



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

2<sup>nd</sup> Consultation

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# Contents

Section		Page
1	Summary	2
2	Background	4
3	Previous consultation responses and our views	7
4	BT's revised exemption request and our views	9
5	Provisional Conclusion	16
Annex		Page
1	Responding to this consultation	17
2	Ofcom's consultation principles	19
3	Consultation response cover sheet	20
4	BT's exemption request	22
5	Proposed exemption	28
6	Overview of relevant services	32

## Section 1

# Summary

- 1.1 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 included mechanisms to allow BT and Ofcom to agree exemptions from the Undertakings. The objective of this Consultation is to seek views from interested parties on BT’s revised request for an exemption from the Undertakings for certain high bandwidth fibre-based products.
- 1.2 These services are currently supplied by Openreach to other Communications Providers (CPs) and BT’s downstream divisions, on an Equivalence of Inputs (EoI) basis. High bandwidth fibre products are typically used to provide dedicated connections between two sites (for example, corporate sites) to satisfy the growing demand for high bandwidth applications such as data centre connectivity and very low latency financial applications, and to extend private networks.
- 1.3 BT originally requested an exemption from the requirement in the Undertakings to provide high bandwidth (i.e. bandwidths above 1Gbit/s) Ethernet access services and optical spectrum access services in May 2011. We consulted on the original exemption request on 31 May 2011 proposing to grant a temporary exemption to Openreach.<sup>1</sup> We did not perform a detailed market assessment but relied on information contained within the Business Connectivity Market Review (BCMR) conducted in 2008 (the BCMR 2008). 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 postponed making a decision on the exemption until the results of the new BCMR (the BCMR 2012) were available.
- 1.4 We have now completed our provisional analysis for the BCMR 2012 and published a consultation<sup>2</sup> on our proposals on 18 June 2012. This includes a detailed assessment of the competitive conditions in the supply of the services relevant to this exemption.
- 1.5 The BCMR 2012 proposes that BT has significant market power (SMP) in the provision of these high bandwidth services in the UK excluding a geographic area defined as West, East and Central London Area (WECLA) and also excluding the Hull area. We refer to this market in the BCMR 2012 as the “wholesale market for multiple interface symmetric broadband origination in the UK excluding the Hull Area and the WECLA”.
- 1.6 BT has now submitted a revised exemption request (set out at Annex 4) for current and potential access and backhaul services above 1Gbit/s that is geographically limited to the markets in which BT does not have SMP. The BCMR 2012 has provisionally identified that this is the case in the WECLA and therefore we are consulting on an exemption that applies to these services in the WECLA only.

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<sup>1</sup> 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/>

<sup>2</sup> The BCMR 2012 consultation is available at: [http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/?utm\\_source=updates&utm\\_medium=email&utm\\_campaign=bcmr-june2012](http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/?utm_source=updates&utm_medium=email&utm_campaign=bcmr-june2012)

- 1.7 BT has requested an exemption because it considers these services are supplied in a competitive market and that requiring Openreach to offer these services on an Eol basis restricts its flexibility to compete effectively to the detriment of itself, CPs and their end users. In the absence of Eol obligations, Openreach would be able to negotiate prices and contractual terms on a bespoke basis.
- 1.8 We are consulting on whether to grant BT's revised exemption request and, if so, on the precise terms of that exemption. Having considered the proposals in the BCMR 2012 consultation 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 provisional 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 provisional conclusion is that the exemption is unlikely to have an adverse impact on the overall operation of the Undertakings. However, we are proposing that the Equivalence of Access Office (EAO) will have an additional monitoring role to give added assurance that this exemption does not undermine the delivery of services on an Eol basis outside the WECLA.
- 1.10 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 requires careful consideration of the matters on a case-by-case basis and particularly whether the exemption may have an impact on the overall operation of the Undertakings.
- 1.11 Given that the BCMR 2012 is still at consultation stage, we do not intend to make a final decision on whether or not to grant BT's revised exemption request until the BCMR 2012 has been completed. Our current intention is to publish the statement for this exemption at the same time as the BCMR 2012 statement. Should additional information come to light during the BCMR 2012 consultation that would significantly impact the substantive results of the analysis of the relevant markets, then we may need to revisit our proposals in relation to BT's exemption request.
- 1.12 We are asking stakeholders to respond on the proposals set out in this consultation by 24 August 2012. It is important to be clear that the scope of responses should be confined to the issues raised within this document. Should stakeholders wish to comment on the market analysis conducted within the BCMR 2012 they should respond accordingly to that consultation. As noted above, to the extent that the conclusions of the BCMR 2012 vary from consultation proposals, we will take this into account before publishing a statement on the present consultation.

