



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

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## Consultation

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## 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 request for an exemption from the Undertakings for certain high bandwidth fibre-based access products.
- 1.2 This consultation seeks comment on BT's request for an exemption from the requirement in the Undertakings to provide high bandwidth (i.e., bandwidths above 1 Gbit/s) Ethernet access services and optical spectrum access services that are supplied by Openreach to other Communication Providers ("CPs") and BT's downstream divisions under Equivalence of Inputs ("Eol"). These services are typically used to provide high-bandwidth dedicated connections between two sites (for example, corporate sites) and satisfy the growing demand for high bandwidth applications such as video conferencing, data centre connectivity and the extension of internal (private) networks. The services within the scope of the proposed exemption are (as they are defined in the request for exemption) Wholesale Extension Service ("WES"), Wholesale End-to-End Service ("WEES"), Optical Spectrum Access ("OSA") and Optical Spectrum Extended Access ("OSEA") above 1 Gbit/s. All these services are offered by Openreach.
- 1.3 BT has requested an exemption because it considers these services to be supplied in a competitive market and it considers that Openreach having 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 an individual basis.
- 1.4 We are proposing to grant a temporary exemption to Openreach. Based on information submitted by Openreach concerning the competitive conditions under which these services are offered, we have reached a provisional view that Openreach should be able to set prices and terms and conditions without applying Eol. We do not consider (based on the evidence received so far) that this will have a significant impact on the ability of other CPs to compete in the high bandwidth access connections market and the overall operation of the Undertakings. We consider that the proposed exemption would benefit other CPs and end-customers by providing greater choice in terms of pricing and contractual flexibility. We are inviting stakeholders' views on the proposals set out in this document.
- 1.5 If we confirm our proposal to grant the temporary exemption, we will reach a view on the appropriateness of these services being exempted from Eol obligations beyond the end of the period of our proposed temporary exemption, after we have reviewed the extent of competition in the supply of these services in the recently commenced Review of the Business Connectivity Market ("BCMR").<sup>1</sup>
- 1.6 Although any future decision will be taken in light of the evidence available at that time, it is likely that we would not extend the exemption if one or more services within the scope of this proposed exemption fall in a market where BT is found in the BCMR

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<sup>1</sup> We have commenced our BCMR and recently issued a call for inputs. The call for inputs for the forthcoming BCMR can be found at: <http://stakeholders.ofcom.org.uk/consultations/bcmr-inputs/>

to have significant market power ("SMP"). However, it does not follow that a finding of no SMP means that the exemption should be extended. Where BT is found not to have SMP in a market which includes one or more of these services, we would expect to consider the outcome of the BCMR alongside whether continuing with an exemption undermines the overall effectiveness of the Undertakings. The Undertakings, for example, include a number of structural and governance commitments by BT which were (and are) essential elements of Ofcom's decision to accept the Undertakings.

- 1.7 The proposed exemption does not apply to high bandwidth backhaul services including Backhaul Extension Service ("BES"), Ethernet Backhaul Direct ("EBD"), Openreach Backhaul Network Service ("OBNS") and Broadcast Access which would continue to be supplied by Openreach on an EoI basis.

## 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 full 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>2</sup>
- 2.2 The Undertakings included mechanisms for BT and Ofcom to agree exemptions from the Undertakings. This Consultation seeks views from interested parties on BT's request for such an exemption from the Undertakings for certain high bandwidth fibre-based access products.
- 2.3 This section provides the background information to this specific exemption. The information covers a description of the services<sup>3</sup> under consideration and the current regulatory obligations that apply to these services.

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

- 2.4 The request relates to certain high bandwidth fibre-based access services offered by Openreach to other communication providers ("CPs") and BT's downstream divisions. These services offer dedicated symmetrical bandwidth above 1Gbit/s over fibre between two sites. The services within the scope of the proposed exemption are:
- 2.4.1 Ethernet-based access services providing bandwidths above 1 Gbit/s. These services include:
- Wholesale Extension Services ("WES") at 2.5 Gbit/s and 10 Gbit/s; and
  - Wholesale End-to-End Services ("WEES") at 2.5 Gbit/s and 10 Gbit/s.
- 2.4.2 Optical spectrum access services providing bandwidths above 1 Gbit/s. These include:
- Optical Spectrum Access ("OSA") bearers and wavelengths at 2.48 Gbit/s and 10 Gbit/s;<sup>4</sup> and
  - Optical Spectrum Extension Access ("OSEA") bearers and wavelengths at 2.5 Gbit/s and 10 Gbit/s.

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<sup>2</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>3</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>4</sup> OSA and OSEA bearers enable wavelength services but do not carry traffic themselves

## High bandwidth Ethernet access services

- 2.5 WES provides dedicated symmetrical bandwidth between end-user premises and the CP network node. WEES provides dedicated symmetrical bandwidth between two end-user premises. All these services are provided over fibre-optic cable using Ethernet transmission at a range of bandwidths.
- 2.6 We understand that Openreach is currently reviewing its Ethernet service portfolio. Openreach has announced it intends to withdraw some Ethernet access services below 1Gbit/s (e.g. WES and WEES) for new supply and has introduced new Ethernet access services (e.g. Ethernet Access Direct) at multiple bandwidths to supersede these services.<sup>5</sup> Ethernet Access Direct ("EAD") is currently available at bandwidths up to and including 1 Gbit/s. EAD is not within the scope of the proposed exemption. The WES and WEES services offering more than 1Gbit/s bandwidth, at 2.5 Gbit/s and 10 Gbit/s that are within the scope of this exemption would still be available for purchase by other CPs.
- 2.7 High bandwidth backhaul services are not within the scope of the proposed exemption. Therefore, backhaul services such as Backhaul Extension Service ("BES"), Ethernet Backhaul Direct ("EBD"), Openreach Backhaul Network Service ("OBNS") and Broadcast Access will continue to be provided on an Eol basis pursuant to the Undertakings.<sup>6</sup>

