive businesses.

BT believes that it is unnecessary to perpetuate EOI obligations on unregulated products in order to avoid undermining compliance with the general functional separation obligations on Openreach or EOI obligations elsewhere where these are considered necessary. Indeed, as a result of Undertakings exemptions and variations²¹ previously agreed after consultation by Ofcom, there are already a number of examples where Openreach product teams manage a range of different products, some subject to EOI obligations and others not, and no problems have arisen in these areas. Examples of such existing arrangements with Openreach teams managing a mixture of EOI and non-EOI products include LAN Extension Services 2Mbit/s (“LES2”) and the Fibre Integrated Reception System (FIRS) for Ebbsfleet.

On that basis, and given that these unregulated products are in a market which Ofcom proposes to find as being competitively supplied, BT concludes that there can be no rationale for the continuation of any EOI obligations on the listed non-SMP services.

BT’s view is that the Undertakings’ general restrictions on sharing confidential information specific to regulated products, or on sharing of confidential customer-specific information, are as much a part of the operational/functional separation obligations which will continue to be embodied in Sections 5 and 6 of the Undertakings as they are about EOI. For the avoidance of doubt, BT reaffirms that this request is solely concerned with EOI. Other features of the Undertakings such as systems separation, etc. would remain unchanged. Similarly, the functional separation obligations on Openreach would continue. Information sharing and other product-specific obligations would still apply along with EOI to other products not included in this exemption.

²¹ <http://stakeholders.ofcom.org.uk/telecoms/policy/bt-undertakings/exemptions-variations/>

In the case where Ofcom finds SMP for these very high bandwidth Ethernet/Optical products in certain geographies only, Openreach would still manage the product within the existing product management teams. Any confidential information regarding the regulated products (in SMP areas) would still remain protected from being shared with any downstream function – even though the single Openreach product team would clearly have sight across all geographies. Of course, all products and geographies where SMP has been found, would be subject to all applicable Undertakings obligations and all relevant SMP requirements. Existing information sharing procedures would apply – and there would be no situations where any downstream function within the BT Group would be able to gain access to protected confidential regulated product information (other than as permitted under the information sharing rules in the Undertakings). Similarly, the commercial policy regarding the SMP product (within the SMP geographic area) would remain subject to all existing processes which do not allow inappropriate influencing of commercial policy by downstream functions.

It is also worth remembering that in terms of service and product delivery in the field, the distinction between EOI and non-EOI is irrelevant. Work is done based on job instructions which are product or service specific but CP agnostic. Adherence to the process contained within these job instructions is then the key thing to ensuring compliance. What matters is making sure that the processes are themselves compliant. This means dealing with a much smaller number of people and therefore the controls and areas of focus are quite manageable and can easily cope with a mix of EOI and non-EOI products and services.

We do recognise that some aspects of the changes sought via this request will introduce possible new compliance challenges, particularly if Ofcom's BCMR finds no SMP in relevant markets for some but not all of the UK geography. We would be happy to submit to some form of independent review of any changed processes and would suggest oversight by the Equality of Access Board (EAB) would likely to be most appropriate. We would expect to agree the details of any such review with Ofcom, as any process changes are implemented. We would expect the review to confirm that the relevant Openreach product teams have been appropriately briefed and trained and to consider in particular those sections of the Undertakings which specifically set out the product-specific obligations. In particular, we would expect the review to re-confirm that paragraphs such as 5.3 to 5.19 and 5.38 to 5.46 remain correctly applied for all those products still subject to SMP and EOI, including wherever there are cases of products found to be SMP in some geographies and not in others. For SMP products/geographies, we would expect the audit to confirm compliance with the various relevant Undertakings requirements including those governing flow of Commercial Information and of Commercial Policy influence.

7. Impact on CPs and downstream markets

In terms of the impact on other CPs – and indeed on downstream consumers – if BT's request is granted, BT considers that the benefits will far outweigh any potential dis-benefits. CPs would still have the protection of the Undertakings for all Openreach products where SMP has been found, but would not receive the unfair benefit of a tilted playing field in which BT was subject to obligations that are more onerous than those considered necessary on an ex ante basis and which thereby impede its ability to serve its customers competitively in markets where it has no SMP.