## Section 2

# Background

- 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*.<sup>3</sup> 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 BT originally requested an exemption for high bandwidth Ethernet access services and optical spectrum access services<sup>4</sup> that are required by the Undertakings to be supplied by Openreach to other CPs and BT's downstream divisions on an EoI basis. BT's original exemption request did not include backhaul services and was national in its geographic scope.
- 2.3 We consulted on the original exemption request on 31 May 2011 and received eight responses from stakeholders. This consultation, the nature of the views expressed by stakeholders and our view on delaying a decision on this request are set out in the next section.
- 2.4 We have now received a revised exemption request from BT. This revised exemption request includes a wider set of products. In particular, the specified list of current products and services covered includes backhaul services previously excluded, as well as any new products introduced in the wholesale market for multiple interface symmetric broadband origination ("MISBO"). But the request is also geographically limited to the markets in which BT does not have SMP.

## The services for which BT is requesting exemption from the Undertakings

- 2.5 BT's revised exemption request relates to products in the wholesale market for MISBO in the geographic markets in which BT does not have SMP. The BCMR 2012 has provisionally identified that BT does not have SMP in the WECLA and therefore we are consulting on an exemption that applies to these services in the WECLA only. The exemption request covers a set of high bandwidth fibre-based services currently offered by Openreach to other CPs and BT's downstream divisions, as well as further products introduced in the same market in future. These services offer dedicated symmetrical bandwidth over fibre between two sites. The current services within the scope of the proposed exemption are:
- 2.5.1 Ethernet access services providing bandwidths above 1Gbit/s. These services include:

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<sup>3</sup> This document is available at: [http://www.ofcom.org.uk/consult/condocs/statement\\_tsr/](http://www.ofcom.org.uk/consult/condocs/statement_tsr/)

<sup>4</sup> More product details are also available at BT's website:

<http://www.openreach.co.uk/orpg/home/products/ethernet-services/ethernet-services.do>

- 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.
- 2.5.2 Optical spectrum access services at any bandwidth that are based on Wave Division Multiplexing (WDM) technology.<sup>5</sup> These include:
- Optical Spectrum Access (“OSA”) bearers and wavelengths;<sup>6</sup> and
  - Optical Spectrum Extension Access (“OSEA”) bearers and wavelengths.
- 2.5.3 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.
  - Bulk Transport Link (“BTL”)
- 2.6 Further details of these services can be found at Annex 6.

## **The process for considering BT’s request for exemption**

- 2.7 Section 5.46.1 of the Undertakings sets out the general principle of Eol by requiring that Openreach will not supply any service to any other part of BT unless it also offers that service to other CPs on an Eol basis. Products within the wholesale market for MISBO as we propose to define it in the BCMR 2012 fall within the scope of this obligation.
- 2.8 In addition to setting out the general principle governing Eol, Section 5.46.1 of the Undertakings provides for various 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 Eol to products where we agree that Eol is not required for reasons of practicability or otherwise.
- 2.9 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”,<sup>7</sup> that we would decide whether or not to consult on any such changes on a case-by-case basis.
- 2.10 As set out in Section 4, we do not consider that this exemption has a material impact on CPs and end-users. Nor will it have a material effect on the comprehensive

<sup>5</sup> Note that some BT’s optical products, i.e. Wavestream National products, are currently subject to an exemption from Eol obligations in the Undertakings granted in December 2010. Wavestream National services are therefore not required to consume any Eol optical input supplied by Openreach. Consultation and Statement are available at <http://stakeholders.ofcom.org.uk/consultations/bt-wavestream/>

<sup>6</sup> OSA and OSEA bearers enable wavelength services but do not carry traffic themselves

<sup>7</sup> We stated this in the statement available at:

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



solution that the Undertakings aim to achieve. However, we are consulting on this exemption request because we want to be clear of the impact of the proposed exemption on CPs and end-users before we reach any conclusion. In addition, as set out in Section 3, several respondents objected to our initial proposal to grant an exemption based on BT's previous exemption request in May 2011. Therefore we consider it important to seek stakeholders' views on this new proposal before concluding on BT's revised exemption request.