## Optical spectrum access services

- 2.8 OSA and OSEA are wavelength services that are delivered using Dense Wavelength Division Multiplexing ("DWDM") technology on dedicated fibre. OSA offers connections over a distance of up to 35km and OSEA up to 70km. Data is transmitted as Ethernet frames or other protocols such as fibre channel.<sup>7</sup> CPs can purchase OSA and OSEA bearers and each bearer can carry multiple wavelengths at 2.5 Gbit/s or 10 Gbit/s.
- 2.9 BT also provides high bandwidth connections to retail customers, known as Wavestream, based on DWDM. 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.

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 Eol basis to other CPs and BT's downstream divisions (such as BT Global Services) by

<sup>5</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>6</sup> More backhaul product details are also available at BT's website: <http://www.openreach.co.uk/orpg/home/products/ethernet-services/ethernet-services.do>

<sup>7</sup> Fibre channel is a protocol typically used in storage networks.



Openreach. BT is currently exempted from providing Wavestream National on an Eol basis.<sup>8</sup>

## Eol obligations related to services in scope

### High bandwidth Ethernet access services

- 2.10 Section 5.46.1 of the Undertakings sets out the general principle governing Eol by providing 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. High bandwidth Ethernet access services fall within the scope of this obligation.

### Optical Spectrum Access services

- 2.11 Under paragraph 5.46.2 of the Undertakings BT undertook to agree with Ofcom the action to be taken in respect of products and services which existed at the date the Undertakings entered into force, were to be supplied by Openreach and which were not set out in Annex 1 to the Undertakings. This included the action to be taken in respect of BT's Wavestream services.
- 2.12 We consulted on a request received from BT to exempt Wavestream services in 2007. On 20 May 2008<sup>9</sup> we agreed an exemption until 31 December 2008 to allow BT to move the supply of Wavestream Connect and Wavestream Regional to Openreach-provided Eol services and until 31 December 2010 to allow the migration of then-existing connections.<sup>10</sup> BT satisfied its obligations in respect of Eol by using OSA and OSEA (respectively) as inputs for new service connections.
- 2.13 We granted the latest exemption to BT on Wavestream National in December 2010. This exempted Wavestream National from Eol but may be reviewed if we find BT to have SMP in a market that includes Wavestream National in the recently commenced BCMR.

## The process for considering BT's request for exemption

- 2.14 Section 5.46.1 of the Undertakings sets out the general principle governing Eol by providing 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. This paragraph 5.46.1 goes on to provide for various exceptions to this. Openreach has requested an exemption under one of these exceptions, paragraph 5.46.1c), which provides that Openreach is not required to apply the principle of Eol to services where we agree that Eol is not required for reasons of practicability or otherwise.
- 2.15 The Enterprise Act 2002 requires that Ofcom should "*have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition concerned and any detrimental effects on customers so far as*

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<sup>8</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>

<sup>9</sup> The statement on the exemption related to Wavestream Connect and Wavestream Regional is available at:

<http://stakeholders.ofcom.org.uk/binaries/consultations/wavestream/summary/wavestream.pdf>

<sup>10</sup> These migration dates were subsequently removed in September 2009. The statement on this decision is available at: <http://stakeholders.ofcom.org.uk/consultations/btundertakings/statement/>

*resulting from the adverse effect on competition*".<sup>11</sup> Ofcom's competition concerns were set out in its Strategic Review of Telecommunications Phase 2 Consultation Document.<sup>12</sup> In considering whether to agree a variation, or exemption from, the Undertakings, Ofcom considers whether this comprehensive solution is materially and negatively affected by the variation or exemption in question.

- 2.16 Section 155 of the Enterprise Act 2002 requires that Ofcom consults where it proposes to amend the Undertakings in any material respect. Therefore, whilst Ofcom is not obliged to consult on non-material changes to the Undertakings, we stated in our statement *Requests from BT for specified exemptions and agreements to its Undertakings under the Enterprise Act 2002 – part 1*<sup>13</sup> that we would decide whether or not to consult on any such changes on a case-by-case basis.
- 2.17 In the circumstances of this case we are consulting on our proposed response to BT's request for exemption before reaching a decision. This is because, while we found the market concerning high bandwidth Ethernet access services to be competitive in the last BCMR, this market review was concluded in 2008 and we have not carried out a detailed assessment of this market since that time.<sup>14</sup> We have also not assessed competition in any market for optical spectrum access services in the context of a market review process because we found such services to fall outside the markets reviewed in the BCMR in 2008. We would like to understand the impact of the proposed exemption given the growing importance of high bandwidth services to CPs.
- 2.18 Having regard to our consultation guidelines and given the scope of this consultation document, we consider that a four week consultation is appropriate. Following on from this consultation, Ofcom intends to publish a statement in Q3 of calendar year 2011.
- 2.19 BT's request for an exemption and its reasoning for that request are described in Section 3 and BT's request is reproduced in Annex 4. Our views on the request are explained in Section 4. The proposed agreement to the exemption is contained within Annex 5.