A particular consequence of EOI is that it leads to transparency of BT's prices. Price transparency in a competitive market has the potential to cause competitive distortions. Removing EOI would remove that distortion and would also be likely to make competitors keener, thereby maximising consumer welfare. It will also act as a spur to competitors to differentiate and improve their products in order to win or retain business.

8. Conclusion

Once Ofcom has undertaken a thorough review of the competitiveness of a market in a formal market review process and has identified a market which is competitively supplied, then continuing to apply a strong Enterprise Act competition constraint on BT, i.e. requiring that it supplies its products in that market on an EOI basis is not necessary, is likely to distort the market (as we set out in section 5) and will undermine the competitiveness of the market, hence penalising end users.

Date: 18th July 2012

Annex 2

Legal text of the exemption

BACKGROUND:

- (a) British Telecommunications plc (“BT”) has offered and Ofcom has accepted Undertakings pursuant to the Enterprise Act 2002, which took effect on 22 September 2005 (the “Undertakings”);
- (b) Access Services (“AS”) as referred to in the Undertakings has been established as Openreach since 22 January 2006;
- (c) On 31 May 2011, Ofcom published a consultation document outlining a request by BT for an exemption in relation to certain high bandwidth products over 1 Gbit/s;
- (d) On 18 June 2012, Ofcom published a consultation document entitled the Business Connectivity Market Review, proposing to find (amongst other things) that there is an effectively competitive wholesale market for multiple interface symmetric broadband origination in an area of London referred to as the WECLA;
- (e) On 25 July 2012, Ofcom published a second consultation document containing an amended request for an exemption and invited representations about its revised proposals; and
- (f) Ofcom having received responses to both consultation documents and having considered every such representation duly made to it in respect of the proposals has decided to agree to this exemption request.

AGREEMENT:

1. Subject to paragraph 2 below, Ofcom agrees pursuant to section 5.46.1(c) that the requirement in section 5.46.1 that AS offer products on an Equivalence of Inputs basis shall not apply to the products and services referred to in Annex 1 to this Agreement.
2. The exemption in paragraph 1 shall only apply to a product or service listed in Annex 1 of this Agreement where:
 - (i) in the case of Wholesale End-to-End Services, both end-user premises are in the WECLA;
 - (ii) in the case of Access Segments, the end-user premise is in the WECLA; and
 - (iii) in the case of Backhaul Segments, the operational building connected by the Backhaul Segment which is closest to the end-user premise is in the WECLA.

Definitions and interpretation

3. The following words or expressions have the meanings assigned to them in Schedules 1 and 2 of Annex 7 the Ofcom statement entitled *Business Connectivity Market Review: Review of the retail leased lines, wholesale symmetric broadband origination and wholesale trunk markets* published on 28 March 2013:

- (i) Access Segments;
- (ii) Backhaul Segments;
- (iii) Wholesale End-to-End Services; and
- (iv) WECLA.

4. Except in so far as the context otherwise requires, other words or expressions in this Agreement have the meaning assigned to them in the Undertakings and otherwise any word or expression shall have the same meaning as it has in the Communications Act 2003.
5. References in this Agreement to section numbers are references to section numbers in the Undertakings.
6. For the avoidance of doubt, where it is herein agreed that the requirements of section 5.46.1 do not apply, information that would otherwise fall within the definition of Commercial Information, shall only do so if it relates to SMP Products.

Signed for and on behalf of British Telecommunications plc

Signature _____

Name _____

Position _____

Date _____

Signed for and on behalf of Ofcom

Signature _____

Name _____

Position _____

Date _____

Products and services to which this Agreement applies

1. This Agreement applies to the following products and services²² (including products and services which are introduced following the date of this exemption wholly or substantially in substitution for the products and services listed below), which are all as at the date of this Agreement products and services within the wholesale market for multiple interface symmetric broadband origination:
 - a) WES/WEES 2500;
 - b) WES/WEES 10000;
 - c) Ethernet Backhaul Direct 10 Gbit/s;
 - d) BES/BES Daisy Chain 2500;
 - e) BES/BES Daisy Chain 10000;
 - f) Bulk Transport Link;
 - g) ONBS 10Gbit/s;
 - h) OSA Bearers;
 - i) OSEA Bearers;
 - j) All OSA and OSEA wavelength services, delivered with any service interface type; and
 - k) TDM Access and Backhaul with interfaces at 2.5 Gbit/s and 10 Gbit/s.
2. This Agreement also applies to new products and services which are within the wholesale market for multiple interface symmetric broadband origination as that market is identified by Ofcom²³ and which are introduced following the date of this exemption.
3. For the avoidance of doubt, this Agreement does not apply to the allocation of space and power in operational buildings used by BT in relation to the products and services supplied under paragraphs 1 and 2 above.