- 2.11 BT's revised request for an exemption, its reasoning for that request and our views are set out Section 4 and BT's revised request is reproduced in Annex 4.

## Section 3

# Previous consultation responses and our views

- 3.1 In this section, we set out our previous consultation proposals, the responses from stakeholders and our decision to delay concluding on the previous exemption request.

## The original consultation

- 3.2 BT originally requested an exemption for high bandwidth Ethernet access services and optical spectrum access services<sup>8</sup> that are required by the Undertakings to be supplied by Openreach to other CPs and BT's downstream divisions on an EoI basis. BT's original exemption request did not include backhaul services and was national in its geographic scope.

## Our provisional views in the original Consultation

- 3.3 In the BCMR 2008,<sup>9</sup> we found that BT did not have SMP in the market for high bandwidth Ethernet access services and optical spectrum access services were not included in the markets we reviewed within the BCMR 2008.
- 3.4 Openreach argued in its original exemption request that our conclusions in the BCMR 2008 suggested that Openreach was facing sufficient competition in the supply of high bandwidth access services.
- 3.5 We did not perform a detailed assessment of the competitive conditions when we consulted on the exemption on 31 May 2011. We relied on the BCMR 2008 market assessment and the information submitted by Openreach as part of the exemption request in consulting on a provisional view that Openreach could be facing competition in the supply of high bandwidth access services and that the granting of the proposed exemption could benefit other CPs and end-customers by providing greater choice in terms of pricing and contractual flexibility.

## Stakeholder responses

- 3.6 We received responses from eight stakeholders, including BT.<sup>10</sup> All stakeholders, except BT, disagreed with our provisional proposal to grant the exemption.
- 3.7 Stakeholders considered that there was insufficient data on the competitive conditions to grant a UK-wide exemption before completion of a detailed market assessment. Stakeholders were of the view that any assessment of the competitive conditions required definition of the relevant market and robust data from all CPs and therefore there was insufficient evidence to consider that Openreach faced competition in the supply of these services. Stakeholders were of the view that a

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<sup>8</sup> More product details are also available at BT's website:

<http://www.openreach.co.uk/orpg/home/products/ethernet-services/ethernet-services.do>

<sup>9</sup> The conclusions of BCMR 2008 can be found in the statement available at:

<http://stakeholders.ofcom.org.uk/consultations/bcmr08/statement/>.

<sup>10</sup> The non-confidential responses are available at:

<http://stakeholders.ofcom.org.uk/consultations/high-bandwidth-exemption/?showResponses=true>

more detailed analysis of the competitive landscape would find variations of competition across the UK. Stakeholders considered that such a detailed assessment would be appropriate for the BCMR 2012 and that we should not pre-judge the outcome by granting an exemption in advance of the results of such an analysis.

- 3.8 Stakeholders disagreed with Openreach's view that it has no particular advantage in the provision of high bandwidth connections. Some stakeholders agreed that they had invested in network infrastructure and that they owned significant core networks. However, they said that they did not have significant scale in access network connections to end-customer sites and were therefore reliant on Openreach access connections to reach these sites. Stakeholders also highlighted that BT retains a significant advantage from the exclusive use of its ducts and fibre in the creation of high bandwidth services.
- 3.9 Stakeholders wanted more flexibility but disagreed with Openreach that EoI is preventing it from offering such flexibility. They did not see EoI as causing any restriction on Openreach providing its CP customers with flexibility in relation to bids. Stakeholders were of the view that the removal of EoI to grant Openreach flexibility in pricing and contractual terms would benefit BT's downstream divisions and would be likely to give BT an ability to restrict competition. They called for consultations between CPs and Openreach to progress requirements for flexibility within the EoI obligations.