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<sup>11</sup> See Section 154(3) of the Enterprise Act 2002.

<sup>12</sup> The Strategic Review of Telecommunications Phase 2 Consultation Document is available at: [http://www.ofcom.org.uk/consult/condocs/telecoms\\_p2/](http://www.ofcom.org.uk/consult/condocs/telecoms_p2/)

<sup>13</sup> We stated this in the statement available at: <http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/bt/statement.pdf>

<sup>14</sup> The conclusions of the BCMR review can be found in the statement available at: <http://stakeholders.ofcom.org.uk/consultations/bcmr08/statement/>.

## Section 3

# BT's request

- 3.1 In this section we summarise BT's request for the exemption and its reasoning for requesting the exemption. The full text of BT's exemption request is reproduced in Annex 4.
- 3.2 BT has requested an exemption under section 5.46.1c) of the Undertakings from the Eol obligation under section 5.46.1, in respect of certain specific high bandwidth Ethernet access services and optical spectrum access services. The specific bandwidth variants within the scope of this request are listed in its request in Annex 4.
- 3.3 Openreach argues that these services are competitively supplied and the Eol obligations are restricting its flexibility to compete effectively in the supply of these services. Openreach notes that we found no operator to have SMP in the supply of Ethernet access services in BCMR 2008 and we have not found BT to have SMP in the supply of optical spectrum access services. We did not assess the competitive conditions in the supply of optical spectrum access services in BCMR 2008. BT considers that both categories of services are supplied competitively and there has been intensification of competition in their supply.
- 3.4 Openreach notes that a number of operators are providing Ethernet and optical access services using their own extensive network infrastructure and are able to compete effectively.<sup>15</sup> It also notes that equipment prices have declined and technology has become simpler to build and operate networks further lowering the entry barriers. Openreach claims it has no particular competitive advantage in the supply of these services and notes that BT's downstream businesses source these services from other CPs in certain circumstances where it is appropriate to do so.
- 3.5 Openreach 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 features are becoming increasingly important in the supply of high bandwidth connectivity services.<sup>16</sup> Openreach believes it would be able to offer more choice for its customers in meeting end-customer needs in the absence of Eol obligations.
- 3.6 Openreach notes that Ofcom has recently commenced its next BCMR and therefore has requested an exemption to temporarily relax the Eol obligations in relation to these specified services as soon as possible without waiting for the conclusion of the BCMR, on the basis that any delay in lifting the Eol would significantly hamper its ability to compete in a high growth market.
- 3.7 Openreach has indicated, for the avoidance of any doubt, that high bandwidth backhaul services including BES, EBD, OBNS and Broadcast Access will continue to be supplied on an Eol basis.

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<sup>15</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.

<sup>16</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.

## Section 4

# Ofcom's views on the request for exemption

## Introduction

- 4.1 In this section, we set out our provisional views in respect of the request for an exemption. We are proposing to grant a temporary exemption and are seeking the views of stakeholders before reaching a final decision. The legal wording of the proposed exemption is set out in Annex 5.
- 4.2 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. In reaching our view on agreeing to the request, we have considered the following factors where appropriate:
- whether there would be, or would likely be, harm to end-customers or other CPs if the exemption was accepted or not accepted due to, for instance, a reduction in effective competition or disruption to the services customers receive;
  - whether there would be a growing demand from CPs (other than BT's downstream divisions) for an EoI service to which the exemption relates; and
  - the length of time for which the exemption will be granted.
- 4.3 Our views on the request for exemption are set out below.

## Our views on exempting high bandwidth Ethernet access and optical spectrum access services from the EoI obligations

- 4.4 This section sets out our views on exempting the high bandwidth Ethernet access services, WES/WEES at 2.5 Gbit/s and 10 Gbit/s, and optical spectrum access services, OSA bearers and wavelengths at 2.48 Gbit/s and 10 Gbit/s and OSEA bearers and wavelengths at 2.5 Gbit/s and 10 Gbit/s, from the EoI obligations.
- 4.5 Openreach has requested an exemption from the application of EoI for certain high bandwidth access services because it considers the supply of these services to be competitive and the application of EoI to these services to restrict its flexibility to compete effectively. In the absence of EoI obligations, Openreach would no longer be required to share information on prices, contractual terms or statement of requirements it receives from its customers with other CPs. Therefore, this would allow Openreach flexibility to negotiate prices and contractual terms on an individual contract basis.