²² See Openreach product manuals for full description on these products.

²³ <http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/final-statement>

Annex 3

Overview of relevant services

High bandwidth Ethernet access services

- A3.1 WES provides dedicated symmetrical bandwidth between end-user premises and a BT/CPs network node. WEES provides dedicated symmetrical bandwidth between two end-user premises. All these services are provided over fibre-optic cable at a range of bandwidths.
- A3.2 BT has withdrawn most WES and WEES products from new supply²⁴. These first-generation products are being replaced by a second generation of Ethernet access products “Ethernet Access Direct” (EAD). EAD is currently available at bandwidths up to and including 1 Gbit/s. EAD is therefore not within the scope of the proposed exemption.

High bandwidth backhaul services

- A3.3 BES, EBD and BTL provide symmetrical backhaul services between access network nodes and core networks and are within the scope of the proposed exemption. BES has been withdrawn from new supply. These services are provided over fibre-optic cable with EBD utilising WDM chains and BT’s 21CN²⁵ architecture and BTL using WDM as a transport technology.
- A3.4 ONBS offers connectivity between a CPs equipment installed within Co-location, Netlocate or BT Locate at a BT MSAN Site, and their equipment installed within Co-location, Netlocate or BT Locate at either the nearest BT MSAN Site, BT Metro Node Site or another BT MSAN Site or Metro Node Site which is within a distance of 15 radial kilometres of the first BT MSAN/Metro Site.

Optical spectrum access services

- A3.5 OSA and OSEA are wavelength services that are delivered using Wavelength Division Multiplexing (“WDM”) technology on dedicated fibre. OSA offers connections over a route distance of up to 103km and OSEA up to a route distance of 180km. Data is transmitted as Ethernet frames or other protocols such as fibre channel.²⁶ CPs can purchase OSA and OSEA bearers and each bearer can carry multiple wavelengths at 2.5 Gbit/s or 10 Gbit/s.
- A3.6 BT provides high bandwidth connections to retail customers, known as Wavestream, based on WDM. BT’s Wavestream is provided by the BT Global Services division. BT Global Services offers three types of services:
- Wavestream Connect for connections up to 35 km;
 - Wavestream Regional for connections up to 70 km; and

²⁴ BT’s product withdrawal announcement is available at:
http://www.openreach.co.uk/orpg/home/products/ethernet-services/wholesale-extension-services/wes/downloads/WES_BES_WEES_withdrawal_fact_sheet.pdf

²⁵ 21CN is BT’s next generation network (NGN).

²⁶ Fibre channel is a protocol typically used in storage networks.

- Wavestream National for connections of above 70 km.
- A3.7 BT Global Services uses OSA and OSEA to enable it to offer BT's Wavestream Connect and Wavestream Regional. OSA and OSEA are provided on an EOI basis to other CPs and BT's downstream divisions (such as BT Global Services) by Openreach. BT is currently exempted from consuming an Openreach input for Wavestream National on an EOI basis.²⁷

TDM access and backhaul services with 2.5Gbit/s and 10Gbit/s interfaces

- A3.8 The TDM Access Bearer service provides permanently connected, uncontended, point-to-point TDM bandwidth. The service can be used to provide connection between an end user-to-end user, an end-user to operator network site or between operator network sites (i.e. daisy-chain).
- A3.9 TDM Backhaul Bearer service provides permanently connected, uncontended, point-to-point TDM bandwidth from an Access Serving Node (ASN) to an Openreach Handover Point (OHP) or from an ASN to another ASN.

²⁷ We granted the latest exemption on Wavestream National in December 2010. This statement on Wavestream National is available at: <http://stakeholders.ofcom.org.uk/consultations/bt-wavestream/statement>