### **Our decision to delay concluding on the original exemption request**

- 3.10 We considered stakeholder's concerns on the assessment of competitive conditions and that these may have changed since Ofcom's assessment in 2008. Given that the BCMR 2012 analysis had already commenced, we decided to postpone any decision on whether to grant BT's original exemption request until we had considered competitive conditions within the BCMR 2012.

## Section 4

# BT's revised exemption request and our views

- 4.1 In this section we set out BT's revised exemption request, its reasoning for requesting the exemption and our views on the exemption request.
- 4.2 Given that we are rely on the analysis within the BCMR 2012 and that this is still at consultation stage we do not intend to make a final decision on whether or not to grant BTs exemption until the BCMR 2012 has been completed. Our current intention is to publish the statement for this exemption at the same time as the BCMR 2012 statement. Should additional information come to light during the BCMR 2012 consultation that would significantly impact the substantive results of the analysis of the relevant market, then we may need to revisit our proposals in relation to BT's exemption request.

## BTs revised exemption request

- 4.3 BT has requested an exemption for (i) a list of specific high bandwidth access and backhaul Ethernet services and Optical Spectrum Access services; and (ii) products introduced after the date of the exemption which are within the wholesale market for MISBO, in the geographic markets in which BT does not have SMP. The BCMR 2012 has provisionally identified that BT does not have SMP in the WECLA and therefore we are consulting on an exemption that applies to these services in the WECLA only. BT considers that the services currently offered and listed in its request are competitively supplied, and that any further products within the wholesale market for MISBO would be introduced, within the WECLA, into an effectively competitive market.
- 4.4 BT considers that Eol obligations are restricting and will continue to restrict its ability to compete effectively in the supply of these services in the WECLA. BT notes that the preliminary analysis undertaken as part of the BCMR 2012 has found no operator to have SMP in the supply of such services in the WECLA. BT considers that services to which the exemption will apply are supplied competitively in the WECLA (or would be introduced into a competitive market in the case of new services) and there has been intensification of competition in their supply.
- 4.5 BT sets out that a number of CPs are providing Ethernet and optical access services using their own extensive network infrastructure and that these CPs are able to compete effectively.<sup>11</sup> It considers that equipment prices have declined and that technology has become simpler, making it easier to build and operate networks and that this has lowered the barriers to market entry. In particular, BT claims it has no particular competitive advantage in the supply of these services and says that its downstream businesses source these services from other CPs in circumstances where it is appropriate to do so.
- 4.6 BT argues that the Eol obligations are restricting its flexibility to meet the needs of its CP customers and consequently its ability to compete effectively in winning new business. It identifies, based on market research it has commissioned, that service

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<sup>11</sup> BT listed Virgin Media, C&W Worldwide, Colt, Global Crossing and Geo Networks as providers offering high bandwidth connectivity services using their own network infrastructure.

features are becoming increasingly important in the supply of high bandwidth connectivity services.<sup>12</sup> BT believes it would be able to offer more choice for its CP customers in meeting end-customer needs in the absence of EoI obligations.

- 4.7 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.

## **Assessment of BT's request**

- 4.8 In reaching our current view on the proposal to agree to BT's exemption request, we have considered the following factors where 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**

- 4.9 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 consultation.

### **BCMR 2012**

- 4.10 We published the BCMR 2012 consultation on 18 June 2012 and we are seeking views from stakeholders in relation to the proposals therein by 24 August 2012. We set out below a brief summary, but stakeholders wishing to read further detail should read that document and respond to it as appropriate as part of that current consultation.

- 4.11 In the BCMR 2012 consultation we have proposed to define wholesale product markets that relate to very high bandwidth services known as Multiple Interface Symmetric Broadband Origination (MISBO), which captures the services that are the subject of this exemption. The BCMR 2012 proposes to define three distinct geographic MISBO markets covering the following areas.

- the WECLA;
- the UK excluding the Hull area and the WECLA; and
- the Hull area.<sup>13</sup>

- 4.12 In our BCMR 2012 consultation we propose to find that no CP has SMP in the wholesale market for MISBO in the WECLA, and that this position is not expected to

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<sup>12</sup> 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.