## Rationale for agreeing to an exemption

### Competition in the supply of high bandwidth Ethernet access services

- 4.6 We last reviewed the market including these services in BCMR 2008.<sup>17</sup> We defined a combined market for access and backhaul services, which we referred to as symmetric broadband origination (SBO), reflecting they were acquired together in most cases. We referred to Ethernet based SBO services as Alternative Interface SBO (AISBO). We defined two distinct AISBO markets, one above 1 Gbit/s and one below 1 Gbit/s, based on the market analysis of AISBOs at different bandwidths. Ethernet access services offering bandwidths above 1 Gbit/s were placed in the high bandwidth AISBO market, in which no provider was found to have SMP.
- 4.7 Openreach argues that it competes to supply these services. The evidence we gathered for BCMR 2008 and the information provided by Openreach in its request for exemption suggests that Openreach faces competition in the supply of high bandwidth Ethernet access services. In BCMR 2008, we estimated BT's market share of the AISBO market above 1 Gbit/s was 38-40% in April 2008 and concluded that BT's market share was falling. According to information submitted by Openreach as part of the exemption request, Openreach's share of the Ethernet access market above 1 Gbit/s remained flat at "[X]" (below our April 2008 estimate) over the last two years and is predicted to fall further. We consider that Openreach is likely to face competition from other providers with their own network infrastructure in serving the needs of businesses requiring high bandwidth connectivity between multiple sites. We have not identified any recent evidence that suggests market failure in the supply of these services. Nevertheless, we have not performed a detailed market analysis and we do not intend to pre-judge the outcome of the BCMR that we have recently initiated.
- 4.8 Openreach considers it has no particular advantage in the provision of high bandwidth connections. Openreach's existing duct and fibre investments might offer a competitive advantage to Openreach in this market. However, the high revenues associated with these services should provide sufficient incentives to other providers to invest in infrastructure to meet customer needs when it is profitable to do so. A number of other providers have invested in network infrastructure to serve this market and (based on our understanding) they continue to expand their networks.<sup>18</sup> Analysis of data submitted by Openreach shows that the number of externally supplied high bandwidth Ethernet access services provided by Openreach has remained relatively flat over the last two years in an otherwise growing market (according to market estimates provided by Openreach).<sup>19</sup>

### Competition in the supply of optical spectrum access services

- 4.9 Two commercially desirable features of optical access services are flexibility and scalability - they offer the ability to add extra high bandwidth connectivity cheaply and quickly once the end user has purchased an initial service. In BCMR 2008, we

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<sup>17</sup> The conclusions of the BCMR review can be found in the statement available at:

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

<sup>18</sup> Although we have not carried a market analysis, we note that several providers have invested in their own infrastructure to offer business connectivity solutions. Openreach identified Virgin Media, C&W Worldwide, Colt, Global Crossing and Geo Networks as some of its competing providers with their own network infrastructure.

<sup>19</sup> According to Openreach the market for high bandwidth Ethernet products grew at approximately 20% between September 2010 and March 2011

concluded that wavelength-based services were not in the AISBO market (based on their different functionality, premium pricing and lack of supply-side substitution).

- 4.10 Although outside the AISBO market as defined in the BCMR 2008, the optical spectrum access services are also used to meet the demand for high bandwidth inter-site connections. Therefore, the competitive conditions could be similar across both sets of services. We have not yet performed a review of this market (although we have considered the evidence Openreach has submitted) and we might reach a different view in our recently initiated BCMR.
- 4.11 Openreach argues that it faces competition in the supply of optical spectrum access services. It has estimated its share of the optical spectrum access market as “[X]” in 2010/11 that includes the installed base of Wavestream services supplied by BT Global Services and the OSA and OSEA services supplied by Openreach. Openreach has also provided information indicating it grew its customer base of optical access services at a significantly lower rate than overall market growth, at “[X]” (in 2010/11). By comparison, overall, the market grew by 19% (in 2010/11).<sup>20</sup>
- 4.12 We have not identified any technical and commercial barriers related to the sourcing of optical spectrum access equipment and the fast growing market indicates low barriers to entry. There are many providers offering high bandwidth connectivity services in the market using their own network infrastructure.<sup>21</sup> However, this view is provisional given that we have not yet carried out a detailed market analysis.

#### Openreach's flexibility to compete in a fast moving market

- 4.13 Openreach argues that the EoI obligations restrict it from offering flexibility in pricing, lead times and contractual terms on a bid-specific basis to compete effectively with other providers in the supply of these services. Openreach has provided evidence that its CP customers (other than BT's downstream divisions) have requested flexibility in the pricing and contractual terms for these services and Openreach considers that the application of EoI is restricting its ability to meet these requirements in winning new business.<sup>22</sup> It also identifies the importance of service factors such as lead times in the supply of these services. According to Openreach, bespoke offerings and service features (for example, lead times) are becoming important in the supply of these services.<sup>23</sup>
- 4.14 Information provided by Openreach indicates that Openreach faces competition in attempting to win bids for the supply of these services. It has won approximately “[X]” of the bids for the supply of high bandwidth WES/WEES and approximately “[X]” of the bids for the supply of high bandwidth OSA/OSEA services to which it tendered in the last year and cited the restrictions on flexibility as the cause of some bid losses.

<sup>20</sup> Openreach's estimate of the growth in the optical access market was based on market estimates provided by IDC

<sup>21</sup> Although we have not gathered market information in the context of this request, we have identified a number of other providers offering high bandwidth connectivity services using their own network infrastructure.

<sup>22</sup> Openreach provided a list of customer requirements related to these products that included flexibility in pricing (e.g. volume based pricing) and contractual terms (e.g. lead times). It also indicated that a statement of requirement has been submitted by other CPs requesting a shorter lead time on optical spectrum access products.

<sup>23</sup> Research commissioned by Openreach showed that service factors are becoming important in the supply of long distance connectivity products.

- 4.15 The high bandwidth access services currently represent a low revenue segment for Openreach. Information provided by Openreach shows that high bandwidth access services contributed less than “[X%]” of its total (including all bandwidth variants) dedicated bandwidth connectivity revenue in 2010/11. However, the high bandwidth connectivity services is a fast moving market and Openreach considers that it is important that it is not restricted in competing effectively in these high growth markets. Therefore, Openreach requests that we consider the temporary relaxation of the EoI obligations as soon as possible rather than wait for the conclusion of the forthcoming BCMR. They argue we would likely to be promoting efficient and effective competition by allowing Openreach a degree of flexibility to compete effectively in a growing market.

#### Impact of the exemption on end-customers and other CPs

- 4.16 The removal of EoI obligations on high bandwidth Ethernet access services would allow Openreach to vary its prices (for example, based on volumes aggregated across contracts) and offer flexible contractual terms (for example, lead times). If the exemption is granted, Openreach would be allowed to negotiate prices and terms with customers on a bid-specific basis. Currently, Openreach's competitors in this market are able to offer bespoke services, prices and contractual terms and the exemption would grant Openreach similar flexibility. We consider allowing Openreach a degree of flexibility by removing the EoI obligations would benefit end-users in a fast moving market with a number of competing providers.
- 4.17 In the absence of EoI, CPs might be concerned that Openreach might withdraw the supply of these services to them while continuing to supply BT's downstream divisions. Openreach has indicated to us that they have no intention of withdrawing these services from external supply and would continue to supply these services (or their successor services) to other CPs. In weighing up this concern, we have had regard to our provisional view that it is not in Openreach's commercial interest to stop supplying these services to other CPs. We recognise that Openreach might introduce EAD, its new Ethernet access service, at bandwidths above 1 Gbit/s. However, EAD is not within the scope of this exemption and therefore all bandwidth variants of EAD would continue to be supplied on an EoI basis.
- 4.18 The relaxation of EoI obligations would allow Openreach to offer bespoke prices and contractual terms to its customers including CPs other than BT's downstream divisions. We would expect Openreach to offer flexible pricing (e.g. volume-based pricing) and flexible contractual terms (e.g. lead times) to all its CP customers. The ability to source wholesale inputs on a bid-specific basis would allow CPs to meet specific end-customer needs in a fast changing market benefiting end-customers and the CPs.
- 4.19 The market definition in BCMR 2008 did not make a distinction between access and backhaul services in defining the AISBO market because they were typically purchased together. The high bandwidth backhaul services are significant enablers of competition for meeting the growing demand for high bandwidth by end-customers and are likely to be at the cusp of significant growth. We note that backhaul services are not within the scope of this exemption and Openreach has assured us that Openreach will continue to supply the high bandwidth backhaul services on an EoI basis. The exclusion of backhaul services from the exemption assures us that CPs can continue to rely on these inputs for high bandwidth connectivity services. We



note that Openreach is not publishing the prices of backhaul services and we would like Openreach to commence publishing these prices again.<sup>24</sup>

### Impact of the exemption on the overall operation of the Undertakings

4.20 The functional separation and EoI obligations in the Undertakings have contributed significantly to the competition in the supply of telecommunication services in the United Kingdom. Based on our view that there would be no harm to end-customers or other CPs from a temporary relaxation of EoI on these specific services and because of the low volumes of these services at the present time, we do not think that this time-limited exemption jeopardises the comprehensive solution imposed through the Undertakings or their overall operation. The evidence we have seen thus far suggests that BT would remain committed to its obligations under the Undertakings.

### **Ofcom's position on the proposed exemption**

4.21 We propose to grant a temporary exemption because:

- Our assessment in BCMR 2008 of the market including Ethernet access services and recent information submitted by Openreach suggests that Openreach continues to face competition in this market and therefore it may not be proportionate to restrict Openreach's pricing and contractual flexibility where its competitors are not restricted in the same way;
- Information submitted by Openreach suggests it faces competition in the supply of optical spectrum access services and therefore it may not be proportionate to impose on Openreach pricing and contractual flexibility not faced by its competitors;
- The market for high bandwidth access services is fast-moving and it is likely that Openreach will be restricted from competing effectively in the supply of these services if we wait until the conclusion of the BCMR;
- We do not consider there is harm to CPs resulting from the exemption as CPs can continue to source these wholesale inputs (and/or their successor services) from Openreach and would be able to benefit from the flexible pricing and contractual terms that would be offered by Openreach;
- We consider end-customers will benefit from bespoke services, prices and contractual terms;
- Backhaul services would continue to be offered on an EoI basis by Openreach;
- We do not think that this exemption jeopardises the comprehensive solution of the Undertakings or their overall operation based on our view that there would be no harm to end-customers or other CPs from a temporary relaxation of EoI on these specific services and because of the low volumes of these services at the present time; and
- The exemption would be temporary and reviewed following the conclusion of the forthcoming BCMR. The legal wording requires Ofcom and BT to review the

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<sup>24</sup> BT adopted a 'Terms on Application' price publication measure recently for some of these high bandwidth backhaul products



application of Eol soon after and no later than six months following the conclusion of the recently commenced BCMR. If Ofcom and BT fail to reach agreement, Openreach would have to offer these services on an Eol basis and the legal text (see Annex 5) has been drafted to ensure that BT would apply the principle of Eol to all new supply within three months of us reviewing the temporary exemption. We would agree with BT on the installed base migration date.