<sup>13</sup> The BCMR 2012 consultation found no MISBO services currently sold in the Hull area and therefore proposed no SMP finding.

change over the next three years. In other words, we propose to find that the market is effectively competitive, with no CP able to behave to an appreciable extent independently of its competitors, customers and consumers.

- 4.13 Our proposal is 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 consultation and a summary of this analysis is set out below. It is important to note that stakeholders with comments in relation to this analysis should respond to that consultation in respect of those comments.

#### Market share and market share trends

- 4.14 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 third largest share after COLT and GEO.<sup>14</sup>

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

	Volume share in 2011
<b>CP</b>	
Colt	35%
GEO	17%
BT	15%
Level 3 and GC	14%
Verizon	9%
Other	10%

- 4.15 The analysis indicates that BT has 15% market share in the WECLA region for these services, compared with a 59% share of the market in the rest of the UK.<sup>15</sup> 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.
- 4.16 The evidence suggests 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

- 4.17 The BCMR 2012 network reach analysis provisionally 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.
- 4.18 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

<sup>14</sup> These market share figures are based on the number of circuit- or wavelength-ends supplied by each CP. See the BCMR 2012 and annexes for full details of how market shares were calculated.

<sup>15</sup> Strictly speaking, the 59% share is for the geographic area of the UK excluding the WECLA and the Hull area. However, there were no MISBO services supplied in the Hull area.

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.

### Economies of scale and scope

- 4.19 The BCMR 2012 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

- 4.20 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 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

- 4.21 The BCMR 2012 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.
- 4.22 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.
- 4.23 The BCMR 2012 proposes to introduce remedies in the market for MISBO services in the rest of the UK excluding the Hull area, that are intended to ensure BT is unable to leverage its market power in the WECLA.<sup>16</sup> In particular, the consultation proposes that MISBO services in which one end-user site is outside the WECLA boundary (and outside the Hull Area) and the other is inside that boundary should be subject to regulations that apply outside the WECLA boundary, on the basis that, otherwise, BT would be able to leverage the market power it enjoys outside the WECLA on to such services. We intend to mirror this approach in terms of the application of this exemption and this is set out below.

### **Impact on CPs**

- 4.24 Given that the provisional view of the analysis undertaken in the BCMR 2012 is that no operator has SMP in the WECLA in the wholesale market for MISBO, the proposed 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 more specifically whether the removal of EoI

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<sup>16</sup> Section 12 of the BCMR 2012 consultation refers:  
<http://stakeholders.ofcom.org.uk/binaries/consultations/business-connectivity/summary/sections815.pdf>

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

- 4.25 In the absence of Eol 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 and tactically refuse to supply other providers.
- 4.26 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.
- 4.27 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.
- 4.28 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 Eol 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 we propose is effectively competitive.
- 4.29 In its request, BT also notes that the absence of Eol 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 result of competitive bids. Hence, exemption from Eol would provide BT with flexibility in the way it designs and prices these services and consequently, it would be able to compete more effectively with alternative suppliers.
- 4.30 In considering this aspect, we have taken into account stakeholders' views set out in Section 3 that a) the current Eol obligations do not necessarily restrict BT's ability to provide flexibility to its CP customers in relation to bids; and b) the removal of Eol to grant BT flexibility in pricing and contractual terms would benefit BT downstream only and would likely give BT the ability to restrict competition.
- 4.31 We agree with stakeholders that Eol obligations do not forbid flexibility, however they force BT to apply that flexibility to every CP. For instance, if BT offers a price discount to a certain CP in a specific bid, that same discount must extend to every CP on an equivalent basis. Therefore, Eol obligations constrain BT's ability to offer bespoke pricing and non-price terms and conditions. In a competitive market such as the one identified in the WECLA, Eol obligations thus potentially reduce BT's ability to compete in the provision of high bandwidth services. We also note that those



stakeholder views were expressed in relation to a different proposal, i.e. to relieve BT from EoI on a national basis. Our proposal in this consultation is now targeted at a relatively small geographic area, where we have found that BT holds a 15% market share. We therefore consider, given the competitive conditions in this market, 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.

- 4.32 As set out above, the BCMR 2012 has identified a risk that BT may be able to leverage its market power in relation to bids/sales that require services both inside and outside the WECLA. As a result, the BCMR 2012 is proposing that the regulation that will apply to those services in which one end-user site is outside the WECLA boundary (and outside the Hull area), and the other is inside the boundary is the same as if both ends were outside the WECLA boundary. For the same reasons, we consider that a similar approach should be taken in relation to this proposed exemption and that it should only apply to those services where both ends are within the WECLA boundary i.e. it would not apply to those services where only one end is in the WECLA. This specific requirement is reflected in paragraph 2 of the proposed exemption legal text set out in Annex 5.

### **Impact on consumers**

- 4.33 Our view is that granting the exemption is likely to have no material impact on consumers in the WECLA. The provisional analysis set out in the BCMR 2012 consultation 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.
- 4.34 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**

- 4.35 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.
- 4.36 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 Fibre Integrated Reception System (FIRS) at Ebbsfleet, rather than core products such as those covered by this exemption request.
- 4.37 BT has indicated that on this occasion it does not wish to move non-SMP products out of Openreach, due to the technical complexity of the products, the relatively small volumes of circuits involved and the operational aspects of re-engineering operational processes. Therefore, if this exemption is granted Openreach will still manage the non-EOI product within existing product management teams.

- 4.38 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. transfer of inappropriate information or 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.
- 4.39 We consider that these existing Undertakings obligations 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 unaffected. We consider that the ability of Openreach to deliver these services outside the WECLA on an EoI basis, will also be unaffected by this exemption. 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 are proposing additional monitoring to be carried out by the Equivalence of Access Office (EAO).
- 4.40 Should Ofcom decide to agree to this exemption, we have agreed with BT and the EAO additional monitoring arrangements to confirm BT is continuing to deliver services outside the WECLA on an EoI basis. These are as follows:
- The 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 in the non-WECLA (or partially in the WECLA area) are 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.

## Section 5

# Provisional Conclusion

- 5.1 The proposals in the BCMR 2012 consultation include a proposal to find that the WECLA is effectively competitive in relation to the supply of wholesale MISBO services with no CP having SMP. We consider that should these proposals remain substantively unchanged in this respect, then 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 do not consider that this exemption will affect the operation of the Undertakings, and in particular the ability of BT to deliver services outside the WECLA on an EoI basis. The additional monitoring that will be conducted by the EAO will ensure that this is the case.
- 5.3 The BCMR 2012 is at consultation stage and it is important to note that our proposals in relation to this exemption are dependent on the final analysis of this market review. We are not intending to make a final decision on BT's revised exemption request until the BCMR 2012 has been completed and will take full account of any substantive changes in the analysis of competition in the supply of wholesale MISBO services in the WECLA following consultation.
- 5.4 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 has an impact on the overall operation of the Undertakings.
- 5.5 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.
- 5.6 For the reasons stated above we propose to agree to BT's request and to grant the exemption. The terms on which we propose to grant the exemption are set out in Annex 5.

## Annex 1

# Responding to this consultation

## How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 24 August 2012**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://stakeholders.ofcom.org.uk/consultations/above-1gb/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email [keith.hatfield@ofcom.org.uk](mailto:keith.hatfield@ofcom.org.uk) attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Keith Hatfield  
4<sup>th</sup> Floor, Competition Group  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- Fax: 020 7981 3833
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the question asked in this document. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

## Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Keith Hatfield on 020 7981 3417.

## Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether

all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/account/disclaimer/>

## Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement in the first quarter of calendar 2013.
- A1.12 Please note that you can register to receive free mail updates alerting you to the publications of relevant Ofcom documents. For more details please see: [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm)

## Ofcom's consultation processes

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

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

Tel: 020 7981 3601

Email [Graham.Howell@ofcom.org.uk](mailto:Graham.Howell@ofcom.org.uk)

## Annex 2

# Ofcom's consultation principles

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

## Before the consultation

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

## During the consultation

- A2.3 We will be clear about who we are consulting, why, on what questions and for how long.
- A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.
- A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.
- A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.
- A2.7 If we are not able to follow one of these principles, we will explain why.

## After the consultation

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

## Annex 3

# Consultation response cover sheet

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

## Cover sheet for response to an Ofcom consultation

### BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

### CONFIDENTIALITY

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

Nothing

☐

Name/contact details/job title

☐

Whole response

☐

Organisation

☐

Part of the response

☐

If there is no separate annex, which parts?