- 4.22 We therefore, propose to exempt Openreach from its Eol obligations in relation to the supply of these services, for the period nominated in the proposed exemption.

## Section 5

# Provisional conclusion

- 5.1 For the reasons set out in Section 4, Ofcom is proposing to agree to BT's request and grant a temporary exemption to Openreach, which we will review following the next relevant market review (the recently commenced BCMR).
- 5.2 We will reach a view on the appropriateness of these services being exempted from EoI obligations beyond the end of the period of our proposed temporary exemption, after we have reviewed the extent of competition in the supply of these products in the recently commenced BCMR. Although any future decision will be taken in light of the evidence available at that time, it is likely that we would not extend the exemption if one or more services within the scope of this proposed exemption fall in a market where BT is found in the BCMR to have significant market power ("SMP"). However, it does not follow that a finding of no SMP means that the exemption should be extended. Where BT is found not to have SMP in a market which includes one or more of these services, we would expect to consider the outcome of the BCMR alongside whether continuing with an exemption undermines the overall effectiveness of the Undertakings. The Undertakings, for example, include a number of structural and governance commitments by BT which were (and are) essential elements of Ofcom's decision to accept the Undertakings.
- 5.3 The proposed exemption requires BT and Ofcom to review the application of EoI soon after and no later than six months following the conclusion of the recently commenced BCMR. If we and BT do not agree, the exemption would lapse (and Openreach would have to offer these services on an EoI basis) within three months of that review. We would agree with BT on the installed base migration date.
- 5.4 We are inviting comments from stakeholders on our proposal to grant the exemption.

*Question 1: Do you agree with our proposal to grant the temporary exemption subject to review following the next relevant market review and with our reasons for proposing to do so? If you do not, please explain why and provide any supporting evidence.*

- 5.5 Following consideration of responses to this Consultation, we expect to publish a statement outlining our decision in Q3 in calendar year 2011.
- 5.6 The proposed exemption does not apply to high bandwidth backhaul services including BES, EBD, OBNS and Broadcast Access which would continue to be supplied by Openreach on an EoI basis. We note that Openreach is not publishing the prices of backhaul services and we would like Openreach to commence publishing these prices again.<sup>25</sup>

<sup>25</sup> BT adopted a 'Terms on Application' price publication measure recently for some of these high bandwidth backhaul products

## 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 28 June 2011**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://stakeholders.ofcom.org.uk/consultations/high-bandwidth-exemption>, 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 [HighBWConsultation@ofcom.org.uk](mailto:HighBWConsultation@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.
- Mani Manimohan  
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 questions asked in this document, which are listed together at Section 5. 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 Mani Manimohan on 020 7981 3833.

## 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 Q3' 2011.
- 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)

## Annex 4

# BT's exemption request

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

### PRODUCT:

**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 access services offering dedicated bandwidth above 1Gbit/s on an Equivalence of Input (Eol) basis.

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

- High bandwidth Ethernet access products at speeds above 1 Gbit/s
- Optical spectrum access products at speeds above 1 Gbit/s.
  - OSA and OSEA are not specifically Alternative Interface Symmetric Broadband Origination (AISBO) services however they are functionally similar to other products in the Openreach Ethernet portfolio. OSA and OSEA are offered to customers on an Eol basis.

A full list of products within the scope of this request is listed in Annex 1.

#### *AISBO services above 1Gbit/s*

In the 2008 Business Connectivity Market Review (BCMR 2008) Ofcom found that the AISBO market >1 Gbit/s was competitive. BT considers that the competitive conditions in this high bandwidth AISBO market have not changed since 2008 and that the market continues to be competitively supplied.

#### *OSA and OSEA services above 1 Gbit/s*

The successor products to Wavestream National are the Openreach products OSA and OSEA. When these products were supplied out of BT Global Services (downstream of Openreach) BT applied for, and was granted, exemptions in relation to the provision of Openreach inputs to the BT Global Services Wavestream Product. This resulted in Openreach supplying OSA and OSEA services on an Eol basis. Details of this previous exemption are set out in Annex 2.

Ofcom issued its final statement granting the exemption request in May 2008. In the BCMR final statement issued in December 2008, OSA and OSEA type services were not found to be part of the AISBO market and Ofcom did not find any entity, including BT, to have SMP in the provision of these services.

#### *Alternate supply to Openreach of services above 1Gbit/s*

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 above 1Gbit/s where it is economic to do so e.g. to win a bid or on a circuit by circuit basis. BT has no particular advantage in the provision of these services and, in common with other CPs, supplies services where it is economic. Moreover, in circumstances where it is appropriate to do so, BT's downstream businesses lease services from alternate operators to supply services to end users.

### *Customer choice and supply on an EoI basis*

The application of EoI prevents Openreach from providing its CP customers with the flexibility they have asked for in relation to bids and in particular:

- Ability to pass through vendor discounts where available
- Ability to offer flexible payment terms to meet customer needs: pre-payment capability, front-end loaded payment profile, spread connection payment profile, bespoke payment profile
- Geographic pricing capability
- The ability to have discounts based on the totality of their deals i.e. across end customers
- The ability to order off a pool contract
- Quoted prices that are closer to offered prices after survey e.g. lower Excess Construction Charges (ECCs), more reliable distance charges etc.
- Flexibility with regard to terms and conditions including longer and shorter contractual lead-times, project management and coordination of delivery, refine circuit design to optimise latency and resilience etc
- Sharing co-location costs (e.g. in Data Centres)
- Flexibility to offer specialised interfaces e.g. Fibre channel
- Deals on resilience solutions

It will benefit customers and competition for the high bandwidth access products and optical products to be offered on non EoI basis so that customers have more choice about how to fulfil their high speed point to point connectivity requirements.