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

### DECLARATION

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

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

☐

Name

Signed (if hard copy)



# **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/ethernet-services/ethernet-services.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 variations<sup>17</sup> 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.

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<sup>17</sup> <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 5

# Proposed 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 where both ends of the service are in postal sectors listed in Annex 2 to this Agreement.

### Definitions and interpretation

3. Except in so far as the context otherwise requires, 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.
4. References in this Agreement to section numbers are references to section numbers in the Undertakings.
5. 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 services (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 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; and
  - j) All OSA and OSEA wavelength services, delivered with any service interface type.
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 Ofcom<sup>18</sup> 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.

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<sup>18</sup> [a reference to the Business Connectivity Market Review statement will be included when published]

List of postal sectors within which this Agreement applies<sup>19</sup>

E1 0	EC1R 3	EC3A 1	EC4N 7	SE11 5	TW4 7	W1B 4	W1T 1	W8 7
E1 1	EC1R 4	EC3A 2	EC4N 8	SE11 6	TW5 0	W1B 5	W1T 2	W8 9
E1 2	EC1R 5	EC3A 3	EC4R 0	SE16 2	TW5 9	W1C 1	W1T 3	W9 3
E1 3	EC1V 0	EC3A 4	EC4R 1	SE16 4	TW7 4	W1C 2	W1T 4	WC1A 1
E1 5	EC1V 1	EC3A 5	EC4R 2	SE8 5	TW7 5	W1D 1	W1T 5	WC1A 2
E1 6	EC1V 2	EC3A 6	EC4R 3	SL9 7	TW8 0	W1D 2	W1T 6	WC1B 3
E1 7	EC1V 3	EC3A 7	EC4R 9	SW1A 0	TW8 8	W1D 3	W1T 7	WC1B 4
E1 8	EC1V 4	EC3A 8	EC4V 2	SW1A 1	TW8 9	W1D 4	W1U 1	WC1B 5
E14 0	EC1V 7	EC3M 1	EC4V 3	SW1A 2	UB1 1	W1D 5	W1U 2	WC1E 6
E14 1	EC1V 8	EC3M 2	EC4V 4	SW1E 5	UB1 3	W1D 6	W1U 3	WC1E 7
E14 2	EC1V 9	EC3M 3	EC4V 5	SW1E 6	UB11 1	W1D 7	W1U 4	WC1H 0
E14 3	EC1Y 0	EC3M 4	EC4V 6	SW1H 0	UB18 7	W1F 0	W1U 5	WC1H 8
E14 4	EC1Y 1	EC3M 5	EC4Y 0	SW1H 9	UB18 9	W1F 7	W1U 6	WC1H 9
E14 5	EC1Y 2	EC3M 6	EC4Y 1	SW1P 1	UB3 1	W1F 8	W1U 7	WC1N 1
E14 6	EC1Y 4	EC3M 7	EC4Y 7	SW1P 2	UB3 2	W1F 9	W1U 8	WC1N 2
E14 7	EC1Y 8	EC3M 8	EC4Y 8	SW1P 3	UB3 3	W1G 0	W1W 5	WC1N 3
E14 8	EC2A 1	EC3N 1	EC4Y 9	SW1P 4	UB3 4	W1G 6	W1W 6	WC1R 4
E14 9	EC2A 2	EC3N 2	N1 0	SW1V 1	UB3 5	W1G 7	W1W 7	WC1R 5
E1W 1	EC2A 3	EC3N 3	N1 6	SW1V 2	UB4 0	W1G 8	W1W 8	WC1V 6
E1W 2	EC2A 4	EC3N 4	N1 7	SW1W 0	UB5 6	W1G 9	W2 1	WC1V 7
E2 6	EC2M 1	EC3P 3	N1 8	SW1W 9	UB6 9	W1H 1	W2 2	WC1X 0
E2 7	EC2M 2	EC3R 5	N1 9	SW1X 0	UB7 0	W1H 2	W2 3	WC1X 8