### *Competitive conditions and EoI*

Since the BCMR publication in December 2008, the market for high bandwidth services has become more competitive. At the same time the entry barriers have reduced as technology has become significantly simpler and cheaper to build, manage and consume.

In 2008 10Gbit/s could be described as a niche technology – now it is a growing market though still not mainstream. In particular:

- Router/Switch port costs for 10Gbit/s have dropped dramatically over the last 12 months making 10Gbit/s services more attractive
- 10Gbit/s optics volume shipments have increased to the point where economies of scale are improving
- Internet traffic interchanges have moved to using 10Gbit/s interconnects from 1Gbit/s
- As storage volumes have increased 10Gbit/s connectivity is now becoming the connectivity of choice to support larger data transfer rates

While 100Mb and 1Gb product prices are reasonably transparent in the market, 10Gb prices are still very bespoke – where previously the pricing structure was driven by equipment costs

(which reduced the pricing flexibility carriers had) they are now more service and demand driven and subject to change, negotiation and more complex terms.

Recent research completed for Openreach by Prodata (March - April 2011) showed that local access tails were purchased based on price **and** service factors. Higher bandwidth circuits, because of their fundamental importance to the CPs and the end users that they support are often bought on these combined factors, with service proving more important factors as time goes on. Lead times (30-60 days, lower if possible), together with agreed SLA/Gs and rapid response / repair times (2 hours & 4-6 hours respectively) are at the forefront of end user minds.

For example, Geo recently won a deal with toptable.com to supply a high bandwidth fibre link, where service was stated as being the key success criteria. Specifically Geo's case study illustrated "*Geo prepared so much information for the meeting that the contract was signed on the same day. The legal teams worked together to obtain a waiver for the wayleave, so that work could start immediately. The target date of the installation of the 1 GB/s dedicated fibre to the building was 60 days. The teams worked solidly through weekends, coordinating efforts with third party suppliers to ensure that no time was lost.*"

<http://www.geo-uk.net/clients/case-study-toptable>

#### *Justification for the exemption*

BT has not been found to have SMP in the supply of AISBO services >1Gbit/s or optical services >1Gbit/s. There has been intensification of competition in the supply of both AISBO >1Gbit/s services and optical based services >1Gbit/s (an expected outcome in the previous exemption request) since the last BCMR. However, alternate suppliers to Openreach have been able to compete effectively due to their ability to offer flexible terms and conditions while Openreach has, and is, not able to compete fairly and effectively as EoI prohibits the provision of these services in the flexible manner that customers demand.

Market size and growth of the high bandwidth services market produced by IDC, suggests the market is currently growing at c19% and there will continue to be a high growth rate in the market through to 2014. Delays in dis-applying EoI will significantly hamper Openreach's ability to compete in a high growth market that can have long contract lengths ( 5 years and over).

Therefore, BT believes that it is inappropriate, and potentially distorts competition, to continue to require BT to provide AISBO and OSA and OSEA services above 1 Gbit/s on an EoI basis.

#### *Forthcoming Business Connectivity Market Review (BCMR)*

BT notes that Ofcom has commenced work on the next BCMR and that the findings of that review may differ from those of the 2008 review. In light of Ofcom's forthcoming assessment of the competitiveness of the market as a whole, it would be reasonable to limit the duration of the present exemption and to review the appropriateness of extending it as part of the BCMR process. This will enable Ofcom to establish a regulatory regime which appropriately addresses both ex ante SMP conditions and the application of the Undertakings in this market.

BT considers that Section 19(2) of the Undertakings may already have relieved BT of the EoI obligation in relation to AISBO services above 1 Gbit/s, but notes 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

The high bandwidth fibre-based access services in relation to which BT makes this application are listed in Annex 1 of this document. In summary these products are:

- a) WES/WEES 2500; WES/WEES 10000  
Point to Point services using dedicated NTE and fibre per circuit operating at 2.5Gb and 10Gb presented to the customer as Ethernet.
- b) 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.
- c) OSA 2.48Gbit/s Wavelength; OSA 10Gbit/s Wavelength; OSEA 2.5Gbit/s Wavelength; OSEA 10Gbit/s Wavelength  
Services which run over OSA/OSEA bearers. Presented as Ethernet and running point to point at speeds of 2.48Gb, 2.5Gb and 10Gb

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

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

For the avoidance of any doubt, BT is not seeking an exemption in relation to the following backhaul services BES/BES Daisy Chain 2500, BES/BES Daisy Chain 10000, EBD 10000Gbit/s, OBNS 10000Gbit/s offered by BT at the date of exemption and their successor products.

## 3. The proposed exemption

The exemption requested would relieve BT of any EoI obligation applying to the services listed in Annex 1 until the completion of the next BCMR. As part of Ofcom's consideration of the competitiveness of the market, BT suggests that Ofcom include an assessment of whether the present exemption should also be extended. Undertaking this work contemporaneously would avoid any potential regulatory 'gap' between the completions of the market review and any separate assessment of the exemption.

### 3.1 Justification for the exemption

As outlined in section 1 above, the key justifications for this exemption are as follows:

- BT has not been found to have SMP in the provision of AISBO services >1Gbit/s or optical services >1Gbit/s
- There are many alternate suppliers in the market and entry barriers have reduced significantly since the last BCMR making commercial flexibility vital in competing effectively and fairly for these services.
- The market continues to be competitively supplied.

Therefore, BT believes that it is inappropriate, and potentially distorts competition, to continue to require BT to provide AISBO and OSA and OSEA services above 1 Gbit/s on an EoI basis.

## **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 Eol 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 now competitively supplied.

### **4.2 Scope**

The scope of the exemption that BT is requesting is specifically in relation to high bandwidth fibre-based access services that are above 1 Gbit/s which are listed in Annex 1.

The details of the previous exemptions requested for services related to these products can be found in Annex 2.

### **4.3 Duration**

The application of 5.46.1 (c) to high bandwidth fibre-based access services above 1Gbit/s should be temporary. As indicated above, BT considers that it would be appropriate for Ofcom to undertake a review of whether or not the exemption should be extended as part of the next BCMR.

## **5. Identification of the products involved**

The high bandwidth fibre-based access services offered or to be offered by at speeds over 1Gbit/s market as listed in Annex 1.

## **6. Identification of products not involved**

For the avoidance of any doubt, BT is not applying for an exemption for the following high bandwidth fibre-based backhaul services offered by BT at the date of exemption and these and their successor products would continue to be supplied on an Eol basis;

- BES/BES Daisy Chain 2500,
- BES/BES Daisy Chain 10000,
- EBD 10Gbit/s (or any higher bandwidth EBD variants launched during the period of this exemption),
- OBNS 10000
- Broadcast Access 1.485 Gbit/s (or any higher bandwidth Broadcast Access variants launched during the period of this exemption)

## **7. Description of the solution proposed**

If the exemption is granted, BT would not be obliged to supply the products listed in annex 1 on an Eol basis. BT suggests that Ofcom undertake an assessment of whether to extend

the proposed exemption as part of the next BCMR. Undertaking this work contemporaneously would avoid any potential regulatory 'gap' between the completions of the market review and any separate assessment of the exemption.

## **8. Justification for the exemption and impact on CPs**

In a competitively supplied market, continuation of such obligations is inappropriate. In particular, continuation of EoI supply:

- Detrimentally impacts on BT's ability to compete fairly and effectively
- Means that BT cannot supply the products that some of its customers are asking for. Business customers and consumers are looking for choice, product variations that meet their needs and rapid innovation and introduction of new services
- Potentially increases price transparency in ways that is not in the interests of any competitors in this market, or end-users.

We believe that the high level of competition in the market for high bandwidth AISBO services at speeds over 1Gbit/s is such that a temporary exemption would have no appreciable adverse impact on competition or prices. Indeed, any reduction in pricing transparency could improve competition and make for keener prices. It will also act as a spur to competitors to differentiate and improve their products in order to win or retain business.

## Annex 5

# Proposed exemption

### WHEREAS:

- (a) 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 and invited representations about its proposals; and
- (d) Ofcom having received responses to the consultation document and having considered every such representation duly made to it in respect of the proposals has decided to agree to this exemption request.

### NOW THEREFORE:

#### Ofcom and BT hereby agree that:

- 1. Section 5.46.1 c) shall apply with respect to the products which are listed in Annex 1 below so that AS shall not be required to provide those products on an Equivalence of Inputs basis for the period from the date of this exemption until the Review Date.
- 2. The exemption in paragraph 1 shall be subject to review, such review to be completed at the latest by six months after the Notification Date.
- 3. By no later than the Review Date, in respect of each of the individual products listed in Annex 1 below, Ofcom and BT will agree either that:
  - (i) section 5.46.1 c) shall continue to apply; or
  - (ii) Equivalence of Inputs shall be required on appropriate and reasonable RFS and IBMC dates to be agreed between Ofcom and BT. In the event that Ofcom and BT do not reach agreement, the day after the RFS Longstop Date shall serve as an RFS Date.

If no agreement is reached between Ofcom and BT with respect to subparagraphs (i) or (ii), then sub-paragraph (ii) shall apply.

#### Definitions and interpretation

- 4. In this Agreement:

**"Act"** means the Communications Act 2003 (c.21)

**"Notification Date"** means the date of publication of a notification under section 79(4) of the Act following the completion of the next market review under section 84 of the Act

after the date of this Agreement of a market which includes at least one of the products set out in Annex 1.

**“Review Date”** means either the date which is six months after the Notification Date or the date on which Ofcom publishes the conclusions of its review under paragraph 2 of this Agreement, whichever is the sooner.

**“RFS Longstop Date”** means the date which is three months after the Review Date.

4. Words or expressions in this Agreement have the same meaning as in the Undertakings.
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; or, in the case of sections 6.10.3 and 6.13 and 6.14, relating to products and services described in section 6.1.2.

Signed for and on behalf of British Telecommunications plc

Signature \_\_\_\_\_  
Name \_\_\_\_\_  
Position \_\_\_\_\_  
Date \_\_\_\_\_

Signed for and on behalf of Ofcom

Signature \_\_\_\_\_  
Name \_\_\_\_\_  
Position \_\_\_\_\_  
Date \_\_\_\_\_