E3 2	EC2M 3	EC3R 6	NW1 0	SW1X 7	UB7 7	W1H 4	W2 4	WC1X 9
E3 3	EC2M 4	EC3R 7	NW1 1	SW1X 8	UB7 8	W1H 5	W2 6	WC2A 1
E77 1	EC2M 5	EC3R 8	NW1 2	SW1X 9	UB7 9	W1H 6	W4 1	WC2A 2
E8 9	EC2M 6	EC3V 0	NW1 3	SW1Y 4	UB8 1	W1H 7	W4 2	WC2A 3
E98 1	EC2M 7	EC3V 1	NW1 5	SW1Y 5	UB8 2	W1J 0	W4 3	WC2B 4
EC1A 1	EC2N 1	EC3V 3	NW1 6	SW1Y 6	UB8 3	W1J 5	W4 4	WC2B 5
EC1A 2	EC2N 2	EC3V 4	NW1 7	SW3 1	UB8 9	W1J 6	W4 5	WC2B 6
EC1A 4	EC2N 3	EC3V 9	NW1 8	SW3 2	UB9 4	W1J 7	W5 2	WC2E 7
EC1A 7	EC2N 4	EC4A 1	NW1 9	SW3 3	W11 1	W1J 8	W5 3	WC2E 8
EC1A 9	EC2P 2	EC4A 2	NW10 5	SW7 1	W11 2	W1J 9	W5 5	WC2E 9
EC1M 3	EC2R 5	EC4A 3	NW10 6	SW7 4	W12 0	W1K 1	W5 9	WC2H 0
EC1M 4	EC2R 6	EC4A 4	NW10 7	SW7 5	W12 6	W1K 2	W6 0	WC2H 7
EC1M 5	EC2R 7	EC4M 5	SE1 0	SW8 1	W13 0	W1K 3	W6 6	WC2H 8
EC1M 6	EC2R 8	EC4M 6	SE1 1	SW8 5	W13 8	W1K 4	W6 7	WC2H 9
EC1M 7	EC2V 5	EC4M 7	SE1 2	SW95 9	W14 8	W1K 5	W6 8	WC2N 4
EC1N 2	EC2V 6	EC4M 8	SE1 3	SW99 0	W1A 1	W1K 6	W6 9	WC2N 5
EC1N 6	EC2V 7	EC4M 9	SE1 4	TW3 1	W1A 3	W1K 7	W7 1	WC2N 6
EC1N 7	EC2V 8	EC4N 1	SE1 6	TW3 3	W1A 9	W1S 1	W7 3	WC2R 0
EC1N 8	EC2Y 5	EC4N 4	SE1 7	TW3 4	W1B 1	W1S 2	W8 4	WC2R 1
EC1R 0	EC2Y 8	EC4N 5	SE1 8	TW3 9	W1B 2	W1S 3	W8 5	WC2R 2
EC1R 1	EC2Y 9	EC4N 6	SE1 9	TW4 6	W1B 3	W1S 4	W8 6	WC2R 3

<sup>19</sup> [This list may be amended in the final version to reflect any changes to the definition of the non-SMP MISBO market in the Business Connectivity Market Review statement following consultation]

# Overview of relevant services

## High bandwidth Ethernet access services

- A6.1 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.
- A6.2 BT has withdrawn most WES and WEES products from new supply<sup>20</sup>. 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

- A6.3 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 21CN<sup>21</sup> architecture and BTL using WDM as a transport technology.

## Optical spectrum access services

- A6.4 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.<sup>22</sup> CPs can purchase OSA and OSEA bearers and each bearer can carry multiple wavelengths at 2.5 Gbit/s or 10 Gbit/s.
- A6.5 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
  - Wavestream National for connections of above 70 km.
- A6.6 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

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<sup>20</sup> 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](http://www.openreach.co.uk/orpg/home/products/ethernet-services/wholesale-extension-services/wes/downloads/WES_BES_WEES_withdrawal_fact_sheet.pdf)

<sup>21</sup> 21CN is BT’s next generation network (NGN).

<sup>22</sup> Fibre channel is a protocol typically used in storage networks.

Openreach. BT is currently exempted from consuming an Openreach input for Wavestream National on an Eol basis.<sup>23</sup>

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<sup>23</sup> 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>